THE DIGEST

OF

ENGLISH CASE LAW.

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OF

ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

VOL. VII.

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The Digest

OF

ENGLISH CASE LAW.

EXTRADITION.

Effect of Act on Treaties.]—Semble, that s. 27 of the Extradition Act, 1870, has the effect of keeping in full force the treaty, though it repeals the act passed to give it effect. *Bouvier, In re*, 42 L. J., Q. B. 17; 27 L. T. 844; 12 Cox, C. C. 303.

Provision preventing Conviction for different Offence.]—B. was arrested in Jersey, under a warrant issued pursuant to the Extradition Act, 1870, and was sent to prison, there to remain for fifteen days, after which he was to be surrendered to the French authorities. He had been condemned by a French court, upon a judgment for three separate offences, one of which, abus de confiance, was not within the existing extradition treaty between this country and France, nor within the Extradition Act, 1870, which repeals the 6 & 7 Vict. c. 75, passed for giving effect to the treaty. By s. 3, sub-s. 2, of the Extradition Act, 1870, a fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded:—Held, that under the existing law of France such a provision is made, and therefore that B. was not entitled to be discharged. *Ib.*

Termination of Convention—Fresh Notice.]—By the terms of the 6 & 7 Vict. c. 75, the contracting parties were at liberty at any time after the 1st January, 1844, to put an end to the convention upon which it was founded, by giving six months' notice of their intention so to do, and the act was to remain in force during the continuance of the convention. The act, however, contained no provisions for the withdrawal or renewal of such notices. The French government, on the 4th December, 1865, gave such notice, but on the 21st May, before the expiration of the six months, they gave a fresh notice, and agreed with the English government that such notice should be treated as expiring on the 21st November, 1866:—Held, that the act was still in force, and a habeas corpus was refused to a French subject detained in English custody after the expiration of the six months included in the original notice. *Widermann, Ex parte*, 12 Jur. (N.S.) 536; 14 L. T. 719.

To what Crimes applicable.] — To satisfy a magistrate in committing a prisoner charged with an extradition crime, under s. 10 of 33 & 34 Vict. c. 52, there must be some evidence that the prisoner committed such crime within the jurisdiction of the country seeking extradition. *Reg.* v. *Lavaudier*, 15 Cox, C. C. 329.

—— **Offence of a Political Character.**]—By the Extradition Act, 1870, s. 3 (1), "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character":—Held, that to bring an offence within the meaning of the words "of a political character," it must be incidental to and form part of political disturbances. A number of the citizens of one of the cantons of the Swiss Republic, being dissatisfied with the administration of the government of the canton, rose against the government, arrested several members of the government, seized the arsenal from which they provided themselves with arms, attacked, broke open, and took forcible possession of, the municipal palace, disarmed the gendarmes, imprisoned some members of the government, and established a provisional government. On entering the municipal palace the prisoner, who had taken an active part in the disturbance throughout, shot with a revolver and killed a member of the government. He escaped to England, where he was arrested and committed for extradition on a charge of murder. On a motion for habeas corpus:—Held, that the offence which the prisoner had committed was

incidental to and formed a part of political disturbances, and therefore was an offence of a political character within the meaning of the statute, and the prisoner could not be surrendered, but was entitled to be discharged from custody. *Castioni, Ex parte*, 60 L. J., M. C. 22; [1891] 1 Q. B. 149; 64 L. T. 344; 39 W. R. 202; 17 Cox, C. C. 225; 55 J. P. 328.

To constitute an "offence of a political character" within the meaning of s. 3, sub-s. 1 of the Extradition Act, 1870, there must be two parties in the State, each striving to impose its own government upon the other. An explosion caused by an anarchist is not, therefore, an offence of that nature. *Meunier, In re*, 63 L. J., M. C. 198; [1894] 2 Q. B. 415; 10 R. 400; 71 L. T. 403; 42 W. R. 637; 18 Cox, C. C. 15.

Section 19 of the Extradition Act is not confined to political offences, but applies to all criminal charges. *Pooley* v. *Whetham*, 50 L. J., Ch. 236; 15 Ch. D. 435; 43 L. T. 267; 29 W. R. 296—C. A.

—— **Falsification of Accounts as Director—Faux—Forgery.**]—Fraudulent falsification of accounts as director, officer, or member of a public company, and constituting the crime of faux en écritures de commerce within article 147 of the Code Penal, is an extradition crime within the 18th head of article 3 of the English version and within the 2nd head of the same article of the French version of the treaty with France signed in 1876 and ratified in 1878; and within the Extradition Acts, 1870 and 1873. *Arton, In re* (No. 2), 65 L. J., M. C. 50; [1896] 1 Q. B. 509; 74 L. T. 249; 44 W. R. 351; 18 Cox, C. C. 277; 60 J. P. 132.

—— **"Crime or Offence."**]—It is a provision of the Hong Kong Ordinance, No. 2 of 1850, that, where it may appear to a magistrate or court that there is a probable cause for believing that a Chinaman, who has taken refuge at Hong Kong, has committed "any crime or offence against the laws of China," he may be imprisoned with a view to his being surrendered to the government of China:—Held, that the words "crime or offence" must be limited to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China, such as murder, robbery, theft, or arson, committed by a Chinaman within Chinese territory, or in Chinese ships on the high seas; piracy, moreover, in certain circumstances, would come within the ordinance, as, for example, if a Chinaman went from the Chinese coast to plunder ships at sea, returning again to China with his plunder. *Att.-Gen. (Hong Kong)* v. *Kwok-a-Sing*, 42 L. J., P. C. 64; L. R. 5 P. C. 179; 29 L. T. 114; 21 W. R. 825; 12 Cox, C. C. 565.

When a Chinaman, who had taken refuge in Hong Kong, was accused of having previously murdered a French captain of a French ship at sea, it was held that he could not be imprisoned and delivered up to the Chinese government under the ordinance; on two grounds—first, that it could not be assumed, without evidence, that there was any law in China to punish a Chinese subject for a murder committed upon a foreigner within foreign territory; and, second, that, even if it could be so assumed, still, the offence having been committed within French territory, ought to be treated as an offence against French, and not as an offence against Chinese, law. *Ib.*

—— **Crimes against Bankruptcy Laws.**]—In the list of extradition crimes in the schedule to the act are included "crimes by bankrupts against the bankruptcy law":—Held, that a wife charged with complicity in the fraudulent bankruptcy of her husband is not a person charged with a crime within the meaning of the description, as it is limited to crimes committed by bankrupts only. *Counhaye, Ex parte*, 42 L. J., Q. B. 217; L. R. 8 Q. B. 410; 28 L. T. 761; 21 W. R. 883.

—— **Forgery.**]—The word forgery in the 6 & 7 Vict. c. 75, includes knowingly uttering a forged document. *Dubois, In re*, or *Coppin, In re*, infra.

The 6 & 7 Vict. c. 76, following the language of a treaty between this country and the United States of America, enacts, that all persons charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, may be delivered up to justice, means such acts as amount to any of those offences according to the law of England, and the general law of the United States, and does not comprise offences which are only such by the local legislation of some particular state of the American union. *Windsor, In re*, 6 B. & S. 522; 34 L. J., M. C. 163; 11 Jur. (N.S.) 807; 12 L. T. 307; 13 W. R. 655; 10 Cox, C. C. 118.

A paying teller of a bank at New York, and as such accountable for the cash at the bank, kept the paying teller's book, called the proof book, and proved his cash by it every day. From this book the general bookkeeper took his figures to show the condition of the bank on the general ledger from day to day. The book in question was one of the books of account at the bank, and the property of the bank. In it was entered by the paying teller from the receiving teller's books, or from the lists of the deposits, the money received each day, and also the amounts paid out by the paying teller, or amounts for which the bank was responsible each day. The proof book also contained a statement of the assets of the bank in coin and cash, so that the proof books should each show each day the exact amount of money in the bank. He falsely, and with intent to defraud, entered a certain sum in the book as assets of the bank:—Held, that this was not a forgery by the law of England or the general law of the United States, and, therefore, that he could not be given up under 6 & 7 Vict. c. 76. *Ib.*

—— **Piracy.**]—In time of peace any act of depredation on a ship is primâ facie piracy: but in time of war between two countries, the presumption is that depredation by one of them on a ship of the other is an act of legitimate warfare. It is immaterial whether the act was done by soldiers or volunteers, and whether it was commanded by the belligerent state, or when done ratified by it. *Tivnan* or *Ternan, In re*, 5 B. & S. 645; 33 L. J., M. C. 201; 11 Jur. (N.S.) 34; 10 L. T. 499; 12 W. R. 858; 9 Cox, C. C. 522.

Waiver of Fulfilment of Conditions in Treaty.]—By the treaty between this country and Bel-

gium, a requisition for the surrender to Belgium of a fugitive criminal to be made to the foreign secretary, accompanied by a warrant of arrest or other equivalent judicial document issued by a judge or magistrate, duly authorised, &c., together with duly-authenticated depositions taken on oath before such judge or magistrate, which documents are to be transmitted to the home secretary, who, if there be due cause, shall require a magistrate to apprehend the fugitive :—Held, that the secretary may waive the fulfilment of these conditions, and that such documents may be received in evidence before the police magistrate before whom the fugitive is brought, although the warrant is not issued and the depositions taken before the same judge. *Counhaye, Ex parte*, 42 L. J., Q. B. 217 ; L. R. 8 Q. B. 410 ; 28 L. T. 761 ; 21 W. R. 883.

Subjects Surrenderable.]—A treaty having been made between this country and the Swiss government under the Extradition Act, 1870 (33 & 34 Vict. c. 52), which provided that no Swiss should be delivered up by Switzerland to the government of the United Kingdom, and no subject of the United Kingdom should be delivered up by the government thereof to Switzerland ; and an order in counsel having been made, which directed that the act should apply in the case of the treaty :—Held, that the treaty must be taken to be incorporated with, and to limit the operation of, the act, and that no British subject in this country could be surrendered to the Swiss government. *Reg.* v. *Wilson*, 3 Q. B. D. 42 ; 37 L. T. 354 ; 26 W. R. 44 ; 13 Cox, C. C. 630.

A person condemned par contumace in France is still an accused person, and as such liable to rendition. *Dubois, In re*, or *Coppin, In re*, 36 L. J., M. C. 10 ; L. R. 2 Ch. 47 ; 12 Jur. (N.S.) 867 ; 15 L. T. 165 ; 16 W. R. 24.

—— **Crime committed in Foreign Country by Person "in Her Majesty's Dominions."**]—N., being in Southampton, wrote and sent certain letters containing alleged false pretences to certain persons carrying on business within the jurisdiction of the German Empire, thereby inducing them to part with certain goods and deliver them to his order to certain persons in Hamburg. N. also sent to the same persons certain alleged forged cheques in payment :—Held, that N. was a fugitive criminal within the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 26, and was rightly committed by the police magistrate to await the warrant of the secretary of state for his extradition. *Reg.* v. *Nillins*, 53 L. J., M. C. 157.

—— **Subject of State not Party to Treaty.**]—An extradition treaty between the United Kingdom and the Netherlands provided that the governments, parties to the treaty, should reciprocally deliver up to each other any persons, who being accused of any of certain specified crimes committed within the jurisdiction of the party requiring the extradition should be found in the territories of the other party. The treaty further provided that neither of the contracting governments should be bound to deliver up its own subjects, and that a person arrested under the treaty in either country should be discharged, if within fourteen days a requisition should not have been made for his surrender by the diplomatic agent of "his" country :—Held, that the provisions for the extradition of criminals under the treaty were not confined to persons who were subjects of the state requiring the extradition, but applied to all persons who had committed any of the specified crimes within the jurisdiction of such state of whatever nationality they might be, except subjects of the state from which extradition was required. *Reg.* v. *Ganz*, 51 L. J., Q. B. 419 ; 9 Q. B. D. 93 ; 46 L. T. 592.

—— **Surrender—Matter of Political Discretion.**]—The extradition treaty between England and Belgium of 1887, suppressing the exception contained in article 1 of the treaty of 1876, provides that the high contracting parties shall not be bound to surrender their own subjects. This implies that they may do so, and the surrender of a British subject to Belgium under the Extradition Act, 1870, now rests in the discretion of the secretary of state. *Galwey, In re*, 65 L. J., M. C. 38 ; [1896] 1 Q. B. 230 ; 73 L. T. 756 ; 44 W. R. 313 ; 18 Cox, C. C. 213 ; 60 J. P. 87.

Relief against Abuse of Process.]—If a warrant under the Extradition Act is obtained, not for the bonâ fide purpose of punishing a person for a crime, but with the indirect object of making him amenable to an attachment in a civil action, the court will relieve against such an abuse of the process of the court. *Pooley* v. *Whetham*, 50 L. J., Ch. 236 ; 15 Ch. D. 435 ; 43 L. T. 267 ; 29 W. R. 296—C. A.

Upon the committal of a fugitive criminal under s. 10 of the Extradition Act, 1870, upon alleged charges of forgery committed in the State of New York, it was suggested that, upon being extradited, the prisoner might be tried in America for some charge other than the alleged charges of forgery, in respect of which she had been surrendered, and accordingly a rule nisi for habeas corpus was granted :—Held, that the rule must be discharged, since the Government of the United States of America had made provision for s. 3, sub-s. 2, of the Extradition Act, 1870, and that a fugitive criminal would be tried there solely for the offence in respect of which he had been surrendered. Further, that the point had been clearly raised and decided in *The United States* v. *Rauscher* (12 Davis Sup. Ct. 407), which as a decision of the Supreme Court of the United States, was binding on all courts within the Union. *Woodall, In re*, 57 L. J., M. C. 72 ; 59 L. T. 549 ; 16 Cox, C. C. 478 ; 52 J. P. 646.

Where a prisoner had been committed for extradition in respect of crimes primâ facie divested of any political character, and there is no evidence that they are of political character, or that his extradition is demanded in order to punish him for an offence of a political character, but only a suggestion to that effect, the court will grant no habeas corpus. Considerations as to whether a demand for a prisoner's surrender by a friendly foreign power under a treaty has been made in good faith and in the interests of justice rest with the government, and the court has no authority to entertain them judicially. *Arton, In re* (No. 1), 65 L. J., M. C. 23 ; [1896] 1 Q. B. 108 ; 73 L. T. 687 ; 44 W. R. 238.

Evidence—Foreign Depositions.]—Under the Extradition Act, 1870, foreign depositions, if duly authenticated, may be received in evidence in proceedings under the act, although taken in the absence of the person accused, and without his

having had an opportunity of cross-examining the witnesses. *Counhaye, Ex parte*, supra.

Authorising the admission in evidence of copies of depositions certified in the manner specified by 6 & 7 Vict. c. 75, is inapplicable where the original depositions may be received in evidence without being so certified. *Dubois, In re*, or *Coppin. In re*, 36 L. J., M. C. 10; L. R. 2 Ch. 47; 12 Jur. (N.S.) 867; 15 L. T. 165; 16 W. R. 24.

—— **Taken at former Hearing Admissible.**]—Upon a hearing, a witness gave his evidence before a police magistrate A. in the presence of the accused and signed his deposition. The further hearing of the case was then adjourned, and on the adjournment day the further hearing was resumed before B., another police magistrate, but as the witness before examined before A. refused to attend and had gone abroad, his deposition made before A. was proved to have been duly taken and was read as part of the case against the accused, whereupon additional evidence having been taken, the prisoner was committed to the Middlesex House of Detention pursuant to the act:—Held, that the deposition so taken at the former hearing by A. was properly receivable by B. upon the subsequent hearing. *Huguet, Ex parte*, 29 L. T. 40; 12 Cox, C. C. 551.

Warrant of Arrest—Authentication of.]—If the original warrant for the arrest of an accused person only requires a seal to justify his arrest according to the French law, such warrant will be sufficient without signature. *Dubois, In re*, or *Coppin, In re*, 36 L. J., M. C. 10; L. R. 2 Ch. 47; 12 Jur. (N.S.) 867; 15 L. T. 165; 16 W. R. 24.

A person accused of forgery in France, in 1862 was committed for rendition upon the production of an arrêt de mise en accusation, dated the 1st May, 1863, accusing him of forgery, and authenticated by the seals of the Cour Impériale de Paris and of the minister of justice; and upon production of the original depositions taken in 1862 and 1863, authenticated by the seals of the minister of justice and the minister of foreign affairs in France. *Ib.*

A document produced before a magistrate as the "foreign warrant" of arrest under s. 10 of the Extradition Act, 1870, was sealed with the seal of the department of justice at the Hague, and purported to be a copy of the record or minutes of a certain order or decree of the criminal court of justice there, setting forth the charges against the criminal whose extradition was sought, and authorising proceedings against him and his arrest:—Held, that the production of such a document before the magistrate was a sufficient compliance with the provisions of s. 10 of the Extradition Act, 1870, which provides that the magistrate may commit the criminal to prison, if, inter alia, the foreign warrant authorising his arrest is duly authenticated. *Reg.* v. *Ganz*, 51 L. J., Q. B. 419; 9 Q. B. D. 93; 46 L. T. 592.

Semble, such document must be regarded as in the nature of an original for this purpose. *Ib.*

—— **Description of Offence.**]—A French subject and fugitive criminal was apprehended in England upon a warrant issued by the chief metropolitan police magistrate, after notice from the home secretary that a requisition had been made for his extradition under the treaty with France (1876) for the surrender of fugitive criminals, and he was committed under s. 10 of the Extradition Act, 1870. In the foreign warrant issued in France the prisoner was accused of the crime of "abus de confiance"; and by Article 3 of the treaty one of the crimes for which extradition is to be granted is "abus de confiance ou détournement par un banquier, commissionnaire, administrateur," &c. In the police magistrate's warrant of committal the offence was described as "fraud by an agent":—Held, that the description of the offence in the warrant was sufficient, and that the facts upon the depositions disclosed a primâ facie case of fraud by an agent within the meaning of 24 & 25 Vict. c. 96. s. 75, to justify the prisoner's committal for trial if the offence had been committed in England, and therefore the magistrate was right in committing him under the Extradition Act. *Piot, Ex parte*, 48 L. T. 120; 15 Cox, C. C. 208; 47 J. P. 247.

The charge contained in a French warrant against a prisoner under arrest in England was that in 19 cases he had embezzled or misappropriated money entrusted or delivered to him in his capacity of notary. The warrant of the secretary of state addressed to the chief magistrate of the metropolitan police courts recited that a requisition had been made for the surrender of the prisoner upon an accusation of "fraud by a bailee," within the jurisdiction of the French Republic. The magistrate's warrant of commitment recited that the prisoner was accused of "fraud by a bailee and frauds as an agent":—Held, upon an order nisi for habeas corpus to discharge the prisoner, that the French warrant stated an offence within article 3, No 18, of the Extradition Treaty, 1876, which the home secretary's warrant translated into the corresponding English provision of the same article; that the magistrate's warrant was good; that the term "embezzlement" in the French warrant might with equal propriety be translated "fraudulent misappropriation"; and that in four out of the nineteen cases there was evidence that the prisoner had been entrusted with property for safe custody in the terms of s. 76 of the Larceny Act, 1861. Accordingly a primâ facie case against the law of England had been made out. *Bellencontre, In re*, 60 L. J., M. C. 83; [1891] 2 Q. B. 122; 64 L. T. 461; 39 W. R. 381; 17 Cox, C. C. 253; 55 J. P. 694.

G. and H. were charged with conspiring together in A., in the jurisdiction of the government of H., to obtain goods by false pretences from H. & Co. in M., in the jurisdiction of the government of G. They wrote letters from A. (containing the false pretences) to H. & Co., in G., ordering goods to be sent to them in A.; they also orally (with like false pretences) ordered the same goods from the agent of H. & Co. who called on them in A. The goods were sent from M. as ordered. On the receipt of the goods, G. and H. sent them to E., whither soon after they themselves absconded; and were there arrested at the request of the government of G. The warrant of arrest described the fugitive criminals as "suspected of fraud." On the application for their discharge, it was contended that the warrant of arrest was bad for insufficiency; and that the offence, if any, had been committed in H. and not in G., so that they ought not to be delivered up to the government of G:—Held, that the foreign warrant of arrest was sufficient, and did not require the offence to be so set out as to strictly satisfy the English definition of the crime committed abroad; but it was enough if it purported to be a judicial

document issued by a court of competent authority ordering the arrest of the fugitive criminal. *Reg.* v. *Jacobi*, 46 L. T. 595, n.

A native of Switzerland was apprehended on November 12, under the Extradition Act, 1870, on a warrant charging him with "crimes against bankruptcy laws." On November 28, a rule nisi for a habeas corpus was obtained, on the ground that the offence was not sufficiently alleged in the warrant. On November 29, a fresh warrant was lodged charging the offence more specifically: —Held, that the first warrant contained a sufficient description of the offence to justify the apprehension and detention of the prisoner. *Terraz*, *Ex parte*, 48 L. J., Ex. 214; 4 Ex. D. 63; 39 L. T. 502; 27 W. R. 170; 14 Cox, C. C. 153.

The court differed as to whether the validity of the second warrant might be gone into on the argument of the rule obtained on the validity of the first. *Ib.*

The 6 & 7 Vict. c. 75, reciting a convention between her majesty and the king of the French, provides for the mutual delivering up to justice persons who, being accused of certain offences therein specified (inter alia, fraudulent bankruptcy), committed in one country, shall be found within the territories of the other; and empowers a justice in England, upon a requisition duly made in the name of the king of the French, and signified by the warrant of the secretary of state to such justice, to issue his warrant for the apprehension of, and to commit, the person accused to gaol, there to remain until delivered pursuant to such requisition. A Frenchman was committed upon a charge of fraudulent bankruptcy committed in France. The warrant of commitment directing the gaoler to keep him in custody "until he shall be discharged by the due course of law," is insufficient. *Besset, In re*, 6 Q. B. 481; 1 New Sess. Cas. 337; 14 L. J., M. C. 17; 9 Jur. 66.

By 6 & 7 Vict. c. 76, s. 1, in case requisition should be made at any time by the authority of the United States, in accordance with a treaty between them and this country of the 9th of August, 1842, for the delivery of any person charged with piracy committed within the jurisdiction of the United States, who shall be found within the territories of her majesty, it shall be lawful for one of the secretaries of state, by warrant under his hand and seal, to signify that such requisition has been made, and to require all justices of the peace to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol for the purpose of being delivered up to justice:—Held, that the statute has reference, not to acts of piracy jure gentium, which are equally cognizable by all nations, but only to such acts as are constituted piracy by the municipal law of the United States, and which are, therefore, not punishable elsewhere than in their jurisdiction. And therefore it is sufficient if a warrant of a justice, ordering the apprehension of a person, in compliance with this statute, is made in the form given by 8 & 9 Vict. c. 120. *Tivnan* or *Ternan, In re*, 5 B. & S. 645; 33 L. J., M. C. 201; 11 Jur. (N.S.) 34; 10 L. T. 499; 12 W. R. 858; 9 Cox, C. C. 522.

In order to enable a justice of the peace to issue his warrant under the statute for the apprehension and committal for trial of an accused person, it need not appear that there was an original warrant for his apprehension in the United States, or depositions taken against him there. *Ib.*

The warrant need not allege that the evidence before him was taken upon oath. *Ib.*

Committal upon improper Warrant—Other Charges.]—A prisoner was committed to be extradited to France upon a warrant of committal which was found to be bad by the court, but other offences alleged against him were included in the French warrant for his extradition:—Held, that he was entitled to be discharged. *Reg.* v. *De Portugal*, or *De Portugal, In re*, 55 L. J., Q. B. 567; 16 Q. B. D. 487; 34 W. R. 42; 50 J. P. 501.

Jurisdiction to Review Magistrate's Decision.]—The decision of a magistrate, who commits a prisoner for extradition, that the offence charged is not of a political character, is subject to review by the court on an application for habeas corpus. *Castioni, Ex parte*, 60 L. J., M. C. 22; [1891] 1 Q. B. 149; 64 L. T. 344; 39 W. R. 202; 17 Cox, C. C. 225; 55 J. P. 328.

Upon an application for a habeas corpus in the case of a fugitive criminal committed by a police magistrate under the Extradition Act, the court has no power to review the decision of the magistrate on the ground that it was against the weight of the evidence laid before him, there being sufficient evidence before him to give him jurisdiction in the matter. *Reg.* v. *Maurer*, or *Maurer, Ex parte*, 52 L. J., M. C. 104; 10 Q. B. D. 513; 31 W. R. 609.

By the Extradition Act, 1870, when a fugitive criminal is brought before a police magistrate, the latter is to hear the case in the same manner and to have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England:—Held, upon a rule for a habeas corpus, upon a committal by a police magistrate, that as a court of common law is not a court of appeal in such a case, it will not question the judgment of the magistrate if the case was within his jurisdiction and there was any evidence to support his decision. *Huguet, Ex parte*, 29 L. T. 40; 12 Cox, C. C. 551.

Law of Local Venue.]—Where the offence is one continuous transaction committed partly in one country and partly in another, the English law of local venue in criminal matters ought not to be applied to the extradition of fugitive criminals. *Reg.* v. *Jacobi*, 46 L. T. 595, n.

Attachment for Contempt of Court during Arrest under.]—An attachment issued by the High Court of Justice for disobedience of an order of the court in a civil action is not an offence within the meaning of the 19th s. of the Extradition Act, 1870. Therefore, where a party to an action in the chancery division was arrested in Paris for a crime under the Extradition Act, and while in prison in England under the warrant was served with an attachment for disobedience to an order in the action: —Held, that the attachment was valid, and that the prisoner was not entitled to his discharge until he had cleared his contempt, although he had been acquitted of the criminal charge. *Pooley* v. *Whetham*, 50 L. J., Ch. 236; 15 Ch. D. 435; 43 L. T. 267; 29 W. R. 296—C. A.

"Apprehension"—Person already in Custody —Arrest without a Warrant.]—Under s. 8 of the Extradition Act, 1870, a fugitive criminal who

is already in custody may be detained for an offence coming within the act, even though he was originally arrested without any warrant. The word "apprehension" in s. 8 includes "detention":—Semble, per Brett, L. J., that a constable would be justified in arresting without a warrant a fugitive from a foreign country on reasonable grounds of suspicion that he has committed a crime which would be a felony if committed in the United Kingdom. *Reg.* v. *Weil*, 53 L. J., M. C. 74; 9 Q. B. D. 701; 47 L. T. 630; 31 W. R. 60; 15 Cox, C. C. 189—C. A.

Trial under wrong Name—Jurisdiction.]—T. was received into custody from the Swedish police in Stockholm, where he was in prison, having been arrested under the name of D., under which name he was extradited. D. had previously been connected with T., and it was proved that T. and D. were different persons:—Held, that the court having jurisdiction to try the indictment, it was immaterial under what name T. was extradited. *Reg.* v. *Finkelstein*, 16 Cox, C. C. 107.

Detention of Articles produced under a Subpœna duces tecum.]—At the hearing of an application for the extradition of a person charged with a theft committed abroad, certain articles forming part of the stolen property were produced under a subpœna duces tecum by a witness who claimed the property in them under a bonâ fide purchase from the prisoner in England. The magistrate committed the prisoner for extradition, and gave a verbal direction that the articles produced by the witness should be detained by the police for the purposes of the prosecution abroad. On an application by such witness under 11 & 12 Vict. c. 44, s. 5, for an order to the magistrate to direct the delivery up of the articles:—Held, (1) that the magistrate was functus officio the moment he made the committal for extradition; (2) that the verbal direction for the detention of the articles being given without jurisdiction, the court had no power under 11 & 12 Vict. c. 44, s. 5 (which deals solely with acts relating to the duties of magistrates) to make the order asked; (3) that even if the court had power the applicant would require to establish his title to the articles; and (4) that the applicant's possessory title to the articles had been lawfully divested by their production under the subpœna duces tecum. *Reg.* v. *Lushington, Otto, Ex parte*, [1894] 1 Q. B. 420; 10 R. 418; 70 L. T. 412; 42 W. R. 411; 17 Cox, C. C. 754; 58 J. P. 282.

J. M.

FACTOR.

See PRINCIPAL AND AGENT.

FACTORY.

See MASTER AND SERVANT.

FACULTY.

See ECCLESIASTICAL LAW.

FAIRS.

See MARKETS AND FAIRS.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION.

FALSE PRETENCES.

See CRIMINAL LAW.

FALSE REPRESENTATION.

See FRAUD.

FALSE RETURN.

To Writ of Mandamus.]—*See* CROWN OFFICE.

By Sheriffs.]—*See* SHERIFF.

FAMILY ARRANGEMENTS.

See COMPROMISE.

FEE SIMPLE.

See ESTATE.

FEE TAIL.

See ESTATE—FINES AND RECOVERIES.

FEES.

Of Counsel.]—*See* BARRISTER—COSTS.

Of Court.]—*See* PRACTICE.

Of Office.]—*See* PUBLIC OFFICER.

FELO DE SE.

Hindoo.]—The English law of felo de se and forfeiture of goods and chattels does not extend to a native Hindoo, though a British subject,

committing suicide at Calcutta. *Bengal (Adv.-Gen.)* v. *Ranee Surnomoye Dossee*, 2 Moore, P. C. (N.S.) 22; 9 Moore Ind. App. 387; 2 N. R. 530; 9 Jur. (N.S.) 877; 8 L. T. 843; 12 W. R. 21.

Will of.]—An executor of a will of a person found felo de se by a verdict of a coroner's inquest is entitled to probate thereof, though the effect of the verdict is to work a forfeiture of the personal property of the deceased to the crown. *Bailey, In goods of*, 2 Sw. & Tr. 156; 31 L. J., P. 178; 7 Jur. (N.S.) 712; 4 L. T. 477.

Estates of Inheritance.]—Estates of inheritance of a felo de se do not escheat to the crown. *Norris* v. *Chambers*, 29 Beav. 246. Affirmed on appeal, 7 Jur. (N.S.) 689; 4 L. T. 345; 9 W. R. 794.

Agreement to Commit Suicide.] — *See* CRIMINAL LAW.

Clauses in Insurance Policies.]—*See* INSURANCE (LIFE).

FELONY.

See CRIMINAL LAW.

FEME COVERT.

See HUSBAND AND WIFE.

FENCES.

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FINES AND RECOVERIES.

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1. GENERAL PRINCIPLES.

Fictitious Conveyances.]—As to the principles on which fictitious conveyances operate. See *Wood* v. *Lambirth*, 1 Ph. 8; 5 Jur. 741.

Fictitious conveyances will not be drawn into question by chancery. *Anon.*, Cary, 4.

Court never makes recoveries good upon equitable circumstances. *Salvin* v. *Thornton*, Ambl. 548; 1 Bro. C. C. 73.

The force of a conveyance by common recovery to extinguish all conditions, powers, and incidents annexed to an estate tail, arises from hence, that the law considers it for this purpose in nature of a real action, and that the recoverer is in by right. *Pullen* v. *Ready*, 2 Atk. 591.

Fine, Nature of.]—A fine, with proclamations by a tenant in tail, whether the proclamations are finished in his lifetime or not, will bar the issue in tail, because the fine is quasi a judgment, and the issue in tail claims the estate through his ancestor, whose right was barred by the judgment. *Hume* v. *Burton*, 1 Ridgw. P. C. 270.

A fine is conclusive evidence: it is a judicial act of the court, and has in everything the form and description of a record; it is a record in C. B. and a matter that can only be tried by the court and not by a jury. *Id.* 60.

But a recovery is grounded on the act of the party. *Id.* 83.

Where a fine with proclamation is levied by tenant in tail, and the præcipe is brought in the same term against the conusee of such fine, and a common recovery suffered there, such fine, præcipe, and common recovery form one common assurance. *Id.* 204.

The act which gives to fines their present force and efficacy, which directs their operation, and where they operate has made them irresistible, does not materially depart from those rules under which other judgments have been held to be conclusive. The effect of that act is two-fold. Under that act a fine with proclamations by a tenant in tail, whether the proclamations are finished in his lifetime or not, will bar the issue in tail, because the fine is quasi a judgment, and the issue in tail claims the estate through his ancestor, whose right was barred by the judgment. Again, by that statute a fine with proclamations, if five years are suffered to pass without claim, will bar every man who does not come within the savings of that act, because there the fine acts quasi in rem, for, by the proclamations, all men are invited to claim, if they have any right, and having failed to do so, within the time prescribed by law, they are therefore barred. *Id.* 270.

2. Agreements to Levy or Suffer.

a. Specific Performance.

Specific performance of an agreement to levy a fine. *Holles* v. *Carr*, 3 Swan. 645.

Issue in tail not bound unless fine actually levied, although tenant in tail was decreed to levy fine. *Weale* v. *Lower*, cited 2 Vern. 306.

—— **Death before Compliance with Decree.**]—Tenant in tail sells for a full value, receives the money, and covenants to levy a fine, and was afterwards decreed to do it; yet dying (though in prison for not performing the decree) his issue could not be bound. *Fox* v. *Crane*, 2 Vern. 306.

The court will not decree that which seems to be impossible: and it is more than doubtful whether the old law now prevails, by which a man was compellable to procure his wife to levy a fine. *Frederick* v. *Coxwell*, 3 Y. & J. 514.

b. Infant, by.

A recovery by an infant who appears by attorney is void. *Zouch* v. *Mitchell*, Godb. 161.

The only possible way to make valid a recovery suffered by an infant is to have a writ of privy seal and sign manual signifying the king's pleasure that a common recovery be suffered by the infant, who is thereupon examined, with his friends, as to the circumstances of the case; and if the court sees it will be of advantage to the infant, they will admit it. *Hume* v. *Burton*, 1 Ridgw. P. C. 264.

The caption of a fine by de po. is of equal authority as if taken in court, and is equally conclusive evidence. *Id.* 60.

But it is otherwise of the caption of a warrant of attorney, acknowledged in a common recovery, which is the act of the party, and a matter in pais. *Id.* 98, 111. And see *Winchester (Bishop's) case*, 3 Comb. 1.

The writ of de po. does not direct the commissioners to examine a party. *Ib.*

If an infant or non compos mentis suffer a recovery by attorney, it is error, for neither of them has capacity to transfer an authority to a third person to act for him. *Id.* 23.

Infancy cannot be assigned for error, by the vouchee in a common recovery, after he comes of age. *Id.* 230.

A petition to the king to direct his judges to take a fine or recovery from an infant referred to the Lord Chancellor. *Mackworth's case*, 1 Vern. 461.

A fine cannot be taken from an infant, but a recovery may by the king's special direction. *Ib.*

Court will, if necessary, order infant, feme covert, being heir or trustee, to levy a fine. *Anon.*, 2 Com. 615.

An infant trustee may levy a fine, but Lord H. doubted whether he could suffer a recovery without a privy seal. *Bowes, Ex parte*, 3 Atk. 164. S. P., *Smith, Ex parte*, Ambl. 624.

An infant on whom an estate is descended may, by an order from this court, convey by a common recovery. *Johnson, Ex parte*, 3 Atk. 559.

An infant mortgagee or trustee, who is a feme covert, may convey by fine. *Maire, Ex parte*, 3 Atk. 479; Com. 615.

c. Lunatic, by.

A fine shall not be reversed for non sane memory or imprisonment, for the contrary appears by the fine. *Hume* v. *Burton*, 1 Ridgw. P. C. 245.

There is no instance of a recovery suffered by an idiot which can only be accounted for from the consciousness that such an act could not stand. *Id.* 90.

Alienations, not of record, by an idiot after inquisition may be avoided by sci. fa. *Id.* 124.

Where the vouchee in a common recovery appears by attorney, the caption of the warrant appointing such attorney, appearing on the record to be taken by the chief justice of C. B. out of court, is not conclusive evidence of the capacity of such vouchee as to the soundness of

mind to make such attorney, and suffer such recovery. *Id.* 16. For a history of this cause, see *Rochfort* v. *Ely* (1 Bro. P. C) 450; but more fully, *Hume* v. *Ely* (7 Bro. P. C.) 369.

Where a lunatic who had no issue, was seised of an estate tail in possession, with the immediate reversion to himself in fee, and the land had been sold under the 1 Will. 4, c. 65, for payment of his debts, an order was made on the committee to suffer a recovery on behalf of the lunatic, in order to complete the title to a purchaser. *Brand, In re*, 1 Myl. & K. 150.

d. Estate of Conusor.

Recovery suffered by one not in possession has no operation. *Wynne* v. *Cookes*, 1 Bro. C. C. 515.

Father and son, on the son's marriage, by lease and release, convey lands to trustees and their heirs to the use of the father for life; remainder to his wife for life; remainder to the son for ninety-nine years, if she should so long live; remainder to trustees during his life to support contingent remainders to the son's intended wife for life for her jointure; remainder to the first and every other son of that marriage in tail male; remainder to the daughter or daughters of that marriage, and the heirs of their bodies, till they shall, out of the rents, issues, and profits have received 3,000*l.*; remainder to the heirs of the body of the son; remainder to the second son of the father, and to his first and other sons; remainder to the right heirs of the son for ever. There were issue of the marriage only two daughters, who, being in possession after all the particular precedent estates determined, suffer a common recovery, and it was held that this was no bar of the subsequent remainders, the limitation to them being only a security till the 3,000*l.* was raised. *Stanhope* v. *Thacker*, Pre. Ch. 435.

By settlement before the marriage of D., the father, after limiting an estate to his son and the heirs of his body, limited it, in default of such issue, to the use of R. for ninety-nine years, if he so long live, remainder to trustees and their heirs during his life upon trust to preserve, &c.; and after the end of the said term, to the use of the first, &c., son of the said R. in tail, with several other remainders, and the last to E., the father of the lessor of plaintiff, in the same words as the limitation to R. R. had one son, F., and when he came of age they levied a fine to make a tenant to the præcipe, and suffered a recovery in which F. was the vouchee:—Held, that this fine and recovery were no bar. *Smith* v. *Packhurst*, 3 Atk. 135; 2 Stra. 1105; Andr. 315.

Where the parties had no seisin to warrant the fine, the courts of law will not presume or strain a point to work a wrong. *Townsend* v. *Ash*, 3 Atk. 339.

But evidence of receipt of rent is a sufficient possession to levy a fine. *Ib.* And see *Dormer* v. *Fortescue*, 3 Atk. 124.

A wrong-doer, to gain a possession by disseisin, must not step on the land and then leave the right owner in possession, which, though sufficient to give a seisin on a feoffment, is not so to levy a fine. *Ib.*

A., by his will, ordered all personal estate to be sold, for the payment of his debts and legacies; and in case it should prove insufficient, he devised his real estates to his executors, for the purpose of making good the deficiency; he then devised his real estate after such time as his debts and legacies should be paid by the rents and profits thereof, to E., for life; and in case E. should have any issue male, then to such issue male, and his heirs for ever; and after the decease of E., in case he left no issue male, then after such time as the testator's debts and legacies were fully paid, he devised part of his said estate to J. in fee, and the residue to N. in fee. E. entered into possession, and kept down the interest of the debts; but afterwards suffered a common recovery of the whole estate, and declared the uses thereof to himself in fee:—Held, that an estate for life was vested in E. at the time of the recovery, notwithstanding the debts were not paid, and that he could make a good tenant to the præcipe:—Held, also, that the remainders limited to J. and N. were contingent remainders, and well barred by this recovery. *Barnardiston* v. *Carter*, 3 Bro. P. C. 64; 1 P. W. 509.

Fine levied by lessee for years or at will, void. Secus, where by one having a defeasible right, and such lessee joins with him. *S. C.*, 1 P. W. 520.

An equitable recovery will bar equitable interests. *Salvin* v. *Thornton*, Ambl. 549; 1 Bro. C. C. 73.

In a marriage settlement lands were conveyed to trustees and their heirs, to the use of the trustees and their heirs, to the use of the husband for life, remainder to the use of the wife for life, remainder to the first, &c., son of the marriage. These limitations to the husband for life, &c., are trusts only, and not uses, and when the husband and wife levied a fine to a mortgagee to raise money, though the fine would have been a forfeiture of the wife's estate for her life had she the legal estate, against which equity would not relieve; yet decreed that a trust estate was not forfeited by a fine. *Whetstone* (*Lady*) v. *St. Bury*, 2 P. W. 146; Pre. Ch. 591.

A limitation in a will to C. and his heirs, to the use of him and his heirs, in trust to pay debts, and after in trust for D., and the heirs of his body, and in default of the heirs of the body of D., remainder to C. and his heirs, on condition he married M.:—Held, that the recovery of D. barred the remainder to C., as being a remainder of the trust, not of the legal estate. *Robinson* v. *Cuming*, 1 Atk. 473; Forrest, 164.

An equitable recovery will not bar a legal remainder. *Brydges* v. *Brydges*, 3 Ves. 125.

e. Tenant to the Præcipe.

A defective common recovery as to a tenant to the præcipe will bar an estate tail in trust only. *Beverley* v. *Beverley*, 2 Vern. 132.

After length of time, court will presume there was a tenant to the præcipe in a recovery. *Webber* v. *Montrath* (*Earl*), 9 Mod. 143.

The only use of making a tenant to the præcipe by fine is, to put the evidence of there being a good tenant to the præcipe upon record, for where he is made by deed, if that deed is lost, the recovery falls to the ground. *Hume* v. *Burton*, 1 Ridgw. P. C. 273.

Where a fine with proclamation is levied by tenant in tail, and the præcipe is brought in the same term against the conusee of such fine and a common recovery suffered thereon, such fine, præcipe, and common recovery form one common assurance. *Id.* 204.

An equitable recovery is valid though the tenant to the præcipe is made by bargain and

sale not enrolled within due time. *Smith* v. *Frederick*, 1 Russ. 174.

The word "and," in the last sentence of the 21 Geo. 2, c. 11, s. 8 (the act for validating recoveries after twenty years, notwithstanding the deed making the tenant to the præcipe should be lost and not appear), is to be read "or"; and it is not necessary, in order to bring a case within that statute, to give strict proof of the loss of the deed. *Townsend* v. *Kingston* (*Earl*), 6 Ir. Eq. R. 118.

Where a lease and release were made to create a tenant to the præcipe in a recovery, and the lease was lost:—Held, to be a case to which relief given by 14 Geo. 2, c. 20, s. 5, applies. *Holmes* v. *Ailsbie*, 1 Madd. 551.

A legal estate in the equitable tenant to the præcipe is no objection to an equitable recovery. *Brydges* v. *Brydges*, 3 Ves. 126.

An estate tail in an equity of redemption is well barred by a recovery, notwithstanding that the mortgagee did not join in making a tenant to the præcipe. *Darcy* v. *Darcy*, Wall. Lyn. 119.

A testator who was entitled to the equity of redemption in freehold premises, subject to a mortgage in fee, devised the premises to J. P. and another as trustees, on trust, in the first place, out of the rents to pay off the mortgage; and he then gave 10*l*. a year out of the rents, in the events which happened to E. P., and the remainder of the rents to J. P. and S. M. P. equally, and after the death of E. P. he devised certain parts of the premises to J. P. and the heirs of his body. S. M. P. died in the lifetime of E. P.; J. P. then joined in suffering a recovery, for the purpose of barring the estate tail: but neither E. P. nor the next of kin of S. M. P. joined in making the tenant to the præcipe:—Held, that the concurrence of E. P. was not necessary, but that the concurrence of the next of kin of S. M. P. was necessary, and that the recovery was, for want of such concurrence, invalid as to one moiety of the premises. *Penny* v. *Allen*, 7 De G. M. & G. 409; 3 Jur. (N.S.) 273; 5 W. R. 303.

The eldest son and heir of S. M. P. was in possession of the rents of all the devised premises, and joined in respect of certain parts of them, of which he was himself tenant in tail, in making the tenant to the præcipe. The court refused, in the absence of any other circumstances, tending to prove it, to presume a surrender to him of S. M. P.'s estate, pur autre vie, or to regard him as having a title to it by general occupancy. *Ib.*

Held, that there could be no general occupancy, whether the estate pur autre vie was regarded as legal or equitable, and that the person beneficially entitled, and not the executor or administrator of S. M. P., was the proper person to concur in making the tenant to the præcipe. *Ib.*

The title of the plaintiff, against which the recovery was set up, accrued in 1837; the plaintiff brought an ejectment in 1852, but was forced to abandon it, and to proceed in equity; he filed his bill in 1855:—Held, that he was not barred of his title to relief by lapse of time, and in particular that the 3 & 4 Will. 4, c. 27, s. 23, did not apply. *Ib.*

The account of rents and profits of those portions of the property to which the plaintiff was declared entitled was directed from 1852, the time when the plaintiff first made an adverse claim by commencing the ejectment. *Ib.*

f. Voucher.

The fine of a tenant in tail does not take away the right of the remainder-man, but the remainder-man is at liberty to prove the vouchee in a recovery non compos. *Hume* v. *Burton*, 1 Ridgw. P. C. 207.

A. is tenant for life, with remainder to trustees to preserve, &c., remainder to first and other sons in tail male, remainder to daughters in tail general, remainder to right heirs of body, remainders over. A. suffers recovery with single voucher, being himself tenant to the writ:—Held, recovery no bar to remainder over; nor is cured by Irish Act, 21 Geo. 2, c. 11, which is formed pretty much of English Acts 10 & 11 Will. 3, c. 14, and 14 Geo. 2, c. 20. *Meredyth* v. *Leslie*, 6 Bro. P. C. 338.

A recovery was suffered by a tenant for life and remainder-man in tail in 1781. The record stated that the tenant to the præcipe called to warranty the tenant for life, who appeared by his attorney, and warranted the tenant in tail, who appeared in person:—Held, that the recovery was valid, though the record did not state a summons to warranty, nor a warrant of attorney to authorise the appearance for the tenant for life. *Stewart* v. *Conyngham* (*Marquis*), 1 Ir. Ch. R. 534.

g. Fraud.

Fraudulent fines no bar in equity. *Anon.* Cary, 20.

Equity has power, by ordering a reconveyance, to vacate a fine fraudulently obtained. *St. John* v. *Turner*, 1 Eq. Abr. 258.

Articles and a conveyance, and fine in pursuance thereof, set aside for fraud. *Coleby* v. *Smith*, 1 Vern. 205.

A person obtained a fine by fraud, decreed a trustee. *Barnesley* v. *Powel*, 1 Ves. 289.

If a fine be gained by fraud from a feme covert under age, who dies, and her heir buys in a prior mortgage, and then levies a fine, and five years pass, and those who claim under the fine bring a bill to redeem, &c., equity will not assist them claiming under such fraudulent title, and also by reason of the fine and non-claim. *Packington* v. *Barrow*, Pre. Ch. 216.

A fine being fraudulently obtained, and erasures in several parts of it, to make it correspond throughout, is a crime in the persons concerned, but not relievable in a court of equity, being examinable only in the proper court where the fine was levied. Decree affirmed. *Clark* v. *Ward*, 4 Bro. P. C. 70; Pre. Ch. 150.

J., and W. his eldest son, join in a mortgage for 100*l*. and interest, and after payment it was declared that the premises should be to the use of J. for life; remainder to W. and the heirs of his body; remainder, over. B. takes an assignment of this mortgage, and afterwards prevails on J. to sell him part of the premises and levy a fine. This sale is a fraud upon W., and was accordingly set aside. *Browne* v *Mitton*, 4 Bro. P. C. 167.

Where a fine and non-claim is levied by one who got possession under a forged deed, the court will decree against the fine. *Cartwright* v. *Pulteney*, 2 Atk. 381.

A fine may at law be impeached for fraud, and in matters of fraud, equity has concurrent jurisdiction. *Conry* v. *Caulfield*, 2 Ball & B. 272.

A fine levied upon a possession acquired by the fraud of a tenant, but acquiesced in by the land-

lord with notice of the fraud, will operate as a bar. *Ib.*

Where tenants give a conditional possession, provided they may pay their rents to a third person till a suit is determined, a fine levied under such a possession shall not stand; for should such a fine prevail, what is said to be a solemn act and the end of all controversies, would cease to be so, and introductory of numerous frauds. Even at law, fines will be set aside for fraud, as in case of a tenant for years. *Baker* v. *Pritchard*, 2 Atk. 390. And see *Fermor's case*, 3 Comb. 77; *Whaley* v. *Tancred*, 1 Vent. 241; *Brereton* v. *Gamul*, 2 Atk. 240.

A., tenant for life, with remainder to B. in tail, by fraud gets B.'s authority to levy a fine. He sells the land, and invests the purchase money in the funds, where it is clearly identified. B. has no lien on this money against the other creditors of A. *Newcomb* v. *Burden*, 2 Anstr. 343.

Observations as to the legal and equitable right of parties to bar known existing adverse claims by fine and non-claim. If, in levying a fine, a direct fraud is practised, this court has undoubted jurisdiction to give relief; but the mere fact that a party levying a fine has good reason to believe that, if he did not do so, an adverse claim might or would be established against him, has never been considered as sufficient evidence of a good fraud to induce this court to grant relief. *Langley* v. *Fisher*, 2 Beav. 90; 15 L. J., Ch. 73.

Semble, if fraud has been practised on a tenant in tail, and carried into effect by a recovery, and tenant in tail dies without issue and without confirming this transaction, the next remainderman in tail may maintain a bill to set it aside. Secus, if the recovery was with the intention of barring the entail, and the fraud only applied to some part of the transaction, independent of that object. *Bellamy* v. *Sabine*, 2 Ph. 425; 17 L. J. Ch. 105. *And see S. C.*, 5 L. J. Ch. 36.

h. Error.

Bill brought by a remainderman in fee of copyhold, expectant on an estate tail which was spent, to be relieved against an erroneous common recovery in the lord's court, praying that the lord might be decreed to suffer plaintiff to bring a plaint in the lord's court, in nature of a writ of error, to reverse this recovery, or that this court would relieve on the merits. The defendant demurred, and the demurrer was allowed. *Ash* v. *Rogle*, 1 Vern. 367.

Whether equity will supply the defect of a fine, where the conusor dies after the caption, and before the fine is perfected. *Wharton* v. *Wharton*, 2 Vern. 3.

Court of equity will not rectify a mistake of names in a recovery, especially after a length of time and against a purchaser. *Bell* v. *Cundall*, Ambl. 102.

By the chirograph of a fine, the caption appeared to be on the 23rd of October, 1701, whereas in fact the fine was not acknowledged till the 2nd of March following, and this was offered to be proved, but the court refused to admit the evidence, being of opinion that no proof of the time of acknowledging a fine ought to be admitted contrary to or against the chirograph, and that the record, which was the chirograph of a fine, could not be falsified until it was vacated or reversed. *Saye and Sele* (*Lord*) v. *Lloyd*, 4 Bro. P. C. 73.

Where a recovery in the common pleas has not been entered of record, if it appears by the prothonotary's minutes it was suffered at bar, the court will order it to be entered, with a proviso that it shall not prejudice any subsequent purchaser. So, as to an old judgment. *Anon*, 3 Atk. 521.

3. Operation.

a. Generally.

Fine cannot bar a possibility. *Whitfield* v. *Fausset*, 1 Ves. 390.

A bill in equity not sufficient to prevent the operation of a fine at law. *Toulmin* v. *Price*, 5 Ves. 238.

Fine levied pendente lite not to be set up at trial of ejectment. *Lutwych* v. *Southin*, Dick. 286.

To a plea in bar of a fine, a direct positive averment of seisin is necessary. *Dobson* v. *Leadbeater*, 13 Ves. 230.

A common recovery suffered in the common pleas will not pass a copyhold. Secus, in customary freeholds. *Oliver* v. *Taylor*, 1 Atk. 474.

A fine cannot be levied of money, or of the trust of money; and therefore, where a sum of money is covenanted to be laid out in lands, and settled to the same uses as the lands comprised in the deed, and the tenant in tail suffers a recovery of the settled estate before money is laid out, it shall go in the same manner as if no such recovery had been suffered. *Warwick* (*Countess*) v. *Edwards*, 1 Bro. P. C. 210.

Tenant for years, at will, or at sufferance, cannot by fine devest an estate, and turn it to a right. *Brereton* v. *Gamul*, 2 Atk. 249.

A fine could be levied only by a person having the freehold either by right or by money. *Doe* d. *Parker* v. *Gregory*, 4 N. & M. 308; 2 A. & E. 14; 4 L. J., K. B. 19.

"Disposition"—Copyholds—Tenant on the Rolls—Declaration of Trust without Surrender—Deed acknowledged.]—The words "dispose" and "disposition" in the Fines and Recoveries Act, 1833, are not used as technical words, but as ordinary English words of wide meaning, and where they are not limited by the context they are sufficient to extend to all acts by which a new interest, whether legal or equitable, in the property is effectually created. Consequently, a married woman, tenant on the rolls of copyholds, can by deed acknowledged under the act effectually declare herself a trustee of those copyholds. Such a disposition is not within the proviso of s. 77 of the act, and is therefore binding on her customary heir. *Green* v. *Patterson* (32 Ch. D. 95) discussed and distinguished. *Carter* v. *Carter*, 65 L. J., Ch. 86; [1896] 1 Ch. 62; 13 R. 824; 73 L. T. 437; 44 W. R. 73.

Application to Rectify Deed.]—The court is not prohibited by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 47, from exercising its ordinary jurisdiction to rectify, on the ground of mistake, a deed of re-settlement which has been enrolled as a disentailing assurance under the act. *Hall-Dare* v. *Hall-Dare*, 55 L. J., Ch. 154; 31 Ch. D. 251; 54 L. T. 120; 34 W. R. 82—C. A.

Specific Performance.]—The jurisdiction which the courts of equity had prior to the Fines and Recoveries Act of decreeing specific performance of a contract by a tenant in tail to bar the entail by ordering him to levy a fine or

suffer a common recovery for the purpose, and enforcing the order as against the tenant in tail personally by the process of contempt, has not been excluded by s. 47 of the Fines and Recoveries Act, and the court can still as against the tenant in tail himself decree specific performance of a contract to execute a disentailing assurance, although the contract is not enforceable as against the succeeding issue in tail. *Bankes* v. *Small*, 56 L. J., Ch. 832; 36 Ch. D. 716; 57 L. T. 292; 35 W. R. 765—C. A.

b. Parcels.

Though in a fine there are often more parcels of land than belong to the conusor, yet a court of equity will restrain it to such lands as really belong to him. *Brereton* v. *Gamul*, 2 Atk. 240.

Charge in the bill, that A. died seised in fee of estate in D., and elsewhere. Plea of fine of all the estates charged in the bill, and of which A. died seised in fee, sufficient without averments that they were in D., and none elsewhere; court will not intend that there are advowsons merely because mentioned in the fine. *Butler* v. *Every*, 1 Ves. J. 136.

Two sisters having estates tail, descended from the mother, and the remainder in fee aliunde. One levies a fine; the question was, whether it barred the fee in a moiety, or only the estate tail in one moiety, and the fee in a moiety of a moiety. It was determined at law that it barred a moiety. *Church* v. *Edwards*, 2 Bro. C. C. 180.

Where a fine and recovery is of so many acres in S., the party interested shall have his election, where and in what parts of the estate the fine and recovery should operate. Decrees, &c., in part reversed. *Blaney (Lord)* v. *Mahon*, 4 Bro. P. C. 76.

Estates held to be comprised in an equitable recovery, the words being sufficiently comprehensive, notwithstanding an inference against the possession of the party, and his intention to include them from acts done under a misconception of his title. *Pigott* v. *Waller*, 7 Ves. 98.

The vill of B. being part of the parish of B., a recovery is suffered of the tithes of the parish, the deed making the tenant, conveying the tithes of the vill. The tithes of the vill pass. *Gibson* v. *Clark*, 1 Jac. & Walk. 159; 20 R. R. 266.

A fine operates on all the conusor's interest, and will pass contingent as well as vested rights, if the intention be so, and the use of the word "vested" does not show a contrary intention, when there are also the words "all estate, &c." Under the circumstances, a share of an estate, of which a fine had been levied, and which descended to the conusor as heir-at-law after the levying of the fine, and the deed to lead the uses thereof, was held to be included in the fine, and subjected to the uses thereof, by a deed executed subsequently to the descent for the purpose of confirming the deed declaring the uses of the fine. *Cole* v. *Sewell*, 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66. Affirmed, 2 H. L. Cas. 186; 12 Jur. 927.

An estate stood limited, subject to a life estate, to five persons, as tenants in common in tail, with cross remainders between them in tail. One of these persons, a married woman, concurred with her husband in a deed mortgaging her fifth share and all other the share and interest to which she might become entitled by the death of any of the other tenants in tail without issue; and the deed contained a covenant to levy a fine of the property expressed to be conveyed by the deed. A fine was levied, purporting to extend only to the fifth share. Afterwards, one of the other tenants in tail died without issue, and without having barred his estate tail:—Held, that there was an error in the fine, which was cured by 3 & 4 Will. 4, c. 74, s. 7, and that the fine was effectual as to one-fourth, and not as to one-fifth only. *Life Association of Scotland* v. *Siddal*, *Cooper* v. *Greene*, 3 De G. F. & J. 58.

c. Protector.

i. *Who is.*

Bare Trustee.]—A bare trustee who, under s. 31 of the 3 & 4 Will. 4, c. 74, is protector of a settlement, can insist on retaining the legal estate, only so long as the purposes of the trust exist, that is, so long as, according to the rules of the court of equity, he is required to be a trustee. *Buttanshaw* v. *Martin*, 1 Johns. 89; 5 Jur. (N.S.) 647.

Therefore, where there was a devise of lands to trustees upon trust for the testator's daughter during her life, for her separate use without power of anticipations, with remainder to the use of her children as tenants in common in tail, with remainders over:—Held, that the testator's daughter having become discoverte and being sui juris, could compel a conveyance by the trustees of the legal estate. *Ib.*

—— **Husband.**]—A husband of a married woman taking an estate to her separate use under a settlement is not a bare trustee under the settlement, within the 3 & 4 Will. 4, c. 74, s. 31. *Keer* v. *Brown*, 1 Johns. 138; 28 L. J., Ch. 477; 5 Jur. (N.S.) 457; 7 W. R. 372.

Tenant in Tail in Possession.]—Where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is protector within the words of s. 22 of the 3 & 4 Will. 4, c. 74. *Blewitt, In re*, 6 De G. M. & G. 187; 25 L. J., Ch. 393; 2 Jur. (N.S.) 21; 4 W. R. 195.

Lord Chancellor—Lunatic.]—Circumstances under which the lord chancellor, as a protector, in lieu of the tenant in tail in possession, a lunatic, will consent to a disentailing deed for the purpose of securing a part of the estate for the near relations of the lunatic. *Ib.*

Joint Tenancy—Tenancy in Common.]—Freeholds stood limited to A., B., C., and D. jointly for life, remainder in fifths to them and E. as tenants in common in tail male, with cross remainders in tail male. A., without the consent of B., C., or D., and in the lifetime of E., who afterwards died without issue, executed a disentailing deed of his estates tail:—Held, that A. was protector not merely of an aliquot share of the estate, but specifically of his original fifth share, and also of the fourth of E.'s fifth in remainder after E.'s estate tail; and consequently that the original fifth share of A., and also his fourth of E.'s fifth share were effectually disentailed. *Tufnell* v. *Borrell*, 44 L. J., Ch. 756; L. R. 20 Eq. 194; 23 W. R. 717.

"Owner of Prior Estate."]—In s. 22 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74),

which points out the person who shall be protector of the settlement, the "owner of the prior estate" is the person who is entitled under the settlement to the beneficial enjoyments of the rents and profits. *Dudson's Contract, In re*, 47 L. J., Ch. 632; 8 Ch. D. 628; 39 L. T. 182; 27 W. R. 179.

In a will made before the passing of the act, the testator, being entitled to the equity of redemption of a freehold estate, devised the same to trustees and their heirs to the use of them and their heirs during the life of A. (a married woman), in trust for A. for her separate use, with remainder to the use of B. in tail, with remainders over. In 1871, the legal estate being still outstanding, the first tenant in tail, with the consent of A. as protector, disentailed the estate:—Held, that the entail was effectually barred, A., and not the trustees, being the proper protector of the settlement. *Ib.*

Trustees under Will.]—The trustees of the real estate under a will were appointed also protectors of the estates tail created by the will. They all died, and new trustees of the real estate were appointed by the court:—Held, that the tenant for life had become protector of the settlement, and that he and the first tenant in tail could convey. *Clarke* v. *Chamberlin*, 16 Ch. D. 176; 29 W. R. 415.

ii. *Married Women.*

Where by a settlement executed prior to the 3 & 4 Will. 4, c. 74, realty was settled to the use of a married woman for life for her separate use, with remainder in tail, she alone is (by virtue of s. 24) protector of the settlement. *Keer* v. *Brown*, 1 Johns. 138; 28 L. J., Ch. 477; 5 Jur. (N.S.) 457; 7 W. R. 372.

Husband Convicted of Felony.]—Where the tenant for life is a married woman, whose husband has been convicted of felony, and the life estate is not settled to her separate use, the court of chancery, together with the wife, is the protector of the settlement. *Wainewright, In re, Slade, Ex parte*, 1 Ph. 258; 12 L. J., Ch. 426; 7 Jur. 499; 13 Sim. 260.

Wife with Separate Estate—Husband not a Bare Trustee.]—A husband of a married woman taking an estate to her separate use under a settlement is not a bare trustee under the settlement, within the 3 & 4 Will. 4, c. 74, s. 31. *Ib.*

iii. *Survivorship of Office.*

When protectors of a settlement are appointed under 3 & 4 Will. 4, c. 74, s. 32, the protectorship is not determined by the death of one of them, but vests in the survivor or survivors. *Bell* v. *Holtby*, 42 L. J., Ch. 266; L. R. 15 Eq. 178; 28 L. T. 9; 21 W. R. 321.

iv. *Other Matters.*

Court as Protector—Form of Petition for Consent.]—Form of petition, evidence, and order, on an application to the court to consent as protector of a settlement to the barring of an entail. *Gravenor, In re*, 1 De G. & Sm. 701.

Settlement by Court—Limitations.]—Where it was referred to the master to draw up a settlement in pursuance of a direction in a deed executed by the late Lord Despencer, that his estates should so far as the law would allow be strictly settled after his death, so as to go along with the title, so long as the holder of the title should be a lineal descendant of himself, but with a provision, that in case the title should at any time, within the limits prescribed by the law for strict settlements, be suspended or in abeyance, then that the rents and profits of the estates should during such interval be equally divided among the co-heirs per stirpes of the person or persons by whose death or deaths such abeyance should have been occasioned; the court approved of a settlement in which the latter object was secured by a proviso, subject to be defeated by a recovery, and not as suggested by the court at the first hearing, by a term of 1,000 years prior in limitation to all the other uses; and the court also declined to appoint a protector of the settlement by reason of his irresponsibility if appointed. *Banks* v. *Le Despencer*, 11 Sim. 508; 9 L. J. (N.S.) Ch. 185; 4 Jur. 601.

Joint Protectors — Death — Survivorship of Office.]—When protectors of a settlement are appointed under 3 & 4 Will. 4, c. 74 (The Fines and Recoveries Act), s. 32, the protectorship is not determined by the death of one of them, but vests in the survivor or survivors. *Bell* v. *Holtby*, 42 L. J., Ch. 266; L. R. 15 Eq. 178; 28 L. T. 9; 21 W. R. 321.

d. Tenant for Life.

The fine of a tenant for life divested the estate of the remainderman or reversioner, leaving in him only a right of entry, to be exercised either then, by reason of the forfeiture, or within five years after the natural determination of the preceding estate. *Goodright* d. *Fowler* v. *Forrester*, 8 East, 552; 1 Taunt. 578.

By a will in 1789, an estate was devised to M. for life, with remainder as he should by deed or will appoint, and in default of appointment, remainder to the heirs of his body, with remainders over. In 1790, M. levied a fine to the use of himself in fee, and afterwards died without issue:—Held, in an ejectment by the heir-at-law of M., that the fine created a discontinuance, and gave a tortious fee to M., and that his heir-at-law was consequently entitled to recover in ejectment, the remainders over being divested, and the rights of the remaindermen only capable of being enforced by real action. *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; 10 L. J., Ex. 201.

A tenant for life and tenant in remainder of copyhold premises suffered a recovery, and declared uses on the surrender, which, as a voluntary conveyance, was void as against a purchaser:—Held, that the recovery itself was not therefore void, but that it operated so as to give them the fee by way of resulting use. *Doe* d. *Baverstock* v. *Rolfe*, 3 N. & P. 648; 8 A. & E. 650; 7 L. J., Q. B. 251.

A common recovery with double voucher suffered by a bare tenant for life as vouchee, without feoffment or fine, destroyed a contingent remainder immediately expectant on the life estate, notwithstanding 14 Eliz. c. 8. *Doe* d. *Davies* v. *Gatacre*, 5 Bing (N.C.) 609; 7 Scott, 807; 8 L. J., C. P. 338.

A., being seised in remainder during the life of B. and C., and the survivor, in trust to preserve contingent remainders, took an estate in

possession to him and his heirs during the life of C., to make him tenant to the præcipe; and a recovery was suffered against A.:—Held, that the contingent remainders were saved by 14 Eliz. c. 8. *Boughton* v. *Sandilands*, 3 Taunt. 373.

If a fine was levied by a tenant for life, remainderman in tail, and reversioner in fee, a declaration of uses by the tenant for life and remainderman in tail did not bind the reversioner without his privity. *Ros* v. *Popham*, 1 Dougl. 25.

A. was tenant for years, remainder to B. for life, remainder to the first and other sons of B. in tail, remainder to the heirs of B. in tail; A. and B. joined in a lease and release to make a tenant to the præcipe, and suffered a recovery; the estate tail limited to the sons of B. was not divested by the recovery, nor was there any forfeiture of the estates of A. and B. *Smith* d. *Richards* v. *Clyfford*, 1 Term Rep. 738; 1 R. R. 384.

By indentures of lease and release, dated in 1796, an estate was conveyed to A. and B. to the use of A., his heirs and assigns for ever. A. devised the estate to his daughter and to the heirs of her body, but in case she died without issue of her body living at her decease, then to his nephew and his heirs for ever. In February, 1814, the daughter suffered a recovery of the estate, and upon her marriage, in March in the same year, executed deeds of lease and release, reciting that she was seised in fee-simple of the estate, and conveyed the same to trustees in trust for her and her husband and their issue, and in default of issue to such person as she should appoint. The marriage took place, and the daughter died without issue, having devised the estate in fee to her husband, who survived her:—Held, that the recovery suffered by the daughter was inoperative, because at that time the legal estate for life was in B., and she was only equitable tenant for life, with a legal remainder in tail, and consequently that the husband had no title. *Ireson* v. *Pearman*, 5 D. & R. 687; 3 B. & C. 799; 3 L. J. (O.S.) K. B. 119; 27 R. R. 490.

e. Tenant in Tail—Disentailing Deed.

i. *Generally.*

Form of.]—A disentailing deed need not pursue any particular form of conveyance; any deed which by its legal operation would have conveyed the fee simple, if the grantor had been seised in fee, will, if executed by a tenant in tail in possession, and if duly enrolled, bar the entail. *Nelson* v. *Agnew*, Ir. R. 6 Eq. 232.

It is not necessary that a disentailing deed should be assented to or executed by the grantees to uses. *Ib.*

—— **Intention.**]—By a disentailing deed under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, after reciting that A. was tenant for life, with remainder to B. in tail, of the two estates therein comprised, and that A. being called upon to pay a debt of 1,200*l.* had applied to C., who had agreed to advance that sum, in consideration of B. joining in the deed, which he had also agreed to do; in order to defeat all estates tail of B., and to convey the inheritance in fee therein, A. and B. jointly conveyed the two estates, and all the interest of A. and B. therein, to C., for five hundred years, to secure the repayment of 1,200*l.* and interest, with remainder to A. for life, remainder to B. in fee. In fact, A. was tenant in tail, not tenant for life, of one of the two estates:—Held, that the conveyance being for valuable consideration as to both B. and C., the tenant in tail under A.'s entail could not be heard to say that such entail was not barred by the deed, the intention to convey the whole fee simple in the property so entailed being sufficiently expressed, and the operative words of the disentailing deed being large enough to bar such entail. *Evans* v. *Jones*, 1 Kay, 29; 2 Eq. R. 421.

Must Operate as a Conveyance.]—A disentailing deed, which fails to operate as a conveyance, cannot bar an entail.

A tenant in tail in possession of an estate executed a disentailing deed, purporting to be a grant of the estate to A. and B. and their heirs, free from all estates tail of the grantor, to the use of A. and B. and their heirs upon trust for the grantor. The deed was enrolled, but not executed by A. and B., who subsequently executed a deed of disclaimer:—Held, that the disentailing deed operated as a grant and not by the statute of uses; that it was rendered inoperative by the subsequent disclaimer by the grantees; and that the estate tail was not barred under 3 & 4 Will. 4, c. 74. *Peacock* v. *Eastland*, 39 L. J., Ch. 534; L. R. 10 Eq. 17; 22 L. T. 706; 18 W. R. 856.

Renders Estate Perpetual.]—A disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate, but enables him, by the exercise of the power which that interest gives him, to render it perpetual. *Lilford* (*Lord*) v. *Att.-Gen.*, L. R. 2 H. L. 63.

Defective Estates—Effect in Confirming.]—In 1825 a person took the benefit of the Insolvent Act, and executed an assignment of all his real and personal property in possession, reversion, or expectancy, to the provisional assignee, in trust for his creditors. The insolvent was at the time tenant in tail in remainder of real estate, and in 1826 he became tenant in tail in possession by the death of his father. In 1831 he became bankrupt, and the commissioners executed a disentailing deed of his real estate. In 1844 he died, leaving issue inheritable under the entail. The assignee under the insolvency claimed the estate against the the assignees under the bankruptcy, on the ground that the estate conveyed to him by the deed of 1825 was enlarged into a fee simple by the disentailing deed executed under the bankruptcy:—Held, that the deed of 1825 only passed such interest as the insolvent had power to convey without fine or recovery, and did not operate as a contract to convey the fee. *Sturgis* v. *Morse*, 29 L. J., Ch. 766; 6 Jur. (N.S.) 766; 8 W. R. 737.

The rule that disentailing assurances will enlarge and confirm defective estates and titles, previously granted, rests on technical grounds, and does not apply to estates created by statutory powers, in the absence of some paramount equity overriding the power to bar the estate tail. *Ib.*

Insolvent Trader — Sale — Confirmation to Purchaser.]—Where a trader sold an estate, and conveyed it as tenant in fee simple, with the

usual covenant for further assurance, and became bankrupt, and it was afterwards considered that he was tenant in tail only, it was ordered that the commissioner should be at liberty to execute a deed of confirmation to purchaser. *Fripp, Ex parte, Phelps, In re*, 1 De G. 293.

Entailed Money.]—A disentailing deed under 3 & 4 Will. 4, c. 74, s. 71, affects entailed money, although not yet due, and not yet liable to be invested in the purchase of land. *Fordham* v. *Fordham*, 34 Beav. 59; 11 Jur. (N.S.) 28; 11 L. T. 529; 13 W. R. 197.

Heirlooms — Defeasible Estate Tail.]—If a tenant in tail in remainder, whose estate is defeasible by the birth of issue of a prior existing tenant for life, executes a disentailing deed, and dies during the life of such tenant for life, he will not obtain a title to chattels under a gift in the nature of heirlooms to the person for the time being in the enjoyment of the estate under the limitations of the will of a testator. *Hogg* v. *Jones*, 8 L. T. 816.

Covenant to Disentail—Specific Performance —Parties.]—To a bill by the covenantee, for specific performance of a covenant entered into by a tenant in tail in remainder, to disentail the estate after the decease of the tenant for life, judgment creditors of the tenant in tail, whose debts have been made charges on his estate, under the statute 1 & 2 Vict. c. 110, are not necessary parties. *Petre* v. *Duncombe*, 7 Hare, 24; 17 L. J., Ch. 370; 12 Jur. 24.

Statute forbidding Alienation—Effect of.]—When lands are limited to a person and the heirs of his body by a statute which forbids the alienation of any portion of the lands therein mentioned by the donee or the heirs of his body, the estate thus created is nevertheless a tenancy in tail deprived of one of its ordinary incidents—namely, that the entail can be barred and the heirs in tail and the remaindermen cut off. *Abergavenny (Earl)* v. *Brace*, 41 L. J., Ex. 120; L. R. 7 Ex. 145; 26 L. T. 514; 20 W. R. 462.

Estate Tail whether Well Barred.]—In 1872 certain lands devised by will were held by trustees on trust, subject to the estate of a tenant for life, for the second son of the testator's daughter A. for life, with remainder to the third son of A. for life, with remainder in tail in each case to the issue of such son. In that year the second son of A. and his eldest son by deed barred the entail; and in the same year the third son of A. died, leaving his eldest son, the plaintiff, surviving. There was a proviso in the will that in case of a certain event happening the trusts in favour of the second son of A. and his issue should be postponed and to take effect in remainder next immediately after the trusts in favour of the third son of A. and his issue. That event happened in 1883. On the death of the tenant for life in 1891, the plaintiff claimed a declaration that he was entitled to the possession and rents of the said lands:—Held, that the disentailing deed was effectual to bar the plaintiff's estate. *Milbank* v. *Vane*, 62 L. J., Ch. 629; [1893] 3 Ch. 79; 2 R. 443; 68 L. T. 735—C. A.

A testator in 1827 devised lands to trustees and their heirs upon trust to stand seised for the life of A., and also until the whole of his just debts and all interest thereon should be paid, and gave the trustees power to set and let the same, and to apply the rents and profits, and the value of whatever timber might be considered at its best growth, towards the payment of the debts, and then to pay the rents and profits to A. for life, and after his death to the heirs of his body, and in default of such issue, to the testator's right heirs for ever. In 1830 the entail was barred:—Held, that the trustees took a fee-simple estate, and that the estate tail was well barred. *Collier* v. *Walters*, 43 L. J., Ch. 216; L. R. 17 Eq. 252; 29 L. T., 868; 22 W. R. 209.

S., by will, gave 5,000*l.* to the eldest son of his late brother for life, with remainder upon trusts corresponding with the limitations made by A. of the C. estate in favour of his issue, but subject to an executory limitation over on the death under twenty-one, without issue then living, of any person who under the said limitations of the C. estate, would be tenant in tail by purchase. A. had never made any settlement, but had registered according to the law of Scotland two deeds of entail of the C. estate, of which he was then tenant in tail in possession. A.'s eldest son having executed a disentailing deed, and thereby become owner in fee of the C. estate, claimed the 5,000*l.* absolutely:—Held, that he had become absolutely entitled to the 5,000*l.* on completion of the instrument of disentail. *Schank* v. *Scott*, 22 W. R. 513.

A., B., C. and D. were joint tenants of freeholds for life, with remainder to A., B., C., D., and E., as tenants in common in tail with cross-remainder. A., without the consent of B., C. or D., executed a disentailing assurance. Subsequently E. died without issue and without having barred his estate tail:—Held, that A. was protector of the same share of which he was tenant in tail, and that, therefore, he had effectually barred his estate tail as well in the one-fourth of E.'s fifth share to which he was entitled in remainder on E.'s estate tail, as in his original one-fifth share. *Tufnell* v. *Borrell*, 44 L. J., Ch. 756; L. R. 20 Eq. 194; 23 W. R. 717.

Two sisters having estates tail, descended from the mother, and the remainder in fee aliunde. One levies a fine; the question was whether it barred the fee in a moiety, or only the estate tail in one moiety, and the fee in a moiety of a moiety. It was determined at law that it barred a moiety. *Church* v. *Edwards*, 2 Bro. C. C. 180.

Party Executing must be Tenant in tail.]—A deed of disentailer, executed under 3 & 4 Will. 4, c. 74, has no effect in barring future contingent estates, unless the party executing it was in fact a tenant in tail. *Slater* v. *Dangerfield*, 15 M. & W. 263; 16 L. J., Ex. 139. See *Evans* v. *Jones*, Kay, 29; 2 Eq. R. 421.

Estate to Illegitimate Child Barrable.]—An estate granted by Charles the Second to one of his illegitimate children for love and affection may be well barred by bargain and sale under 3 & 4 Will. 4, c. 74, s. 15, notwithstanding 34 & 35 Hen. 8, c. 20. *Grafton (Duke)* v. *London and Birmingham Ry.*, 5 Bing. (N.C.) 7; 6 Scott, 719; 1 Arn. 363; 8 L. J., C. P. 47.

Construction of Will.]—A testator, by will, dated before 1837, devised property to trustees

and their heirs, to the use of his daughter A. for life, and after death, for such one or more of her children, or his, her, or their issue, in such manner and form as A. should by will appoint; and, in default of appointment, "for all and every her children, and the heirs of their body or bodies lawfully begotten, in equal shares and proportions." The testator then proceeded, "And in case of the death of my daughter A., without leaving any child her surviving, and in the event of such child or children her surviving and dying without leaving any issue of his or her body, then in trust for my own right heirs for ever." A. had a son, who died in her lifetime, having previously joined with her in the execution of a disentailing deed:—Held, that the son took a vested estate tail under the will, and consequently that the ultimate limitation to the right heirs of the testator was barred by the disentailing deed. *Richards* v. *Davies*, 13 C. B. (N.S.) 861; 32 L. J., C. P. 112; 11 W. R. 430—Ex. Ch.

"Disposition"—Disentailing Deed only Enrolled.]—A disposition is made to a purchaser for value, within the meaning of the proviso in 3 & 4 Will. 4, c. 74, s. 38 (Fines and Recoveries), although the disentailing deed, conveying a fee to the tenant in tail to such uses as he shall direct, is the only deed enrolled; provided that deed and the other deeds declaring the uses in favour of the purchaser form part of one and the same transaction. *Crocker* v. *Waine*, 5 B. & S. 697; 33 L. J., Q. B. 316; 10 L. T. 600; 12 W. R. 905.

Fine must be Levied.]—Issue in tail not bound, unless fine actually levied, although tenant in tail was decreed to levy fine. *Weale* v. *Lower*, cited 2 Vern. 306.

Tenant in tail sells for a full value, receives the money, and covenants to levy a fine, and was afterwards decreed to do it; yet dying (though in prison for not performing the decree) his issue could not be bound. *Fox* v. *Crane*, 2 Vern. 306.

The fine of a tenant in tail does not take away the right of the remainderman, but the remainderman is at liberty to prove the vouchee in a recovery non compos. *Hume* v. *Burton*, 1 Ridgw. P. C. 207.

Fine a Quasi Judgment.]—A fine with proclamations, by a tenant in tail, whether the proclamations are finished in his lifetime or not, will bar the issue in tail; because the fine is quasi a judgment, and the issue in tail claims the estate through his ancestor, whose right was barred by the judgment. *Id.* 270.

Equity of Redemption—Estate tail in Condition as to Assuming Name—No Notice.]—An estate tail in an equity of redemption is well barred by a recovery, notwithstanding that the mortgagee did not join in making a tenant to the præcipe. *Darcy* v. *Darcy*, Wall. Lyn. 119.

Recovery.]—Tenant in tail conveys his estate to the use of himself and his intended wife, for their lives, with remainder to the heirs of their bodies, and after marriage suffers a recovery; the recovery bars but a moiety, and is a severance of the joint estate. *Moody* v. *Moody*, Ambl. 649.

Where there is a deed to lead the uses of a recovery, tenant in tail cannot declare new uses, but such subsequent declaration must be by all parties concerned in interest. *Stapilton* v. *Stapilton*, 1 Atk. 7.

Where a father was tenant for life, with remainder to his son in tail, who, on his marriage, by lease and release, conveys his estate to trustees in strict settlement, and some time afterwards joins with his father in making a mortgagee of the same estate, and suffers a recovery to the use of the mortgagee:—Held, that the recovery shall notwithstanding come first to the use of the marriage settlement. *Cheney* v. *Hall*, 2 Eden, 357.

Recovery suffered by deaf and dumb person, and settlement to uses set aside, though no actual fraud. *Ferres* v. *Ferres*, 2 Eq. Abr. 695.

Copyholds—Post-Nuptial Settlement—Disposition.]—A feme covert entitled to an equitable estate tail in copyholds at B. executed, in February, 1870, a deed declaring that such copyholds should be held in trust for such persons as she and her husband should jointly appoint, and in default for herself in fee. The deed was duly acknowledged, but was not entered upon the court rolls of the manor within six months after execution. By a deed of settlement dated in March, 1870, she and her husband purporting to exercise this joint power, appointed the copyholds at B., and also covenanted to surrender those and other copyholds to which she was entitled in fee, to trustees upon trust to sell, invest the proceeds, and hold the fund (in the events which happened) for her for her separate use for life, then for her husband for life, and then for her children other than her eldest son. No sale or surrender of any of the copyholds was ever made. The feme covert had several children, and after the deaths of her and her husband the trustee of the settlement petitioned that all the copyholds might vest in him for all the estate therein of the eldest son and customary heir, who was an infant, and the court made a vesting order according to the prayer of the petition:—Held, first, that the deed of February, 1870, being a mere declaration of trust by the tenant in tail, and not a "disposition" within the Fines and Recoveries Act, was inoperative as an assurance to bar the estate tail in the copyholds at B. Secondly, that in concurrence with *Honeywood* v. *Foster* (30 Beav. 1) and *Gibbons* v. *Snape* (1 De G. J. & S. 621), and upon the construction of the statute, that, taking s. 41, together with ss. 50 and 53 of the Fines and Recoveries Act, a disentailing assurance by an equitable tenant in tail of copyholds, which is not entered upon the court rolls of the manor within six months after execution, is void; and consequently that the power of appointment which the deed of February, 1870, purported to create could not be exercised. Thirdly, that the settlement of March, 1870, was not a disposition by the feme covert within the act, and could not be treated either as an assignment of her equitable interest in the copyholds or as a valid declaration of trust, or as anything more than a mere covenant to surrender. *Green* v. *Paterson*, 56 L. J., Ch. 181; 32 Ch. D. 95; 54 L. T. 738; 34 W. R. 724—C. A.

If a tenant in tail suffers a recovery, and declares uses which are void, he does not take back an estate tail, but an estate in fee. *Tanner* v. *Radford*, 6 Sim. 21.

Tenant in tail may suffer a recovery and bar his issue; though he had previously, by an

innocent conveyance, aliened in fee. *Bond* v. *Bond*, Hay & J. 374.

If a tenant in tail by purchase under a settlement, made by his ancestor ex parte maternâ, suffered a recovery, and declared the uses to himself in fee, he took the fee as a purchaser, descendible to his paternal heirs. *Roe* d. *Crow* v. *Baldwere*, 5 Term Rep. 104; 2 R. R. 550.

Where a common recovery was suffered of an estate tail, the recoveror acquired an absolute estate in fee simple derived out of the estate tail; so that if a tenant in tail by purchase, under a marriage settlement made by his ancestor ex parte maternâ, with the reversion in fee by descent ex parte maternâ, suffered a common recovery to the use of himself in fee, this estate would descend to his heirs general and not to the heirs ex parte maternâ; for the recovery did not let in the reversion in fee, but a new estate was thereby acquired, by purchase, which was totally different from the old estate tail. *Martin* d. *Tregonwell* v. *Strachan*, 6 Bro. P. C. 319; 1 Wils. 266; 2 Stra. 1179; 5 Term Rep. 107, n.; 2 R. R. 552, n.

Tenant in tail under will, before suffering recovery, settles estate on self for life, and with remainders to other tenants in tail in remainder under will, and afterwards suffers a recovery and mortgages the estate:—Held, valid against tenants in tail in remainder. *Cormick* v. *Trapaud*, 6 Dow, 60.

Articles on marriage to settle lands on the husband and wife for their lives, remainder to the first, etc., son of the marriage, remainder to the heirs male to the body of the husband by any wife, remainder to the heirs of the body of the husband by the first wife, remainder to the husband in fee, with provisions for the daughters of that marriage, if no son; husband has one daughter by the first wife, suffers a recovery, and marries a second wife, taking notice of his first marriage articles in his second settlement. He being tenant in tail by the articles, was allowed by his recovery to have barred his daughter of the first marriage. *Powell* v. *Price*, 2 P. W. 535.

Fine merges Estate tail.]—The operation of a fine levied by tenant in tail, who has the immediate reversion in fee in himself, is to merge the estate tail, and bring the reversion in fee into possession, by which means it will become liable to the incumbrances of all who were seised of it. *Shelburne* (*Earl*) v. *Biddulph*, 6 Bro. P. C. 356.

If a tenant in tail, remainder in fee, grant an estate to A., to commence after the death of tenant in tail, and then levy a fine to other uses, A.'s estate is merged in the fine. *Langley* v. *Browne*, 2 Atk. 201.

Vesting Order under Trustee Act, 1850.]—A vesting order under the Trustee Act, 1850, will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under the 3 & 4 Will. 4, c. 74. *Powell* v. *Matthews*, 1 Jur. (N.S.) 973.

Under a devise of a mansion and family estate to several successively for life and in tail; with a proviso, that whatsoever person should, by virtue of the will, became possessed of or entitled to the estate, should, from the time he became so possessed, take upon himself the surname of Thelwall, and make the mansion his usual and common place of abode and residence:—Held, that a tenant in tail in remainder succeeding to the possession, who had also become heir-at-law to the testator, not being found to have had notice of the will of her ancestor, containing such condition, her title could not be impeached by the remainderman over, who brought ejectment after her death, against her husband, by whom she had issue, which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the præcipe. *Doe* d. *Kenrick* v. *Beauclerk*, 11 East, 657; 11 R. R. 307.

Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews; and after his wife's death, to the use of his nephews and the survivor for their lives; remainder to the use of the trustee to preserve contingent uses and estates, during their lives; and after their decease in trust for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the use of another in fee:—Held, that the limitation in trust for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound the entail, and defeated the subsequent limitation in fee. *Doe* d. *Terry* v. *Collier*, 11 East, 377; 10 R. R. 529.

Tenants in Common—Partition.]—Two tenants in common of copyhold estate in tail, agree upon a partition, each surrenders the part allotted to the other:—Held, entail was barred only as to a moiety. *Oakley* v. *Smith*, Ambl. 368; 1 Eden, 261.

Equitable.]—If cestui que trust in tail levies a fine or suffers a recovery, it shall have the same operation as if it were an estate at law, especially if it be on a consideration paid. *Goodrich* v. *Brown*, 1 Ch. Ca. 49; 2 Freem. 180; 1 Ch. Ca. 213; *S. C.*, cited, and said to be the first precedent of the kind. And see *Washburn* v. *Downs*, 1 Ch. Ca. 213, where it is said to be Bridgman's opinion that it should not bar, but it is now well settled.

A. conveys his estate to trustees in trust to convey as he shall by will direct, and then by will directs them to convey to B., his son in tail male, remainder to C. in tail male, remainder to the right heirs of the testator, and B. being in possession suffers a recovery without the trustees, this shall bar the estate tail in equity; for a trust is a creature of equity, and to be governed by its rules. *North* v. *Way*, 1 Vern. 13; 2 Ch. Ca. 78.

Common recovery suffered or fine levied by cestui que trust of an estate tail has the same effect in equity as it would have at law in case the legal estate was in him. *Carpenter* v. *Carpenter*, 1 Vern. 440.

A trust estate in tail is not within the statute de Donis, and therefore may be barred by feoffment or bargain or sale, without fine or recovery. *Washborn* v. *Downs*, 1 Ch. Ca. 68. S. P., *Beverley* v. *Beverley*, 2 Vern. 132.

Recovery will bar equitable estates tail. *Botler* v. *Allington*, 1 Bro. C. C. 72.

Cestui que trust in tail brings a bill against

the trustees to the intent they should join in a recovery; this not proper, but it is proper to pray that the trustees may convey the premises to the cestui que trust in tail, who may then suffer a recovery, though if the trustees are also trustees for any annuity subsisting, they are not compellable to part with the legal estate out of them to the cestui que trust in tail. *Carteret* v. *Carteret*, 2 P. W. 133.

Equitable recovery valid, though the tenant in tail was not, at the time, in actual receipt of the rents which the trustee paid over to other under a decree afterwards reversed. *Grenville (Lord)* v. *Blyth*, 16 Ves. 224.

Equitable tenant in tail aliens in fee by way of mortgage; a good equitable recovery may be suffered of the secondary equitable estate without the concurrence of the mortgagee. *Nouaille* v. *Greenwood*, Turn. & R. 26; 23 R. R. 174.

Presumption as to.]—In ejectment by heir in tail of E., one of three sisters who were coparceners in tail, to recover the third part of certain lands, it appeared that in 1748 two of them, M. and D., suffered recoveries of their shares, but E. did not. All married, and in 1759 their husbands entered into an agreement to make partition of the lands so held in coparcenary, as well as of other lands, part leasehold, part freehold, the leasehold having been devised by the same will which created the estates tail, and the freehold not being comprised in the will. The agreement provided only for a deed of partition. No deed was proved to have been executed. The lands had been held according to the agreement from the date of it till the ejectment. Those in dispute had been held by the husband of D., and those who took under him and her:—Held, that the possession being accounted for, the court could not presume a recovery or fine to bar the estate tail. *Doe* d. *Millett* v. *Millett*, 6 Q. B. 1036; 17 L. J., Q. B. 202; 12 Jur. 649.

Discontinuance.]—Discontinuance can only be created by a tenant in tail in possession at the time he does the act to defeat the settlement. *Doe* d. *Jones* v. *Jones*, 1 B. & C. 238; 2 D. & R. 373; 1 L. J. (o.s.) K. B. 102.

The discontinuing party must be actually seised by force of the entail. *Driver* d. *Burton* v. *Hussey*, 1 H. Bl. 269.

Remainder under an old settlement barred by a fine and non-claim, the fine also working a discontinuance. *Snell* v. *Silcock*, 5 Ves. 469.

In order that a fine levied by a tenant in tail may operate as a discontinuance to the reversioner, the tenant in tail must be rightfully in possession, by force of his estate tail, at the time when the fine is levied. *Anderson* v. *Anderson*, 30 Beav. 209; 7 Jur. (N.S.) 1067; 4 L. T. 19; 9 W. R. 492.

Therefore, a fine levied by a tenant in tail in remainder expectant upon the determination of an estate by the curtesy during the existence of the previous estate, and in favour of the tenant by the curtesy, held not to work a discontinuance. *Ib.*

Estates were settled to certain uses, with remainder to trustees for 500 years, to raise portions for younger children, remainder to the use of the first and other sons successively of the settlor in tail male, remainder to his heirs and assigns for ever. The estate came, by virtue of the settlement, to E., the eldest son, who also became the reversioner in fee. He levied a fine to his own use in fee, and devised the estates in trust for T., his brother, for his life, remainder to the use of T., his brother's son for life, remainders to the sons of the last-mentioned T. successively in tail male, remainder to the use of F. in fee. E. died without issue in 1774. T., the brother, suffered a recovery in the same year, devised the estates to T., his son, for life, with remainder over, and died in 1780. T., the son, entered on his father's death:—Held, that E., being the tenant in tail, possessed of the immediate estate of freehold, was not precluded by the term of 500 years from levying a fine, which worked a discontinuance of the remainders; and that he thereupon acquired a tortious fee, which he might devise as above. *Doe* d. *Cooper* v. *Finch*, 4 B. & Ad. 283; 1 N. & M. 130; 2 L. J., K. B. 41.

Creation of Base Fee.]—An estate being limited by a marriage settlement to the use of A. and his wife, and the heirs of their bodies, and A. having died, leaving his widow and three children, viz., G., an only son, and L. and H., daughters; the widow, in 1735, by a deed-poll, in consideration of an annuity to her by her son G., and of natural affection, granted, surrendered and yielded up the estate to G., in fee; and afterwards, during her life, suffered a recovery. The widow died in 1767; G. died without issue in 1779, having devised the estate to trustees to secure the payment of an annuity to W., the only son of his sister, L. (who was then dead), and subject thereto to B., the eldest son of W., for life, with remainder to his second son. In 1790 B. entered, on his father's death, into possession of the entirety of the estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814, he suffered a recovery of one moiety, and in 1816 conveyed the entirety of the estate to mortgagees in fee. In 1818, M., the descendant of the other coparcener, H., at B.'s request, suffered a recovery of a moiety, which it was declared should enure (subject to a term to secure a sum of money to M.) to the use of B.'s mortgagees:—Held, first, that the deed-poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail. *Woodroffe* v. *Doe* d. *Daniel*, 15 M. & W. 769; 7 Jur. 959—Ex. Ch. Affirmed in the House of Lords, 2 H. L. Cas. 811; 13 Jur. 1013.

Held, secondly, that this base fee did not, on the death of the widow, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate; and that, although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued till his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from G.'s death in 1779, and not from the death of his mother in 1767; and that B.'s entry in 1790 was not barred by lapse of time. *Ib.*

Held, thirdly, that although B. entered under the will, and manifested an intention to take the estate under it for his life only, that intention was immaterial, and he was remitted, nolens volens, as to his moiety, to the original estate tail, which was barred by the recovery in 1814. *Ib.*

Held, also, that the entry and remitter of B. did not operate to remit M., his coparcener, to the other moiety of the estate. *Ib.*

A tenant in tail of the gift of the crown, the reversion being in the crown, suffered a common recovery before 34 Hen. 8; he gained a base fee descendible and alienable so long as there was issue in tail, and the reversion was still in the crown. *Neale* d. *Athole* (*Duke*) v. *Wilding*, 1 Wils. 275.

In 1841, Lord H., being entitled in remainder (subject to the existing life estate of Lord D.) as tenant in tail to two undivided third parts of certain hereditaments, mortgaged his interest in the property to M. D. In 1842 Lord H. became bankrupt. At the date of his bankruptcy the statute in force was 6 Geo. 4, c. 16, as amended by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74). No disentailing deed was executed by the commissioners in bankruptcy pursuant to s. 64 of that statute; but in 1872 Lord H. executed a disentailing deed. In 1878 Lord D., the tenant for life, died. The plaintiff was a sub-mortgagee from M. D., and brought this action to realise his security:—Held, that the mortgage by Lord H., the tenant in tail in remainder, conferred upon the grantee, not merely an estate for the life of the grantor, but a base fee, voidable by the entry of the issue in tail; that, notwithstanding the intervening bankruptcy, the subsequent disentailing deed by the tenant in tail operated to confirm the base fee; and that, therefore, the plaintiff was entitled, under his security, to a base fee, to continue so long as there should be issue of Lord H. who would have succeeded under the entail. *Hankey* v. *Martin*, 49 L. T. 560.

Husband and Wife.]—Where feme covert joins with her husband in fine, she cannot recall it after five years. *Anon.*, Cary 5.

Wife may dispose of personal estate as well as real by joining in fine with husband, over which she has absolute power, and on her consent her whole fortune was paid over to husband, though stated to be insolvent. *Willats* v. *Cay*, 2 Atk. 67.

A husband and wife levied a fine of the wife's lands, which was declared to the use of the husband and his heirs; the husband devised the lands to H.; H., as a voluntary devisee, shall not have the aid of equity against the heir of the wife. *Coventry* v. *Hall*, 2 Ch. Ca. 134.

Tenant in tail conveys his estate to the use of himself and his intended wife for their lives, with remainder to the heirs of their bodies, and after marriage suffers a recovery, the recovery bars but a moiety, and is a severance of the joint estate. *Moody* v. *Moody*, Ambl. 649.

Feme covert having power to convey her estate after her death conveys it by lease and release to take effect after her death. She afterwards joins with her husband in levying a fine to different uses; the lease and release held to have no effect, and the fine operated. *Bramhall* v. *Hall*, Ambl. 467.

Husband and wife levy a fine of her trust estate; this shall bind the wife, unless there be proof of force or fraud; and this, although she by answer had sworn that she was compelled by duress to join. *Penne* v. *Peacock*, Forrest, 41.

The wife joins in a mortgage and levies a fine to bar her dower, and in consideration thereof the husband agrees the wife shall have the equity of redemption in lieu of her dower, and afterwards he makes a second mortgage. This agreement is fraudulent as against the second mortgage, so far as to entitle the wife to the whole equity of redemption, but decreed she should have her dower notwithstanding the fine. *Dolin* v. *Coltman*, 1 Vern. 294.

Where a wife joined her husband in a fine to a purchaser, but not in the declaration of uses, she shall be bound after fifteen years' widowhood, and acquiescence. *Swanton* v. *Raven*, 3 Atk. 105.

Where a feme covert has an interest in land, no consent of a remainderman can bar the entail, unless there had been a fine, nor can equity carry such an agreement into execution as to a legal estate. *Trafford* v. *Boehm*, 3 Atk. 449.

A fine levied of the wife's estate must, in order to have validity, be the joint act of her and her husband. *Belt* v. *Bell*, Ll. & G. Plunk. 53.

Husband seised in right of his wife of a share of the New River water, the wife cannot be barred sans fine; and where they both without a fine mortgage such share, and the wife after the husband's death pays interest, this will not affirm the mortgage. *Drybutter* v. *Bartholomew*, 2 P. W. 127.

Purchase to the use of baron and feme and their heirs; they join in a mortgage to the vendor to secure part of the purchase money; upon a bill to foreclose, they answer jointly; the husband dies, and the wife insists on the want of a fine:—Held, the joint answer is equal to a fine, and mortgage good. *Anon.*, Mos. 248.

Where by a marriage settlement a sum was to be raised out of an estate in Jamaica, and invested in lands in this country, to be settled on the husband for life, remainder to the wife for life, or an option to her of an annuity for life, in lieu of such life estate, and before the money was raised the husband and wife joined in mortgaging the Jamaica estate, and the latter acknowledged before a magistrate the deed which, by the colonial law, was equivalent to a fine:—Held, that she thereby barred all interest at law or in equity in the estate, and was not, therefore, entitled to the dividends arising from the compensation money which had been invested. *Forbes* v. *Adams*, 9 Sim. 462; 8 L. J. (N.S.) Ch. 116.

Husband and wife being jointly entitled to equity of redemption in fee, convey it by deed without fine to mortgagee; wife survives; she or her heir may redeem at any time within twenty years from husband's death. *Price* v. *Copner*, 1 Sim. & S. 347; 1 L. J. (O.S.) Ch. 178.

—— **Contingent Interest.**]—Semble, a feme covert cannot, by a deed not acknowledged, convey a contingent interest in a term of years settled to her separate use. *Bestall* v. *Bunbury*, 13 Ir. Ch. R. 549.

Where, by an instrument executed before the 3 & 4 Will. 4, c. 74, real property is settled to the use of a married woman for life, for her separate use, with remainder over in tail, she is, under s. 24, the sole protector of the settlement, and her husband's consent is not requisite, under s. 34, to enable the tenant in tail to make an absolute disposition of the property. *Keer* v. *Brown*, 1 Johns. 138; 28 L. J., Ch. 477; 5 Jur. (N.S.) 457; 7 W. R. 372.

Before 3 & 4 Will. 4, c. 74, a fine was necessary to pass the interest of a married woman in that part of her fee-simple estate which did not belong to her husband; and since that statute a deed duly acknowledged by her under s. 77 is necessary for that purpose, notwithstanding that the estate of the wife may be given to her for her separate use. *Lechmere* v.

Brotheridge, 32 L. J., Ch. 577 ; 9 Jur. (N.S.) 705 ; 8 L. T. 751 ; 11 W. R. 814.

But where a married woman has an estate for life for her separate use, in freehold hereditaments, she can alienate that estate without any acknowledgment under the statute ; for no fine was necessary for that purpose previously to the act. *Ib.*

—— **"Interest in Land"—Reversionary Interest — Assignment — Beneficial Interest in Mortgage Debt.**]—The beneficial life interest of a married woman in a trust fund properly invested by the trustees upon a mortgage of land is an "interest in land" within the Fines and Recoveries Act (Kay, L. J., dissenting). *Newton's Trusts, In re* (23 Ch. D. 181), overruled. *Miller* v. *Collins*, 65 L. J., Ch. 353 ; [1896] 1 Ch. 573 ; 74 L. T. 122 ; 44 W. R. 466—C. A.

—— **Settlement—After-acquired Property—Future Interests—Expectancy—Power of Disposal.**]—The Fines and Recoveries Act does not enable a married woman, by an after-acquired property clause in a settlement, to dispose of real estate in which she has only an expectation that some interest may accrue to her. *Allcard* v. *Walker*, 65 L. J., Ch. 660 ; [1896] 2 Ch. 369 ; 74 L. T. 487 ; 44 W. R. 661.

Malins' Act only applies to property to which a married woman is entitled under an "instrument" made after December 31, 1857. It does not apply to interests under intestacies, nor to mere possibilities. The married woman must at the date of the disposing deed have some existing title to the interests. *Ib.*

—— **Application for Leave to Dispense with Husband's Concurrence.**]—An application under s. 19 of the Fines and Recoveries Act on behalf of a married woman for leave to dispose of lands without her husband's concurrence, should, semble, notwithstanding the Judicature Acts, be made to the Queen's Bench Division. *Giles (Ellen), In re*, 8 R. 273 ; 70 L. T. 757. *And see* col. 62.

—— **Settlement of Copyholds—Declaration of Trust by Deed Acknowledged—Validity—"Disposition."**]—A voluntary declaration of trust of copyholds, made by a married woman, a tenant on the rolls, by deed acknowledged, with the concurrence of her husband, is a valid "disposition" in equity of the copyholds under s. 77 of the Fines and Recoveries Act, and the customary heir of the married woman will be bound by the trusts. *Pride* v. *Bubb* (41 L. J., Ch. 105 ; L. R. 7 Ch. 64) applied. *Green* v. *Paterson* (56 L. J. Ch. 181 ; 32 Ch. D. 95) distinguished. *Carter* v. *Carter*, 65 L. J., Ch. 86 ; [1896] 1 Ch. 62 ; 13 R. 824 ; 73 L. T. 437 ; 44 W. R. 73.

By a marriage settlement an estate was limited to the use of the husband for life : remainder to the use of the wife for life ; remainder to the children of the marriage, and, in default of issue, to the use of such person as the wife should appoint ; and, for default of such appointment, to the use of the right heirs of the survivor of the husband and wife for ever ; with power to the husband and wife to charge the estate ; and a power to trustees, in whom the legal estate was vested, to sell, by the direction and with the approbation of the husband and wife, or the survivor. The husband and wife borrowed a sum of money by way of annuity ; created a term of 1,000 years ; and levied a fine to G. in fee, with a deed declaring the uses to be "in trust to secure the regular payment of the annuity, and for corroborating and strengthening the said term" :—Held, that the fine did not operate to extinguish the power of the wife to consent to a sale of the settled estates, so as to prevent an exercise of the power of sale by the trustees. *Tyrrell* v. *Marsh*, 10 Moore, 305 ; 3 Bing. 31 ; 3 L. J. (O.S.) C. P. 138 ; 28 R. R. 577.

Where husband and wife granted to trustees an estate, of which the wife's father was seised in fee-simple, and afterwards, in the life of the father they levied a fine of the lands to the uses of the settlement, and the father afterwards died, leaving the wife one of his co-heiresses :—Held, that her moiety of the estate became subject to the uses of that settlement, by reason of the fine, as an estoppel against the husband and wife and all persons claiming title under them. *Helps* v. *Hereford*, 2 B. & Ald. 242 ; 20 R. R. 416.

Under the will of a testator, who died in March, 1862, M., a married woman, was entitled in reversion expectant on the death of a tenant for life to a share of the proceeds of real estate devised to trustees in trust for sale on that event. In August, 1862, in the lifetime of the tenant for life, M.'s husband executed a general assignment, under the Bankruptcy Act, 1861, of all his property to a trustee for the benefit of his creditors. In August, 1866, he was adjudged bankrupt, and in December following he obtained his discharge. The tenant for life died in January, 1869. By a deed executed in February following, and duly acknowledged by M. under s. 77 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), M. and her husband assigned all moneys which should become due to them or either of them under the testator's will to S. by way of mortgage. Shortly afterwards the trustees of the will sold the real estate, and ultimately paid M.'s share of the proceeds into court under the Trustee Relief Act :—Held, that the husband was not precluded by the creditors' deed of 1862 or by his bankruptcy in 1866 from concurring with his wife in the mortgage of 1869, and accordingly that the mortgage was valid against the trustee of the creditors' deed and the assignee in bankruptcy. *Jakeman's Trusts, In re*, 52 L. J., Ch. 363 ; 23 Ch. D. 344.

Under the will of a testator who died in 1843, his three children, T., W., & S., a married woman, were each entitled to one-third of his residuary estate, subject to the life interest therein of his widow. In 1844 T. died a bachelor and intestate. By a deed executed in 1854 (before Sir R. Malins' Act), to which the tenant for life, the trustees of the will, W., & S. and her husband were parties, and which was acknowledged by S. under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) two mortgage debts, secured to the trustees on real estate and forming part of the testator's residuary estate, were assigned by the tenant for life and W. and by S. and her husband, with the privity of the trustees, by way of mortgage. The deed was executed under the erroneous assumption that, according to the terms of a gift over in the will, T. took no share in the testator's estate, and consequently his administrator was not made a party :—Held, that the deed was not effectual to pass S.'s share of the two mortgage debts. *Williams* v. *Cooke*

(4 Giff. 343) distinguished. *Newton's Trusts, In re*, 23 Ch. D. 181.

A testator devised lands to his wife for life; remainder to all the children of his brother who should be living at the time of his wife's decease. His brother left one daughter, who married, and afterwards, with her husband, during the life of testator's widow, levied a fine come ceo, &c., of the lands, and declared the use to A. After the death of the widow, A. brought ejectment against the tenant in possession:—Held, that it was maintainable, for that although the brother's daughter had only a contingent remainder during the life of the widow, and the fine could only operate by estoppel until the contingency happened, yet afterwards it operated on the estate. *Doe* d. *Christmas* v. *Oliver*, 10 B. & C. 181; 8 L. J. (O.S.) K. B. 137.

A testator devised to his daughter, E., the wife of H., for life; remainder to John, his daughter's son, and his heirs and assigns for ever; but in case he should die before the testator's daughter, E., and she should have no other child living at her death, his will was that his daughter should give and devise the premises to such person as she should think proper. The testator died in February, 1763, and John, the daughter's son, in April. In January, 1766, the daughter had another son. In November, 1770, H. died; and in 1773 E. levied a fine with proclamations:—Held, that, although at the death of the testator, and until the death of his grandson John, the power given to the daughter to devise to such person as she should think proper, could avail only as an executory devise; yet, upon the death of John, the character of the limitation changed, and it became contingent, and that it was therefore barred by the fine. *Doe* d. *Harris* v. *Howell*, 10 B. & C. 191; 5 M. & Ry. 24; 8 L. J. (O.S.) K. B. 123.

By a marriage settlement in 1806, manors and lands were limited to the use of the husband for life; remainder to the use of the wife for life; remainder in strict tail male; remainder to the wife in fee, in case she should survive her husband; but if she should die in his lifetime, remainder to the daughters successively in tail male; remainder to the use of such persons related by blood or consanguinity, as the wife by her will might appoint; and in case of no such appointment to the wife in fee. The settlement also contained a power for the trustees, at the request and with the direction of the husband and wife, or the survivor, to sell or exchange the settled estates, and for that purpose to revoke all or any of the uses contained in the settlement; and also a covenant for further assurance on the part of the husband and wife, and all persons claiming under the husband. In pursuance of this settlement certain fines were levied. By deed, dated March, 1807, reciting the settlement, and the fines levied in pursuance thereof, and the limitations therein contained; and that the wife was desirous of acquiring an absolute power of appointment over the manors and lands comprised in the settlement, in the event of her surviving, or dying in the lifetime of her husband, and there being a general failure of issue of her body inheritable to the manors, under the settlement, the husband and wife covenanted to levy certain fines sur conusance de droit come ceo, with proclamations, to G. and his heirs, of all the manors, lands, &c., comprised in the settlement; which fines were to operate, and to be taken to operate, first, for corroborating the uses contained in the settlement antecedently to the limitations to the use of the wife in fee-simple, and, subject thereto, to the use of such persons as the wife by will or deed might appoint. In pursuance of this latter deed, several fines come ceo, &c., were levied by the husband and wife:—Held, that these latter fines did not operate to extinguish or suspend the right or power of the husband and wife, or the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees. *Jersey (Earl)* v. *Deane*, 5 B. & Ald. 569. *And see* ESTATE.

ii. *Inrolment.*

When and by Whom.]—The inrolment of the deed of disposition, under the statute 3 & 4 Will. 4, c. 74, may be made immediately upon the execution of the deed, and may be effected either by vendor or purchaser; and as the inrolment relates to the execution of the deed, it follows that a tenant in tail who has not barred the entail under the statute can, nevertheless, make a good title in fee simple. *Cattell* v. *Corrall*, 4 Y. & Coll. 228.

Copyholds—3 & 4 Will. 4, c. 74, Applicable to.]—The provisions of the 3 & 4 Will. 4. c. 74, as to the inrolment, within six months of the execution, of deeds to bar equitable estates tail, are applicable to copyholds; and unless such a deed affecting copyhold hereditaments is entered upon the court rolls of the manor, within six months after its execution, it is absolutely void. *Gibbons* v. *Snape*, 32 Beav. 130. Affirmed 1 De G., J. & S. 621; 33 L. J., Ch. 103; 9 Jur. (N.S.) 1096; 9 L. T. 132; 11 W. R. 1087.

A deed to bar an equitable estate tail must, in order to operate upon copyhold lands, under 3 & 4 Will. 4, c. 74, be entered on the court rolls within six calendar months after the date of its execution, by analogy to the time within which it must be inrolled in the court of chancery to affect freeholds. *Honywood* v. *Forster*, 30 Beav. 1; 30 L. J., Ch. 930; 7 Jur. (N.S.) 1264; 4 L. T. 785; 9 W. R. 855.

The 3 & 4 Will. 4, c. 74, s. 53, requires disentailing deeds relating to copyholds to be entered on the court rolls of the manor of which they are held within six months after their execution. *Boyd* v. *Pawle*, 14 L. T. 753; 14 W. R. 1009.

Therefore, where an equitable tenant in tail of copyholds executed a disentailing deed, and neglected to enter it on the court rolls, but on the last day within the time limited produced it to the steward of the manor, who, upon being told that it could not be left in his charge, as it was required for other purposes, indorsed it with a memorandum to that effect:—Held, that the requirements of the statute had not been complied with, and the deed was invalid. *Ib.*

After Death of Tenant in Tail.]—A disentailing deed executed in pursuance of the 4 & 5 Will. 4, c. 92 (Irish) (similar to the English Act 3 & 4 Will. 4, c. 74), is valid if inrolled within six months from the time of its execution, although such inrolment has not taken place until after the death of the tenant in tail who executed the deed. *Browne, Ex parte, Piers, In re*, 14 Ir. Ch. R. 452. And see *S. C.*, 13 Ir. Ch. R. 459.

The 4 & 5 Will. 4, c. 92, s. 66, applies only to disentailing deeds executed by the same tenant

in tail, and not to deeds executed by successive tenants in tail. *Ib.*

Therefore, where A., a tenant in tail, executed a disentailing deed, which was inrolled within the six months prescribed by the statute, but not until after A.'s death, and B., a succeeding tenant in tail, executed a disentailing deed to a purchaser for value after A.'s death, which was inrolled prior to the inrolment of the deed executed by A. :—Held, that the deed executed by A. was entitled to priority over the deed executed by B. *Ib.*

The 4 & 5 Will. 4, c. 92, has no application to the inrolment of a disentailing deed by a tenant in fee, nor to any disposition of lands otherwise than by a tenant in tail in pursuance of the Act. *Ib.*

f. Mortgages.

If a fine be gained by fraud from a feme covert under age, who dies, and her heir buys in a prior mortgage, and then levies a fine, and five years pass, and those who claim under the fine bring a bill to redeem, etc., equity will not assist them claiming under such fraudulent title, and also by reason of the fine and non-claim. *Packington* v. *Barrow*, Pre. Ch. 216.

Mortgagee is not barred by fine, by mortgagor in possession. *Pomfret* (*Earl*) v. *Windsor* (*Lord*), 2 Ves. 482.

Fine levied by a mortgagee, and five years' non-claim, will not bar the mortgagor of his equity of redemption. *Welden* v. *Dux Ebor.*, 1 Vern. 132. And see *Story* v. *Windsor* (*Lord*), 2 Atk. 631 ; 1 Ch. Ca. 34.

A fine and non-claim is a good bar to an equity of redemption ; so it is to a bill of review. *Lingard* v. *Griffin*, 2 Vern. 189.

g. Charges.

A. devised lands to B. in tail, remainder to C. in tail, subject to the payment of legacies ; C. levies a fine, and five years' non-claim pass, and mortgages the lands ; fine and non-claim no bar of the legacies, C. having no title but under the will, the mortgagor must be supposed to have notice of the legacies. *Drapers' Co.* v. *Yardley*, 2 Vern. 662.

One having a sum of money charged upon land secured by a term in third person, levies a fine of the land : this extinguishes his right to the charge ; so if he suffers a recovery. *Chandos* (*Duke*) v. *Talbot*, 2 P. W. 605.

A., on his marriage, gave a bond of 600*l.* with a warrant of attorney, to confess judgment thereon, defeasance on payment of 300*l.* to his wife if she survived : afterwards she joined with him in a conveyance by fine of his real estate :—Held, that this extinguished her right, or any lien created by this judgment on the real estate. *Goodrich* v. *Shotbolt*, Pre. Ch. 333 ; Gilb. Eq. Rep. 18.

As to a fine of land not barring a rent-charge issuing out of the land. *Whitfield* v. *Faussett*, 1 Ves. 387.

Fine cannot bar a possibility. *Id.* 390.

A. had a rent-charge issuing out of lands which B. purchased among others with notice ; B. afterwards sold part of the lands so charged, and prevailed on A. and her husband to join in a fine to the purchaser. Though the rent-charge was thereby extinguished, yet as B. paid no consideration to A., she was relieved. —— v. *Hawkes*, 1 Ch. Ca. 273.

If a tenant in tail confesses a judgment and suffers a recovery to any collateral purpose, that recovery shall enure to make good all his preceding incumbrances, and a common recovery will let in this judgment, though a conusee of a judgment has neither the legal estate, nor any equitable lien. So a common recovery will let in a charge under marriage articles, and it makes no difference whether the estate be legal or equitable. *Hart* v. *Middlehurst*, 3 Atk. 376.

A fine by a tenant in tail, though levied with a different intent, operates, in the first place, to confirm any incumbrance previously created by him, by a voidable conveyance. *Loyd* v. *Loyd*, 2 Con. & L. 592 ; 4 Dr & War. 354.

A fine is a bar to every charge upon the land to which the party levying the fine is entitled in his own right. *Beynon* v. *Gollins*, Romilly's Notes of Cases, 132.

D. being tenant for life in 1799 demised all the lands and premises of which he was so seised for life, to certain trustees for ninety-nine years, if he should so long live, upon trust to pay himself an annuity of 10,000*l.* per annum, and to apply the residue in payment of his creditors who should avail themselves of the benefit of the deed. In 1819 D. joined with B., his eldest son, the tenant in tail, in suffering a recovery and re-settling the estates ; and by a deed executed in 1822, after giving D. a power of charging the estates with a sum of 217,000*l.*, and B. a power of charging the estates likewise upon D.'s death with 100,000*l.* ; these estates were limited to certain trustees upon trust to pay B. an annuity of 5,000*l.*, with an additional annuity of 1,000*l.* on his marriage. B. married, and mortgaged the annuities, together with the 100,000*l.* which he was entitled to charge as aforesaid, for the purpose of securing large advances made to him by the plaintiff. On a bill filed by plaintiff for the purpose of obtaining the benefit of those securities, to which some of the creditors claiming under the trust deed of 1799 were made parties, they being in possession by a receiver appointed by the court, in a cause instituted for the purpose of carrying the trusts of the deed into effect :—Held, that the trusts of the deed of 1799 were not extinguished by the recoveries in 1819. *Wallace* v. *Donegal*, 1 Dr. & Wal. 461. Affirmed sub nom. *Houlditch* v. *Wallace*, *id.* 490 ; 5 Cl. & F. 629.

H. T., on his marriage, covenanted to settle certain lands upon certain trusts, under which portions were to be secured to his younger children : he afterwards sold the lands, and levied a fine to the purchaser : the fine was held to have no operation in equity to protect the purchaser :—Held, also, that H. T. was a trustee for his children, and that the fine could not give to the purchaser a benefit which the father himself could not take. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

See also *Smith* v. *Frederick*, 1 Russ. 174 ; *Brown* v. *Blake*, 1 Moll. 368 ; *Eales* v. *Conn*, Sim. 65.

h. Remainders.

Father and son, on the son's marriage, by lease and re-lease, convey lands to trustees and their heirs, to the use of the father for life, remainder to the son for ninety-nine years, if he should so long live, remainder to trustees during his life, to support contingent remainders to the son's intended wife for life, for her jointure, remainder to the first and every other son of that marriage in tail male, remainder to the

daughter or daughters of that marriage, and the heirs of their bodies, till they shall, out of the rents, issues, and profits, have received 3,000*l.*; remainder to the heirs of the body of the son, remainder to the second son of the father and to his first and other sons, remainder to the right heirs of the son for ever. There were issue of the marriage only two daughters, who, being in possession after all the particular precedent estates determined, suffer a common recovery; and it was held that this was no bar of the subsequent remainders, the limitation to them being only a security till the 3,000*l.* was raised. *Stanhope* v. *Thacker*, Pre. Ch. 435.

If A. be a cestui que trust for life, remainder in trust for B. in tail, remainder to C. in fee, B. cannot, by a recovery, bar the remainder, if there be no good tenant to the præcipe. *North* (*Lord*) v. *Williams*, 2 Ch. Ca. 64.

Common recovery by cestui que trust in tail, bars the entail and all the remainders. *North* v. *Way*, 1 Vern. 13; 2 Ch. Ca. 63, 78.

Cestui que trust in tail, with remainder over, levies a fine and dies without issue, and there are five years and non-claim. By opinion of lord keeper, remainderman barred. *Basket* v. *Pierce*, 1 Vern. 226.

Entry of remainderman within five years after a fine levied by tenant in tail, will not save his right. *Stapleton* v. *Sherrard*, 1 Vern. 213; 3 Ch. Rep. 255.

Tenant in tail of a trust estate, with remainders over, cannot by will or settlement bar the remainders, or without a recovery, any more than tenant in tail of a legal estate. *Kirkham* v. *Smith*, Ambl. 518.

To bar legal remainders by common recovery there must be a legal tenant to the præcipe. *Salvin* v. *Thornton*, Ambl. 455; 1 Bro. C. C. 73.

One, having an equitable interest for the life of another, with legal remainder to himself in tail, and then to others, levies a fine and suffers a recovery; whether it will bar the legal remainders, quære. *S. C.*, Ambl. 699.

Tenant in tail under will, before suffering recovery, settles estate on self for life, and with remainders to other tenants in tail in remainder under will, and afterwards suffers a recovery and mortgages the estate:—Held, valid against tenants in tail in remainder. *Cormick* v. *Trapaud*, 6 Dow. 60.

An equitable recovery will not bar a legal remainder. *Brydges* v. *Brydges*, 3 Ves. 125.

Remainder under an old settlement barred by a fine and non-claim, fine also working a discontinuance. *Snell* v. *Silcock*, 5 Ves. 469.

The fine of a tenant in tail does not take away the right of the remainderman, but the remainderman is at liberty to prove the vouchee in a recovery non compos. *Hume* v. *Burton*, 1 Ridgw. P. C. 207.

A fine with proclamations by a tenant in tail, whether the proclamations are finished in his lifetime or not, will bar the issue in tail; because the fine is quasi a judgment, and the issue in tail claims the estate through his ancestor, whose right was barred by the judgment. *Id.* 270.

Lands being settled by H. on sons of R. successively in tail male, with divers remainders over, and ultimate reversion, to H. and his heirs. H. is attainted of treason, and afterwards B., the issue in tail male, being in possession under the settlement, suffers a recovery. Quære, if it is a bar to reversion vested in crown by attainder. *Blosse* v. *Clanmorris*, 3 Bligh, 62.

As a tenant for life, and the person in remainder, in nature of a tenant in tail of a freehold lease, may certainly join and bar the next in limitation, so he who hath both the interests in himself may also bar the entail of such a lease. *Forster* v. *Forster*, 2 Atk. 259.

A second son tenant for life of a freehold lease, remainder to the heirs of the body of the father, the tenant for life, and the elder brother, may bar the entail. *Ib.*

It was doubted formerly, but now settled, that if a tenant in tail, remainder in fee, levy a fine, a common recovery bars the fee, and the issue in tail have not a scintilla juris. *Langley* v. *Brown*, 2 Atk. 201.

If tenant in tail, remainder in fee, grant an estate to A., to commence after the death of tenant in tail, and then levy a fine to other uses, A.'s estate is merged in the fine. *Ib.*

A. by his will ordered all his personal estate to be sold, for the payment of his debts and legacies; and in case it should prove insufficient, he devised his real estate to his executors, for the purpose of making good the deficiency. He then devised his real estate, after such time as his debts and legacies should be paid by the rents and profits thereof, to E. for life; and in case E. should have any issue male, then to such issue male and his heirs for ever. And after the decease of E., in case he left no male issue, then, after such time as the testator's debts and legacies were fully paid, he devised part of his said real estate to J. in fee, and the residue to N. in fee. E. entered into possession, and kept down the interests of the debts; but afterwards suffered a common recovery of the whole estate, and declared the uses thereof to himself in fee:—Held, that an estate for life was vested in E. at the time of the recovery, notwithstanding the debts were not paid, and that he could make a good tenant to the præcipe:—Held, also, that the remainders limited to J. and N. were contingent remainders, and well barred by this recovery. *Carter* v. *Barnardiston*, 3 Bro. P. C. 63; 1 P. W. 509.

Where lands are devised to A. for life, and if A. shall leave issue male, then to such issue male and his heirs for ever, and if A. shall leave no issue male, then to B. in fee; if A. suffers a recovery of these lands and five years pass, the right heirs of the testator are barred, in regard they ought to have entered upon such forfeiture, and have no new entry upon the death of the tenant for life. *S. C.*, 1 P. W. 520.

Contingent remainder created by a limitation to the use of the husband and wife and survivor, and heirs and assigns of survivor, barred by a fine subsequently levied by the husband and wife. *Parker* v. *Carter*, 4 Hare, 409. And see *Cole* v. *Sewell*, 2 H. L. C. 186; 12 Jur. 927.

i. Power of Appointment.

A bare naked power is not barred by any of the statutes of fines, otherwise as to an interesse termini. *Willis* v. *Sherrall*, 1 Atk. 476.

Neither can a collateral or naked power be barred or extinguished by fine, feoffment, or any other conveyance. *Albany's Case*, 1 Com. 111. *Digge's Case*, 1 Com. 174. *Edwards* v. *Slater*, Hard. 415.

Power of appointment in grantee for life, though in favour of particular objects, is not a trust, and may be extinguished by a recovery. *Smith* v. *Death*, 5 Madd. 371.

j. Trust Estate.

Fine levied by a trustee and five years pass, does not destroy the trust, nor separate it from the land, but transfers them both together. *Borey* v. *Smith*, 1 Vern. 84 ; 2 Ch. Ca. 124.

If a man purchases an estate, which he sees has a defect upon the face of the deed, yet a fine will bar it, for that defect is the very occasion of the fine. So a man who purchases from a trustee who has levied a fine, is as much a trustee as he was ; and it is the same as to the grantee of a mortgagee, for his fine will not discharge the equity of redemption. The operation of a fine and non-claim is not by turning it into a right, but it is by force of the bar arising from the statute of non-claim. *Story* v. *Windsor* (*Lord*), 2 Atk. 631 ; 1 Ch. Ca. 34.

Trustee to preserve contingent remainders joining in a recovery with the remainderman in tail, having attained twenty-one, held no breach of trust ; and no objection to a specific performance. *Biscoe* v. *Perkins*, 1 Ves. & B. 485 ; 12 R. R. 279.

Fine and non-claim will not bar a person claiming under a trust ; if to a person having notice of the trust it is merely a conveyance. So, if trustee conveys to a person, with notice, and takes a reconveyance, it operates nothing. So, if the person to whom he conveyed had no notice, yet, on the reconveyance, the trust would attach, though it did not attach on the person to whom he conveyed ; nor would have attached, if that person had conveyed to another without notice. One taking from a trustee with notice, levies a fine to strengthen his estate : this shall not bar the cestui que trust. *Kennedy* v. *Daly*, 1 Sch. & Lef. 379.

k. Forfeiture.

If a tenant for life of a trust estate, limited to trustees to preserve, etc., levies a fine sur concessit of her life estate, it will not work a forfeiture of the estate for life, because it cannot affect the subsequent remainders which are preserved by the trustees. So, where a fine sur concessit is levied by a tenant for life (reversioner in fee, after several limitations in a deed or will), equity will never construe such a fine to work a wrong. *Lethieullier* v. *Tracey*, 3 Atk. 729 ; Ambl. 204, 220.

Conveyance of a chattel interest by sale and release cannot work a forfeiture or disseisin ; otherwise if it were by feoffment, but in that case the person entitled to take advantage of the forfeiture is not bound to do so till the expiration of the lease. Fines levied by parties not having the freehold have no effect ; they may be avoided by plea of partes finis nil habuerent. *Saunders* v. *Annesley* (*Lord*), 2 Sch. & Lef. 99.

A fine levied by a termor for years is a forfeiture, but the reversioner has five years after the expiration of the term. *Brandlyn* v. *Ord*, 1 Atk. 571.

Tenant for life, remainder over, mortgages and levies a fine whereby estate is forfeited and remainderman recovers in ejectment, yet mortgagee having no notice of his being tenant for life only, and mortgagor, having made affidavit that he was entitled absolutely as heir-at-law, and that there was no will :—Held, entitled for life of mortgagor. *Willis* v. *Fineux*, Pre. Ch. 108.

On a marriage settlement, lands were conveyed to trustees and their heirs, to the use of the trustees and their heirs, to the use of the husband for life, remainder to the use of the wife for life, remainder to the first, etc., sons of the marriage : these limitations to the husband for life, etc., are trusts only, and not uses ; and when the husband and wife levied a fine to a mortgagee to raise money, though the fine would have been a forfeiture of the wife's estate for her life had she had the legal estate, against which equity will not relieve, yet decreed that a trust estate was not forfeited by a fine. *Whetstone* (*Lady*) v. *St. Bury*, 2 P. W. 146 ; Pre Ch. 591.

l. Descent.

A., being tenant for life, remainder to trustees to preserve, etc., remainder to his first, etc., sons in tail, remainder to heirs of his own body, remainder to right heirs of his father the devisor, had a sister of half-blood who was daughter of father by former venter, and he had also sister of the whole blood. A. made a lease and re-lease, and thereby conveyed to B. in trust for payment of debts, etc., and levied fine thereof, but had not suffered recovery :—Held, that this altered the reversion, and that estate should go to right heirs of A. *Stringer* v. *New*, 9 Mod. 363.

Where a common recovery was suffered of an estate tail, the recoverer acquired an absolute estate in fee simple derived out of the estate tail ; so that if a tenant in tail by purchase, under a marriage settlement made by his ancestor ex parte maternâ, with the reversion in fee by descent ex parte maternâ, suffered a common recovery to the use of himself in fee, this estate would descend to his heirs general and not to the heirs ex parte maternâ ; for the recovery did not let in the reversion in fee, but a new estate was thereby acquired, by purchase, which was totally different from the old estate tail. *Martin* d. *Tregonwell* v. *Strachan*, 6 Bro. P. C. 319 ; 5 Term Rep. 107, n. ; 1 Wils. 266 ; 2 Stra. 1179.

m. Revocation of Will.

Where a common recovery is to a particular purpose, it shall operate as a revocation only to answer that purpose. *Parsons* v. *Freeman*, 3 Atk. 741.

Where the tenant in a common recovery has not pleaded non-tenure, he gains a new estate, though the limitations are to the old uses, and the will is revoked by it. *Bennet* v. *Vade*, 2 Atk. 324 ; 9 Mod. 212.

Recovery by tenant in tail with reversion in fee is a revocation at law, so in equity if an equitable estate. *Williams* v. *Owens*, 2 Ves. J. 598.

Where a devised estate is differently modified there is a revocation, otherwise where the testator remains with the same estate and interest, and subject to the same means of disposition, though changed as to the legal or equitable quality. *Ib.*

Fine for the mere purpose of a partition is no revocation even at law. *Ib.*

A recovery after a will, though no intention to revoke, is a revocation. *Brydges* v. *Chandos* (*Duchess*), 2 Ves. J. 430.

One devises his freehold estates to certain uses, and bequeaths a leasehold messuage to trustees to convey it to the uses of the freehold,

so that they shall not be separate. He afterwards suffers a recovery of the freehold estates, which operating as a revocation of the freehold, the bequest of the leasehold is also revoked. Reversed in the House of Lords, as to this last point. *Darley* v. *Darley*, Ambl. 653 ; Dick. 397 ; 3 Wils. 6. But see *Southey* v. *Somerville*, 13 Ves. 492, where Lord Eldon said, he should be disposed to agree with the opinion of Lord Camden rather than the judgment of the House of Lords. And see *Carrington* v. *Payne*, 5 Ves. 404 ; 5 R. R. 87. *Lowndes* v. *Stone*, 4 Ves. 649 ; 4 R. R. 316. *Ware* v. *Polhill*, 11 Ves. 280 : 8 R. R. 144.

A. devised estates of which he had only the equitable fee, and afterwards agreed to sell part of the estates, and to remove an objection taken by the purchaser, but which was not well founded ; he suffered a recovery :—Held, that though the recovery was an equitable one, and the purpose for which it was suffered was expressly mentioned in the deed declaring the uses, and though the limitations thereby made of the property not intended to be sold were precisely the same as before the recovery, and were expressed to be in restoration and confirmation of them, the will was revoked. *Lock* v. *Foote*, 5 Sim. 618.

n. Agreements to Settle.

A. covenanted on his marriage to lay out 3,000*l.* in the purchase of land, and to settle it on himself in tail, remainder to B. A. purchased the manor of D. with this 3,000*l.* and never settled it, but suffered a recovery thereof ; as the covenant was a lien on the land, so the recovery suffered thereof discharged the lien and barred B. of the benefit of the covenant, and the remainder. *Marwood* v. *Turner*, 3 P. W. 171.

Articles on marriage, to settle lands on husband and wife for lives, remainder to heirs male of body of wife by husband, remainder to heirs male by any other wife, remainder to heirs female by wife. Settlement is made before marriage, and said to be in pursuance of article, whereby lands are limited to husband for life without waste, and with power of making leases, remainder to first, etc., sons of marriage, in tail male, remainder to first and other sons in tail by other marriage, remainder to heirs of body of husband ; there are issue to daughters. Husband suffers recovery, and devises premises to sister ; daughters may compel reconveyance to them. *West* v. *Erisey*, 1 Com. 412 ; 2 P. W. 349. And see on appeal, 1 Bro. P. C. 225.

Articles on marriage, to settle lands on the husband and wife for their lives, remainder to the first, etc., son of the marriage, remainder to the heirs male of the body of the husband by any wife, remainder to the heirs of the body of the husband by the first wife, remainder to the husband in fee, with provisions for the daughters of that marriage, if no son. Husband has one daughter by the first wife, suffers a recovery and marries a second wife, taking notice of his first marriage articles in his second settlement. He being tenant in tail by the articles, was allowed by his recovery to have barred his daughter of the first marriage. *Powell* v. *Price*, 2 P. W. 525.

In marriage articles, there is a diversity between a limitation to the heirs of the body of a man, and to the heirs female of the body of a man, and the sons more favoured than daughters. *Id.* 539.

By a marriage settlement, an estate in Jamaica was limited to trustees for a term, upon trust to raise 18,000*l.*, to be laid out in land in Great Britain of the value of 600*l.* a year, to be settled when purchased on the husband for life, with the remainder to the wife for life, with an option to her to have an annuity of 600*l.* out of the land instead of the land itself ; the wife afterwards joined with the husband in mortgaging the Jamaica estate in fee, and acknowledged the mortgage-deed before a magistrate, which by the laws of Jamaica is equivalent to a fine :—Held, that the wife had thereby barred herself of all claim to a provision under the settlement. *Forbes* v. *Adams*, 9 Sim. 462 ; 8 L. J., Ch. 116.

M. G. being seised in fee of the estate of Brookhill, in 1768, on her marriage with E. B., and while under age, entered into articles, whereby the estate of Brookhill was agreed to be settled to the first and other sons of the marriage in tail male, and M. G. covenanted to levy a fine when of age, to the uses of the articles. In 1777, a fine was levied by E. B. and wife, but no uses were then declared. By a deed, in 1794, reciting that up to that time no uses had been declared of the fine of 1777, E. B. and wife conveyed the lands of Brookhill to the second son of the marriage in tail, and declared the fine of 1777 should enure to the uses of the deed of 1794. On the death of E. B., who survived his wife, the second son entered into possession of the said lands, as tenant in tail, under the deed of 1794, and in 1821, a fine levied with proclamations, and five years' non-claim elapsed. Upon a bill filed by the heir-at-law of the eldest son of the marriage, to carry the articles of 1768 into effect :—Held, that the fine levied in 1821, and the five years' non-claim, barred the plaintiff's right to recover, inasmuch as that fine was levied by a person who did not derive, under the title of E. B., and who had, at most, constructive notice only of the articles of 1768. *Bell* v. *Bell*, Ll. & G. t. Plunk. 44.

4. Declaration of Uses.

Where there is a deed to lead the uses of recovery, tenant in tail cannot declare new uses, but such subsequent declaration must be by all parties concerned in interest. *Stapilton* v. *Stapilton*, 1 Atk. 7.

Where there is an agreement to suffer a recovery, and uses are by it declared, though it is suffered at a different time from the recovery covenanted to be suffered, yet if there is no subsequent declaration of uses, it shall enure to those so declared. *Ib.*

Where the uses of the recovery are declared to be the recoveror and his heirs, it does not create a new use, but he is in one of the ancient use. *Garth* v. *Cotton*, 3 Atk. 756.

A covenant in a mortgage deed, by husband and wife, in 1692, to levy a fine in the Easter term following, but not levied till Trinity term in 1695. For 10*l.* more they join in a conveyance of the equity of redemption, and covenant that the fine theretofore levied should be to the uses of the latter deed. The covenant in 1695 was held to be good and binding on the husband and

wife, and the former deed might be laid out of the case, as the covenant under it was not strictly pursued. *Fleetwood* v. *Templeman*, 2 Atk. 79.

Where a father was tenant for life, with remainder to his son in tail, who on his marriage, by lease and re-lease, conveys his estate to trustees in strict settlement, and some time afterwards joins with his father in making a mortgage of the same estate, and suffers a recovery to the use of the mortgage:—Held, that the recovery shall notwithstanding come first to the use of the marriage settlement. *Cheney* v. *Hall*, 2 Eden, 357.

The father, tenant for life, remainder to the son in tail, with remainder over. The son is an infant, and on an advantageous match being proposed for the son, the father and infant join in marriage articles, and the father only covenants that, within a year of the son's coming of age, the father and son will join in a fine and recovery of the family estate to the several uses. The infant son seals the deed, and within a year after he comes of age joins with his father in a fine and recovery, but no deed to lead to uses is to be found. The infant son sealing the articles not sufficient to declare the uses of the fine and recovery. *Nightingale Ferrers* (*Earl*), 3 P. W. 206.

P., tenant for life, remainder to his son R. for life, remainder to his, R.'s, first, etc., son in tail. P., by indenture tripartite, between himself, his son R., and J., covenants to levy a fine of the premises, but R. only sealed the deed, without joining in any covenant; this no surrender nor release, nor consequently any destruction of the contingent remainder to the first, etc., son of R. *Id.* 210, n.

Where a fine is covenanted to be levied to certain uses, it is competent to the parties, whilst it is directory, to vary the uses, but the uses must be varied by all the parties, and by an instrument of as high a degree as the former, and the fine ought to be levied to the same conusee; and, therefore, where a fine covenanted to be levied to certain uses was omitted to be levied, and several years afterwards a fine was levied by the same conusors pursuant to a deed declaring other uses, and to a different conusee:—Held, that the fine operated to the uses of the latter deed, and not of the former. *Houghton* v. *Tate*, 3 Y. & J. 486.

A fine was levied of certain premises by a man and his wife, to the use of B., his executors, etc., for 999 years, and at the same time the lessor covenanted, that if B., his heirs or assigns, should by deed express his will and mind to have the freehold and inheritance of the said premises, then such fine should enure to such persons, and for such estates as by such deed should be expressed. This lease was held a mere chattel, and passed by a general residuary bequest of personal estate. *Williams* v. *Llandaff* (*Bishop*), 1 Cox, 254.

If a tenant in tail suffers a recovery, and declares uses which are void, he does not take back an estate tail, but an estate in fee. *Tanner* v. *Radford*, 6 Sim. 21.

If a fine is levied pursuant to a decree for a particular purpose, equity will not permit any other use to be made of it. *Goodrich* v. *Brown*, 1 Ch. Ca. 49; 2 Freem. 180. And see *Baden* v. *Pembroke* (*Earl*), 2 Vern. 56. *Brown* v. *Blake*, 1 Moll. 368; and *Dickens* v. *Unthank*, 24 L. J., Ch. 501; 1 Jur. (N.S.) 916; 3 W. R. 504.

5. Non-Claim.

Entry of remainderman within five years of a fine levied by tenant in tail will not save his right. *Stapleton* v. *Sherrard*, 1 Vern. 213.

A fine levied by a termor for years is a forfeiture, but the reversioner has five years after the expiration of the term. *Brandlyn* v. *Ord*, 1 Atk. 571.

Where lands are devised to A. for life, and if A. shall leave issue male, then to such issue male and his heirs for ever; and if A. shall have no issue male, then to B. in fee. If A. suffers a recovery of these lands, and five years pass, the right heirs of the testator are barred; in regard they ought to have entered upon such forfeiture, and have no new entry upon the death of the tenant for life. *Carter* v. *Barnardiston*, 1 P. W. 520.

A fine with proclamations, if five years after the title accrued are suffered to pass, will bar every man who does not come within the savings of the statute, because there the fine acts quasi in rem, for by the proclamations all men are invited to claim, if any right they have; and having failed to do so within the time prescribed by law, they are therefore barred. *Hume* v. *Burton*, 1 Ridgw. P. C. 271.

An ejectment and confession of lease, entry, and ouster without further proceeding, is not such an actual entry as will be sufficient to avoid a fine or Statute of Limitations. *Sterling* v. *Penlington*, 9 Mod. 248.

The difference between the bar created by the Statute of Limitations, and by a fine and non-claim, is, that the former takes away the remedy, the latter takes away the right. *Bell* v. *Bell*, Ll. & G. Plunk. 65.

Effect of fine and non-claim in equity. *Salsbury* v. *Bagott*, 2 Swan. 603.

Plea of fine and non-claim in bar to plaintiff's title overruled, because the pendency of suit in equity, as it was proper matter of equity, prevented the running of the fine. *Baker* v. *Pritchard*, 2 Atk. 389.

It would be dangerous where a person enters on the foot of a trust, and never makes any declaration of his having performed the trust in pursuance of the will, to construe this such an entry as that a fine and non-claim would bar the right of plaintiff, a remainderman. *Shields* v. *Atkins*, 3 Atk. 560.

Fine levied after a feoffment with livery, is a bar after the five years are run out. *Id.* 526.

A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term. *Leigh* v. *Leigh*, 1 Sim. 349.

Non-claim on a void fine of no effect. *Pomfret* (*Earl*) v. *Windsor* (*Lord*), 2 Ves. 482.

On fine by tenant for life, reversioner need not enter until five years after his death. *Ib.*

Fine by persons in possession and non-claim, the legal estate being in trustees, held not to bar an equitable charge under the deed of trust, though a great length of time had elapsed. *Id.* 472.

Trustee for term to pay debts, purchased the inheritance from tenant for life, and had it conveyed to him by fine and feoffment; remainderman is not entitled to account of rents, except from his entry to avoid the fine; and if he neglects to claim for five years he is barred. *Reynolds* v. *Jones*, 2 Sim. & S. 206.

6. Acknowledgments to bar Wife's Interest.

a. Validity of, generally.

General Principle.]—There is no principle enabling this court to bind the real estate of a married woman, in any manner, except by those formalities required by law. Both principle and authority concur in showing that this court has no authority to alter the character of the property of an infant, and convert realty into personalty. *Field* v. *Moore*, 7 De G. M. & G. 691; 25 L. J., Ch. 66; 2 Jur. (N.S.) 145; 4 W. R. 187.

No contract entered into by a married woman with a person who knows her to be married, otherwise than by deed acknowledged, or by some act in court in which she is put at arm's length from her husband, can bind her real estate, even although she has for a long time led the other party to believe that she will abide by such contract, and he has, on the faith of such belief, irrevocably abandoned valuable rights. *Nicholl* v. *Jones*, 36 L. J., Ch. 554; L. R. 3 Eq. 696; 15 L. T. 383; 15 W. R. 393.

A wife may, by a deed duly acknowledged, to which her husband is a party, acquire a power to dispose by will of her real estates, whether in possession or in reversion. *Pride* v. *Bubb*, 41 L. J., Ch. 105; L. R. 7 Ch. 64; 25 L. T. 890; 20 W. R. 220.

Acknowledgment passes all Interest.]—The interest of a married woman in the proceeds of real estate devised by the will under which she took such interest, upon trust for sale:—Held, to pass by her deed executed and acknowledged according to the provisions of the 3 & 4 Will. 4, c. 74, for abolishing fines and recoveries, and substituting more simple modes of conveyance, whether such interest be in possession or reversion, and whether the sale of the real estate be or be not made. *Briggs* v. *Chamberlaine*, 11 Hare, 69; 23 L. J., Ch. 635; 18 Jur. 56.

Contingent Remainder.]—Assuming that between the passing of 3 & 4 Will. 4, c. 74, and of 7 & 8 Vict. c. 76, a man or a feme sole could not by any means effectually dispose at law of a contingent remainder in fee by act inter vivos, except by estoppel by means of a false recital, still, upon the true construction of the former act, a married woman could convey such an estate by deed acknowledged. *Crofts* v. *Middleton*, 25 L. J., Ch. 513; 2 Jur. (N.S.) 528; 4 W. R. 429—L.JJ.

Supposing such a deed could not operate so as to pass the legal estate, still, if made for a valuable consideration, it would be good to confer an equitable title by way of contract; for the 3 & 4 Will. 4, c. 76, gives a married woman power, with the concurrence of her husband, to contract by acknowledged deed, so as to bind her real estate though not herself personally. *Ib.*

Contingent Interest.]—Under the Irish Fines and Recoveries Abolition Act (4 & 5 Will. 4, c. 92), ss. 22 & 68, a married woman can by deed, acknowledged under that statute, dispose of an interest in realty limited to her for her sole and separate use, contingent upon the insolvency of her husband, although the contingency has not arisen. *Smallman, In re*, Ir. R. 8 Eq. 249.

Real Estate.]—A married woman can elect, so as to bind her interest in real estate, without deed acknowledged under 3 & 4 Will. 4, c. 74, *Barrow* v. *Barrow*, 4 Kay & J. 409; 27 L. J., Ch. 678; 4 Jur. (N.S.) 1049; 6 W. R. 714.

Where a wife has an estate for life in freeholds for her separate use, she can alienate that estate without any acknowledgment under 3 & 4 Will. 4, c. 74. *Lechmere* v. *Brotheridge*, 32 Beav. 353; 2 N. R. 219; 32 L. J., Ch. 577; 9 Jur. (N.S.) 705; 11 W. R. 814. But see *Taylor* v. *Meads*, 34 L. J., Ch. 203; 11 Jur. (N.S.) 166; 11 L. T. 6; 13 W. R. 394—L.JJ.

But a married woman cannot dispose of her fee-simple lands, settled to her separate use, except by deed, duly acknowledged under 3 & 4 Will. 4, c. 74. *Ib.*

With respect to personal property, whether vested or contingent, settled to the separate use of a feme covert, she may deal with it as a feme sole, and either sell or incumber it. *Ib.*

The executors of a widow brought an action of covenant upon a lease executed by her and her late husband (who was seised in her right), but not acknowledged by her according to 3 & 4 Will. 4, c. 74, ss. 77, 79, and not made according to the power in 19 & 20 Vict. c. 120, s. 32. The defendants had executed the lease as sureties for the lessee, who was left in possession for the whole term, before and after the death of the husband, the widow doing nothing to disaffirm the tenancy:—Held, that they were liable, as it must be presumed that the lessee obtained what he bargained for—a lease, valid while the husband and wife lived, and voidable upon his death. *Toler* v. *Slater*, 37 L. J., Q. B. 33; L. R. 3 Q. B. 42; 17 L. T. 168: 16 W. R. 124.

A husband cannot dispose of his wife's interest in the proceeds of real estate, directed by a will to be sold, in any mode short of a deed executed and acknowledged by her under 3 & 4 Will. 4, c. 74. *Franks* v. *Bollans*, 37 L. J., Ch. 664; L. R. 3 Ch. 717; 18 L. T. 623; 16 W. R. 1158.

Purchase Money of Land taken by Railway Company.]—Where purchase money paid into court by a railway company belongs to a married woman, the court will pay it out to her, without deed acknowledged but simply upon her examination. *Hayes, In re*, 9 W. R. 769.

—— **Special Act.**]—Where an Act of Parliament authorised the purchase of lands in which a feme covert is interested, and gave the Court of Exchequer authority to distribute the purchase money amongst the parties beneficially entitled, the exercise of that authority by the court is in lieu of the solemnities ordinarily required for the conveyance of the real property of a feme covert, or on the payment of her money out of court. *Ellison, Ex parte*, 2 Y. & Coll. 528; 7 L. J., Ex. Eq. 49; 1 Jur. 283.

Agent to Convey.]—A statutory enactment which authorises the appointment of a person to execute a conveyance in the name and on behalf of another, cannot be made applicable when the latter person is a married woman; acknowledgment and separate examination being essential to the conveyance of real estate by a married woman, and being acts which from their nature cannot be performed vicariously. *Stables, In re*, 33 L. J., Ch. 422; 10 L. T. 1; 12 W. R. 513.

Enrolment before Acknowledgment.] — The

acknowledgment of a deed by a married woman need not be taken before the enrolment of the deed. *Taverner, Ex parte*, 7 De G., M. & G. 627 ; 25 L. J., Ch. 45 ; 1 Jur. (N.S.) 1194 ; 4 W. R. 29.

Amount of Interest.]—A deed of assignment by way of mortgage, duly acknowledged by a married woman, is sufficient evidence against her in an ejectment by the mortgagee, after her husband's death, although by the recitals it appears that she had only a life interest in a term, and the deed purported to convey the whole, notwithstanding that the objections are taken that it is void as regards her, being a conveyance by a married woman of a chattel interest, or that it is invalid as purporting to convey the whole interest in the term, and that, therefore, it is no estoppel upon her. *Audsley* v. *Horn*, 1 F. & F. 135.

Husband having only Life Estate—Specific Performance.]—B. contracted to purchase from S. a freehold property for which an agreement was entered into between them, and a deposit paid. It turned out that S. was not entitled in fee, but only to an estate pur autre vie, with remainder to the use of him and his wife. The wife's acknowledgment to the conveyance being necessary, this formality could not be completed, the sale was therefore considered as abandoned, and the deposit returned. The property was subsequently sold to W., and the conveyance duly acknowledged by the wife. On a bill by S. for a specific performance of this agreement, and a declaration that W. was a trustee for B. :—Held, that he was so, and a decree for specific performance made as to such interest as S. had in the property, and reference as to the amount of compensation to the plaintiff for the interest not conveyed to him. *Barnes* v. *Wood*, 21 L. T. 227.

Wife Living Apart from Husband.]—When the acknowledgment of a party to a fine was taken before commissioners who were aware of the fact of her being a married woman, and of the non-concurrence of her husband, but the parties were living separate under a deed by which the husband covenanted not to interfere with his wife's property, the court refused to reverse the fine at the instance of the husband, but left him to his common-law remedy. *Check* v. *Bootle*, 4 M. & Scott, 460.

Married Woman Resident in New Zealand.]—An acknowledgment by a married woman resident in New Zealand of a documentary deed was taken before a commissioner lawfully authorised to administer oaths in that colony :—Held, that this was sufficient, and an order was granted directing the proper officer of the court to receive and file the document. *Smith (Elizabeth), In re*, 50 L. J., Q. B. 32 ; 43 L. T. 438 ; 29 W. R. 264.

Order for Conveyance Set aside on Ground of Fraud.]—Where an order under 3 & 4 Will. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1, for the conveyance of a married woman's interest in property without the concurrence of her husband has been obtained by fraud or the suppression of facts which ought to have been disclosed at the time, the court will set it aside. *Cockerell, Ex parte*, 4 C. P. D. 39 ; 27 W. R. 366.

Evidence of Execution—No Seal but Attestation.]—A deed acknowledged by married women was duly signed by them, but no seal was affixed to it, though pieces of ribbon were inserted in the parchment opposite to the signatures on which seals were to have been put. The attestation clause stated the deed to have been "signed, sealed, and delivered" in the presence of the attesting witnesses, and the certificate of the commissioners before whom the acknowledgment had been taken certified that the married women had acknowledged the instrument as their respective acts and deeds :—Held, primâ facie evidence that the deed was sealed, and there being no evidence to the contrary, the certificate of acknowledgment was allowed to be filed. *Mayer, In re*, 40 L. J., C. P. 201 ; 24 L. T. 273 ; 19 W. R. 641. *S. C.*, nom. *Sandilands, In re*, L. R. 6 C. P. 411.

4 & 5 Will. 4, c. 92—Insolvency of Husband.]—Under the Irish Fines and Recoveries Abolition Act (4 & 5 Will. 4, c. 92), ss. 22 and 68, a married woman can by deed, acknowledged under that statute, dispose of an interest in realty limited to her for her sole and separate use, contingent upon the insolvency of her husband, although the contingency has not arisen. *Smallman, In re*, Ir. R. 8 Eq. 249.

Wife past Child-bearing.]—A sum of money was in court under the Settled Estates Act (19 & 20 Vict. c. 120), subject to the trusts of a marriage settlement. There was no issue, and the wife was past child-bearing. Under the settlement the survivor of the husband and wife was entitled absolutely in default of children :—Held, that upon the execution of a deed acknowledge by the wife, the court would order the fund to be transferred to the joint account of the husband and wife. *Belt's Settled Estates, In re*, 37 L. T. 272 ; 25 W. R. 901.

b. Examination of Wife.

Object and Effect of Examination.]—One of the essential purposes of the separate examination of a wife on a sale and conveyance of her real estate by herself and her husband under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), is to ascertain whether the purchase money is to belong to her husband or not. Accordingly, when she has acknowledged the conveyance before the commissioners, and has, on being separately examined by them, refused any provision out of the purchase money or otherwise, she must be treated as having given up to her husband all claim upon the purchase money, and as having no further interest in it either at law or in equity. This is the case even if the purchase money or any part of it is left outstanding in trustees by way of an indemnity fund against charges on the estate; as, for instance, in the case of part being vested in trustees by a deed of declaration of trust for the purpose of keeping down an annuity originally charged on the estate, and subject to which it is sold; consequently, in such a case, in the event of the wife surviving the husband, and the fund still remaining outstanding, she cannot, as against his estate, claim the fund as her chose in action not reduced into possession by the husband. The effect of a married woman's acknowledgment and separate examination under the Fines and Recoveries Act, discussed. *Tennent* v. *Welch*,

57 L. J., Ch. 481; 37 Ch. D. 622; 58 L. T. 368; 36 W. R. 389.

—— **Protection of Married Women.**]—By a parol ante-nuptial agreement it was agreed that the husband should take a certain portion of the wife's property, and that the residue should be settled for her separate use. This agreement was carried out so far as related to the husband, but no settlement was made on the wife. The wife, subsequently to her marriage, filed her bill by her next friend, stating these facts, and praying that her interests in certain property consisting of real estate coming to her might be declared accordingly. The husband, by his answer, admitted the statements in the bill. A deed was then prepared, purporting to be a settlement on the wife, in pursuance of the agreement, and giving her a power to dispose of her property by will. This deed, though signed by the wife, was not acknowledged by her. She made a will disposing of her property in favour of her husband and other parties, and died. The husband then filed a supplemental bill, praying as against the heir of the wife, that the parol agreement might be carried into effect, that the want of an acknowledgment might, if necessary, be supplied, and that the will of the wife might be established as a valid execution of the power given to her by the deed:—Held, first, that in a suit thus framed, there was no case established in point of proof as against the heir; secondly, that the contract so entered into before marriage, there being nothing but marriage following, could not be carried into effect under the Statute of Frauds; and, thirdly, that the court would not supply the want of the acknowledgment, as tending to destroy the protection which the law throws around married women. *Lassence* v. *Tierney*, 1 Mac. & G. 551; 2 H. & Tw. 115; 14 Jur. 182.

Woman Married after 1870.]—The 8th section of the Married Women's Property Act, 1870, does not enable a woman married after the passing of the act to pass by an unacknowledged deed the fee simple of real estate descended upon her. Observations upon a dictum of Jessel, M.R., in *Voss, In re* (13 Ch. D. 504, 505). *Johnson* v. *Johnson*, 56 L. J., Ch. 326; 35 Ch. D. 345; 56 L. T. 163; 35 W. R. 329.

Specific Performance of Agreement.]—See *Cahill* v. *Cahill*, 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861.

Trust for Sale—"Bare Trustee."]—A testator devised his real estate to trustees for sale, who were married women, one of them having married before and the other after the Married Women's Property Act, 1882. Both of them also took beneficial interests in the proceeds of sale. Under the judgment in an action for the administration of the testator's estate, part of the real estate was sold by the trustees, the purchaser paying his purchase money into court:—Held, that the married women were "bare trustees" within s. 6 of the Vendor and Purchaser Act, 1874, and that the conveyance to the purchaser did not require the concurrence of the husbands, or acknowledgment under the Fines and Recoveries Act. *Docwra, In re, Docwra* v. *Faith*, 54 L. J., Ch. 1121; 29 Ch. D. 693; 53 L. T. 288; 33 W. R. 574.

Copyholds, Covenant to Surrender.]—A covenant to surrender copyholds vested in husband and wife in right of the wife is inoperative to pass the wife's estate, though by deed acknowledged. *Green* v. *Paterson*, 56 L. J., Ch. 181; 32 Ch. D. 95; 54 L. T. 738; 34 W. R. 724—C. A.

Sale under Settled Estates Act.]—Notwithstanding the provision of s. 50 of the Settled Estates Act, 1877, that, when a married woman consents to an application to the court under the act, she is to be examined apart from her husband as to her consent, such an examination is not now necessary in the case of a woman who has married since the commencement of the Married Women's Property Act, 1882. *Riddell* v. *Errington*, 54 L. J., Ch. 293; 26 Ch. D. 220; 50 L. T. 584; 32 W. R. 680.

In the case of a woman married before the commencement of the Married Women's Property Act, 1882, s. 1 of the act applies only as to property acquired by her after the commencement of the act. Therefore, if such a woman is a petitioner, or a respondent to a petition, under the Settled Estates Act, 1877, relating to property her interest in which was acquired before the commencement of the act of 1882, she must be examined separately, as provided by s. 50 of the act of 1877. *Harris's Settled Estates, In re*, 54 L. J., Ch. 208; 28 Ch. D. 171; 51 L. T. 855; 33 W. R. 393.

On an application under the Settled Estates Act, 1877, for the sanction of the court to the purchase of certain land by the trustees of a settlement out of funds in court arising from sales of the settled hereditaments, the separate examination of a married woman, the tenant for life, was directed, notwithstanding s. 32 of the Settled Land Act, 1882. *Arabin's Trusts, In re*, 52 L. T. 728.

Payment of Fund out of Court.]—A fund standing to the separate credit of a married woman, unless married after the Married Women's Property Act, 1870, will not be paid to her by the court, even on her separate receipt, without her separate examination. Secus, where the marriage was after the act, and the applicant takes under an intestacy. *Deignan* v. *Deignan*, 13 L. R. Ir. 278.

Separate Examination dispensed with.]—On a petition under the Settled Estates Act to sanction a lease of property vested in trustees without power of leasing, the lease being clearly for the benefit of all parties, the separate examination of a married woman interested in the property and resident in Australia was dispensed with. *Halliday, In re*, 40 L. J., Ch. 687; L. R. 12 Eq. 199; 19 W. R. 966.

—— **Wife Abroad.**]—When a petition is presented to authorise a sale of settled estates under 19 & 20 Vict. c. 120, and a party interested, being a married woman, is abroad and served, the court will dispense with her acknowledgment. *Tibbett, In re*, 20 L. T. 299; 17 W. R. 394.

—— **Election to take Proceeds of Realty as Personalty.**]—The court will not permit a married woman to elect to take her share of proceeds of sale of real estate as personalty without her separate examination, even where the share does not amount to 200*l*. *Shaw, In re, Topham* v. *Burgoyne*, 49 L. J., Ch. 213; 41 L. T. 670.

—— **Execution by Master.**]—Independently of the 4 & 5 Will. 4, c. 78, the Court has jurisdiction, under the 28 Geo. 3, c. 35, to direct a deed, which is to have the effect of a deed under the provisions of the "Fines and Recoveries Act" (4 & 5 Will. 4, c. 92), to be executed by the Master for defendant out of the jurisdiction. *Piers* v. *Piers*, Sau. & Sc. 89.

Compromise of Restitution Suit—Release of Jointure.]—A married woman was entitled by an ante-nuptial settlement to a jointure rentcharge after her husband's death secured upon his real estates in Ireland. The wife having left him, the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up and signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification that no further steps were to be taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise and was executed by the husband, but the wife refused to execute it or to return to her husband, and the husband afterwards died:—Held, that the wife was not, when she signed the document, in all respects in the same position as a feme sole, and that even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4, c. 92, ss. 68 & 71; and that specific performance of the agreement to release her jointure could not be decreed against her. *Hunt* v. *Hunt* (4 De G. F. & J. 22; 31 L. J. Ch. 161) and *Besant* v. *Wood* (12 Ch. D. 605) commented on. *Cahill* v. *Cahill*, 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861.

Deed Executed under Mistake.]—Under the will of a testator who died in 1843, his three children, T., W., and S., a married woman, were each entitled to one-third of his residuary estate, subject to the life interest therein of his widow. In 1844 T. died a bachelor, and intestate. By a deed executed in 1854 (before Sir R. Malin's Act), to which the tenant for life, the trustees of the will, W., and S. and her husband, were parties, and which was acknowledged by S. under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), two mortgage debts, secured to the trustees on real estate and forming part of the testator's residuary estate, were assigned by the tenant for life and W. and by S. and her husband, with the privity of the trustees, by way of mortgage. The deed was executed under the erroneous assumption that according to the terms of a gift over in the will, T. took no share in the testator's estate, and consequently his administrator was not made a party:—Held, that the deed was not effectual to pass S.'s share of the two mortgage debts. *Williams* v. *Cooke* (4 Giff. 343) distinguished. *Newton's Trusts, In re*, 23 Ch. D. 181.

c. Taking before Commissioners.

Before whom.]—Before 17 & 18 Vict. c. 75, an acknowledgment by a feme covert before two commissioners, one of whom was interested, was void. *Bancks* v. *Ollerton*, 10 Ex. 168; 2 C. L. R. 1090; 23 L. J., Ex. 285; 2 W. R. 622. S. P., *Ollerton, In re*, 15 C. B. 796.

The town commissioners, taking the acknowledgment of a married woman under 3 & 4 Will. 4, c. 74, s. 82, must be appointed commissioners for the same district. *Webster, Ex parte*, 1 D. (N.S.) 678; 4 Scott (N.R.) 636; 4 Man. & G. 27.

Commissioners who take the acknowledgment in England of a married woman under 3 & 4 Will. 4, c. 74, s. 82, need not be appointed for the county in which the acknowledgment is taken. *Blackmur* v. *Blackmur*, 45 L. J., Ch. 710; 3 Ch. D. 633; 24 W. R. 900.

Examination of Married Woman.]—No person connected with the husband ought to be present when a married woman's examination as to her consent is taken. *Bendyshe, In re*, 26 L. J., Ch. 814; 3 Jur. (N.S.) 727; 5 W. R. 816.

Before taking an acknowledgment of a married woman before two commissioners, there must be a previous examination before both, even though one is interested or concerned, and r. 3, H. T. 4 Will. 4, does not render this unnecessary; that rule and 17 & 18 Vict. c. 75, must not be considered to approve of or confirm any practice of taking acknowledgments before commissioners, one of whom is interested or concerned, and except in cases of reasonable necessity, both should be disinterested and not concerned in the matter. *Menhennitt, In re*, 39 L. J., C. P. 40; L. R. 5 C. P. 16; 21 L. T. 332; 18 W. R. 66.

Giving up Interest.]—Where the consideration-money for a married woman giving up her interest in the estate in respect of which the acknowledgment is taken is to be paid into her own hands, the commissioners should distinctly ascertain from her that she wishes to pass her property without any provision being made for her. *Dorning, In re*, 34 L. J., C. P. 173. *S. C., Dowling, In re*, 18 C. B. (N.S.) 223.

When property is sold under the compulsory provisions of an act of parliament, that rule of H. T. 4 Will. 4, which directs inquiry to be made of a married woman at the time of acknowledging a deed to convey her interest, whether any provision is made for her in consideration of her so giving up her interest, is inapplicable. *Foster, In re*, 7 C. B. 120.

Where the amount of the consideration which forms the inducement for a married woman to give up her interest in an estate, was too small to form the subject of a settlement, and the arrangement was that the amount should be paid to the wife, the court allowed the acknowledgment to be registered. *Webber, Ex parte*, 5 C. B. 179.

The officer of the court is justified in declining to receive and file an acknowledgment of a deed by a married woman, conveying her interest in property, where a provision is to be made for her in lieu of such interest, and the commissioner merely certifies that the deed declaring the trusts of that provision "has been already ingrossed, and was produced before him"; and the court will not make any order on the subject until they are satisfied that the deed has been duly executed. *Dallas, In re*, 10 C. B. (N.S.) 346; 30 L. J., C. P. 282.

—— **In Consideration of Provision in Will.**]—The court refused to allow a certificate of acknowledgment by a feme covert to be filed, where it appeared from her answers to the in-

quiry of the commissioners, as to whether she intended to give up her interest in the estate without any provision being made for her in lieu thereof, that the consideration for her consent was a provision made for her by her husband's will, although it was shown by another affidavit that she perfectly understood that to be no provision, inasmuch as the will was revocable. *Dixon, In re*, 4 C. B. 631 ; 16 L. J., C. P. 231.

Wife Deaf and Dumb.]—The court directed the officer to file an acknowledgment of a married woman, it appearing by affidavit, and also upon the certificate, that she was deaf and dumb, that the nature of the transaction had been duly explained to her by signs, and that she had, in like manner, signified her assent. *Harper, In re*, 6 Man. & G. 731 ; 7 Scott (N.R.) 431.

Letting Wife's Lands.]—A husband and wife, seised in fee in right of the wife, demised land for a term of years. The deed was executed by both, but not acknowledged by the wife under 3 & 4 Will. 4. c. 74, s. 79. During the term the husband died, and the wife did no act to disaffirm the tenancy, and also died during the term :—Held, that in the absence of any proof that it was contemplated when the deed was executed that the acknowledgment of the wife should be taken, the lease was valid up to the time of her death, and an action was maintainable by her executors on the covenants in the lease, in respect of breaches which occurred during her life and after the death of the husband. *Toler* v. *Slater*, 37 L. J., Q. B. 33 ; L. R. 3 Q. B. 42 ; 17 L. T. 168 ; 16 W. R. 124.

Before Notaries.]—The court allowed a certificate of acknowledgment where the affidavit verifying the certificate was sworn before a notary public in the Hebrides, as the affidavit on which the application was made stated that there was no commissioner of the court in the Hebrides or nearer than the mainland. *Groom, In re*, 17 W. R. 589.

Fees.]—Commissioners for taking acknowledgments of married women have a lien for their fees on the deed, certificate of execution, &c. *Grove, Ex parte*, 3 Bing. (N.C.) 304 ; 3 Scott, 671 ; 5 D. P. C. 355 ; 2 Hodges, 246 ; 6 L. J., C. P. 30.

Duplicate Commission where Original was Lost.]—A commission for taking the acknowledgment of a married woman at Rokewood, a remote part of Victoria, having been returned with a defective affidavit of verification, the documents (with the exception of the deed, which had been executed in this country by a party entitled to a share of the property) were sent out again by post, and were lost. The court allowed a duplicate commission to go, with a fresh affidavit, it appearing that all the parties were still living at Rokewood. *White, Ex parte*, L. R. 8 C. P. 106.

Form of Commission.]—It is no objection to issuing a commission to take the acknowledgment of a feme covert resident beyond seas, that her christian name is unknown ; but when the commission is returned, the court will require strict proof of her identity. *Atherton* v. *Appleton, In re*, 3 D. & L. 26 ; 1 C. B. 447 ; 14 L. J., C. P. 225.

The court allowed a commission for taking the acknowledgment of a married woman in Australia to go out with a blank for the christian name of the husband, which (the marriage having taken place there) was unknown here. *Legge, In re*, 15 C. B. 364.

Enlarging Time for Returning Commission.]—The court will enlarge the time for returning a commission for taking the acknowledgment of a married woman abroad, where, by reason of the remoteness of the residences of the parties, the time allowed has proved too short. *Booth, In re*, 5 C. B. (N.S.) 540.

But not where it has been executed after the return-day named therein. *Carter, In re*, 9 C. B. (N.S.) 791.

The court will enlarge the time for returning a special commission where it has been duly executed, but its return has been unavoidably delayed until after the return-day therein named. *Van Ufford, In re*, 9 C. B. (N.S.) 789.

The court refused to enlarge the time for returning the commission in order to get the defects remedied, the time for the return having expired. *Tierney, In re*, 15 C. B. 761.

d. Dispensing with Husband's Concurrence.

Married Women's Property Act, 1882—Acknowledgment.]—M. and H., spinsters and tenants in tail in remainder, executed a deed in 1884, without the consent of the protector of the settlement, barring their estates tail and conveying their estates to S. in fee simple. The deed was duly enrolled. M. and H. afterwards married, and in 1889, the protector of the settlement being then dead, executed a deed enlarging the base fee in favour of S. :—Held, that by virtue of the Married Women's Property Act, 1882, s. 1, sub-s. 1, and s. 2, the restrictions imposed by the Act for the Abolition of Fines and Recoveries, s. 40, were no longer in force, and that the deed of 1889 did not require to be acknowledged by M. and H. as married women, or concurred in by their husbands. *Drummond and Davies, In re*, 60 L. J., Ch. 258 ; [1891] 1 Ch. 524 ; 64 L. T. 246 ; 39 W. R. 445.

Husband and Wife Separated.]—The court will not grant a rule to enable a wife to execute a conveyance without her husband's concurrence upon an affidavit which stated that the husband is living apart from his wife by mutual consent, but will require further particulars of the cause of such separation. *Eardley, Ex parte*, 25 L. T. 804.

Under 3 & 4 Will. 4, c. 74, ss. 77 and 91, the court authorised a feme covert to convey copyhold property, to which she was entitled to her sole and separate use, her husband having resided abroad for more than twenty years with another woman. *Shireley, Ex parte*, 5 Bing. (N.C.) 226 ; 7 Scott, 174 ; 7 D. P. C. 258 ; 1 Arn. 484 ; 3 Jur. 125.

A feme covert, when her husband has absconded, and has not been heard of for some time, may pass a contingent life interest in freehold property. *Gill, Ex parte*, 1 Bing. (N.C.) 168.

On an application by a wife to dispense with the concurrence of her husband to a conveyance on the ground that his residence is unknown, the affidavit must expressly state that he has not

contributed to her support. *Carburton, In re*, 16 W. R. 84.

So, on the ground of his desertion, the affidavit must show that he does not contribute to her support. *Robinson, Ex parte*, L. R. 4 C. P. 205.

When an application is made to enable a married woman to execute a deed affecting her property without the consent of her husband, the affidavit must expressly state that the husband does not contribute to her support. *Fletcher, In re*, 17 W. R. 319.

When a wife, having been deserted by her husband, has been living apart from him for upwards of two years, and has maintained herself and her children without any assistance from him during that time, the court will, although the husband and wife are in communication with each other, grant an order to dispense with the concurrence of the husband in the execution of a conveyance by the wife of freehold property to which she is entitled apart from him, he having refused when applied to for the purpose to concur. *Sutcliffe, Ex parte*, 29 L. T. 747.

By a marriage settlement made in 1844, the property of the intended wife was conveyed to trustees to permit the husband to receive the rents and profits during the coverture, or until the wife should, by writing under her hand, otherwise direct or appoint, and from and after such direction or appointment, for the use of the wife. The deed also contained a power of sale, to be exercised at the request and by the direction (in writing) of the husband and wife. The husband received the rents and profits down to 1851, when the wife exercised her power of appointment by directing the trustees to receive the rents and profits, and to apply them to her separate use. In 1852, the husband went to Australia :—Held, not a case for an order to dispense with the husband's concurrence in a deed for the conveyance of the property. *Eden, In re*, 5 C. B. (N.S.) 232 ; 28 L. J., C. P. 4.

Husband's Interest in Rents.]—An order in the usual form obtained under s. 91 of the Fines and Recoveries Act, 1833, by a married woman, empowering her to dispose of her real estate without the concurrence of her husband, does not deprive him of the common law rights which he acquired in the property by reason of the coverture. Where, therefore, under such an order, a married woman sold and conveyed all her estate and interest in real estate, her husband refusing to join :—Held, that the husband's common law right to the rents during the coverture remained unaffected by the wife's alienation, but that (she asserting her equity to a settlement) he was bound, whether his estate was legal or equitable, to provide for her out of the rents ; and, under the circumstances, the whole of the rents were settled upon her. *Fowke* v. *Draycott*, 54 L. J., Ch. 977 ; 29 Ch. D. 996 ; 52 L. T. 890 ; 33 W. R. 701.

Judicial Separation.]—Conveyance of separate property by a married woman, when living apart, by a sentence of judicial separation without alimony. *Andrews, Ex parte*, 19 C. B. (N.S.) 371.

Living apart, Husband refusing to execute Deed.]—A widow entitled to personal estate, settled to her separate use, married R. Shortly after her marriage with R. she proposed that they should live apart, and agreed to make R. an allowance. R. refused to sign any agreement, but did live separate, and received the allowance, but occasionally they met. On the marriage of a daughter by her former husband, Mrs. R. proposed to settle a certain sum out of her separate estate, but R. refused to assent to the settlement. Mrs. R. then obtained an order of the court under 3 & 4 Will. 4, c. 74, s. 91, and 20 & 21 Vict. c. 57, s. 1, on the ground that she and her husband were living apart, and the settlement was made on the daughter's marriage. On motion by R. to rescind the order, on the ground that his wife was not living apart from him :—Held, that the parties were living apart, and the court refused to rescind the order. *Rogers, In re*, 1 H. & R. 85 ; 35 L. J., C. P. 71 ; L. R. 1 C. P. 47 ; 11 Jur. (N.S.) 1038 ; 13 L. T. 437 ; 14 W. R. 142. See also *Sutcliffe, Ex parte*, supra.

The court dispensed with the concurrence of the husband (who was living separate from his wife), in the conveyance of property in which the wife had a separate interest under the will of her deceased father, where the husband had refused to execute the deed. *Perrin, In re*, 14 C. B. 420.

The concurrence of the husband will be dispensed with, where the parties are living apart by mutual consent, and the husband refuses to join in the execution unless part of the purchase-money is paid to him. *Woodcock, In re*, 1 C. B. 437.

Where a husband and wife were living apart, and the wife being devisee under a will of real property on trust for sale, the husband refused to concur in a conveyance of such property upon a sale under the trusts of the will, unless he received a sum of money for doing so, the court granted an order dispensing with the concurrence of the husband under 3 & 4 Will. 4, c. 74, s. 91, although it was admitted by the affidavit that the husband had, since he had left his wife, to a slight extent contributed to her support. *Caine, In re*, 52 L. J., Q. B. 354 ; 10 Q. B. D. 284 ; 48 L. T. 357 ; 31 W. R. 428.

Effect of Order.]—Where a married woman has obtained an order of the Court of Common Pleas dispensing with her husband's concurrence, she may dispose of her real estate by a deed which is not acknowledged by her. *Goodchild* v. *Dougal*, 3 Ch. D. 650 ; 24 W. R. 960.

Husband a Bankrupt.]—Under the will of a testator, who died March, 1862, M., a married woman, was entitled in reversion expectant on the death of a tenant for life to a share of the proceeds of real estate devised to trustees in trust for sale on that event. In August, 1862, in the lifetime of a tenant for life, M.'s husband executed general assignment, under the Bankruptcy Act, 1861, of all his property to a trustee for the benefit of his creditors. In August, 1866, he was adjudged bankrupt, and in December following he obtained his discharge. The tenant for life died in January, 1869. By a deed executed in February following, and duly acknowledged by M. under s. 77, of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), M. and her husband assigned all moneys which should become due to them or either of them under the testator's will to S. by way of mortgage. Shortly afterwards the trustees of the will sold the real estate, and ultimately paid M.'s share of the proceeds into court under the Trustee Relief Act :—Held, that

the husband was not precluded by the creditors' deed of 1862 or by his bankruptcy in 1866 from concurring with his wife in the mortgage of 1869, and accordingly that the mortgage was valid against the trustee of the creditors' deed and the assignee in bankruptcy. *Jakeman's Trusts, In re*, 52 L. J., Ch. 363 ; 23 Ch. D. 344.

Husband a Lunatic.]—When an application is made to dispense with a husband's concurrence to his wife's deed on the ground of his incapacity to execute by reason of lunacy, such lunacy and incapacity must be shown by an affidavit of a medical man, and it is not enough to produce an affidavit verifying a medical certificate. *Reeves, In re*, 24 W. R. 848.

The court will not allow the wife of a lunatic to convey her separate estate without some explanation as to the nature of the lunatic's property, and whether it contributes to the wife's support. *Cloud, In re*, 15 C. B. (N.S.) 833.

The court refused to make an order under 3 & 4 Will. 4, c. 74, s. 91, dispensing with the concurrence of the husband to the execution of a deed by his wife on an affidavit by the son that the husband and wife had for three years been living apart, in consequence of the intemperate and violent habits of the former, which rendered necessary his confinement in a lunatic asylum for some time, and that although he had since been discharged, he was not in a fit mental condition to execute a deed or understand its nature. The court directed that application should be made to the husband to execute, and that the result should be stated to the court, and that he should have notice of an application for the order ; and further, that there should be an affidavit by a medical man of the husband's mental condition. *Clare's Trusts, In re*, 49 L. J., C. P. 557.

Husband a Minor.]—A husband, being a minor, the court granted a rule to enable the wife to execute a conveyance of her separate property without his concurrence. *Haigh, In re*, 2 C. B. (N.S.) 198 ; 26 L. J., C. P. 209 ; 3 Jur. (N.S.) 371 ; 5 W. R. 531.

Land not contracted to be Sold.]—The 3 & 4 Will. 4, c. 74, s. 91, gives no authority to the court to grant an order dispensing with the concurrence of a husband in the sale or conveyance of the wife's land, unless the land is actually contracted to be sold or conveyed. *Graham, Ex parte*, 19 C. B. (N.S.) 370 ; 34 L. J., C. P. 321 ; 11 Jur. (N.S.) 468 ; 13 W. R. 782.

Form of Rule.]—Form of rule to dispense with the concurrence of the husband in the disposition by a feme covert of her separate property. *Duffill, Ex parte*, 6 Scott (N.R.) 30 ; 5 Man. & G. 378.

Form of Conveyance.]—The court will not sanction a particular form of conveyance by a married woman. *Woodall, In re*, 3 C. B. 639.

Affidavit—Absconding or Absent Husband.]—An application under 3 & 4 Will. 4, c. 74, s. 91, to enable a feme covert, whose husband has absconded, to make a conveyance, must be founded upon the affidavit of the wife herself. *Williams, In re*, 2 Scott (N.R.) 120 ; 1 Man. & G. 881 ; 9 D. P. C. 72. S. P., *Bruce, Ex parte*, 9 D. P. C. 840 ; 3 Scott (N.R.) 592.

An affidavit describing her as a widow is informal. *Noy, In re*, 7 Scott (N.R.) 434.

The affidavit must describe her as wife of, &c., even though it discloses circumstances showing a well-grounded belief that the husband is dead. *Sparrow, Ex parte*, 12 C. B. 334.

The court declined to receive an affidavit in which she was described as "wife or widow." *Anderson, In re*, 2 C. B. (N.S.) 811.

The affidavit must contain the addition or description of the husband. *Gardner, In re*, 1 C. B. (N.S.) 215.

And negative any communication from him. *Horsefall, In re*, 1 Man. & G. 132 ; 10 L. J., C. P. 292.

But where a delay until the following term would have caused great inconvenience to the parties, the court gave directions for the order to be drawn up in vacation on the production of an affidavit from the wife. *Ib.*

In support of an application for an order to dispense with the concurrence of the husband of a married woman to the deeds of conveyance of property, an affidavit that he had absconded from home, and had since sailed for Port Phillip ; that since the departure of the ship, his wife had heard nothing of him, and that she believed him to be on his voyage ; that her husband had been made a bankrupt, and that her interest in the property in question passed to his assignees ; and also, that her husband having sold the property, she was desirous of completing the conveyance, is sufficient. *Stone, Ex parte*, 9 D. P. C. 843.

The court refused, in 1847, to dispense with the concurrence of a husband, upon an affidavit merely stating that he entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand, and that she believed it was his intention never to return. *Gilmore, Ex parte*, 3 C. B. 967.

The mere statement that the husband, a seaman, has gone abroad, and has not been heard of for some years, and that the wife has been informed that he is dead, is not enough ; the affidavit must show some reasonable ground for presuming the statement to be true. *Taylor, Ex parte*, 7 C. B. 1.

Where the husband was a seaman in the British navy on a foreign station, and the wife had not heard from him for two years, and the affidavits stated she believed he would never return :—Held, that the facts were insufficient. *Smith, In re*, 16 L. J., C. P. 168.

An affidavit stating that, having fallen into distressed circumstances, the husband, about two months before, left England for Australia with the intention of never returning, and that he had ever since been living separate and apart from his wife, is sufficient. *Kelsey, In re*, 16 C. B. 197 ; 3 C. L. R. 37.

But it is not enough to state that some years ago the husband left the wife and has since lived with another woman (in this country), without showing some direct application to him for his concurrence. *Parker, Ex parte*, 3 C. L. R. 148.

An affidavit showing that the husband had absconded, and had not been heard of for twenty years, although it also appeared that the wife had in the meantime married again, is sufficient. *Farnall, Ex parte*, 17 C. B. 189. S. P., *Shirley*,

Ex parte, 5 Bing. N. C. 226; 7 Scott, 174; 7 D. P. C. 258; 1 Arn. 484; 3 Jur. 125.

When the husband is beyond the seas, it must be shown that he has absented himself under such circumstances as to induce the court to infer that he has no intention to return to this country. *Squires, In re*, 17 C. B. 176; 25 L. J., C. P. 55; 4 W. R. 122.

An affidavit merely stating that the wife had left her husband in consequence of his violence, and was living apart from him, is insufficient. *Price, In re*, 13 C. B. (N.S.) 286; 7 L. T. 327.

—— **Lunacy of Husband.**]—When the husband is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is lunatic at the time of the application. *Turner, In re*, 3 C. B. 166.

And it is not enough to produce an affidavit verifying a medical certificate. *Reeves, In re*, 24 W. R. 848.

—— **Illness of Husband.**]—The court refused to dispense with the concurrence of the husband of a married woman, on an application by her to be permitted to convey her interest in an estate, although it was stated that he and the applicant were living apart by mutual consent, and that he was in a "very nervous and excitable state, and that it would be very difficult, if not impossible, to procure the execution by him of any deed," until it was sworn that an application had been made to him with that object, and refused. *Murphy* or *Mirfin, In re*, 2 D. (N.S.) 110; 5 Scott (N.R.) 166; 4 Man. & G. 636; 12 L. J., C. P. 92.

—— **Wife not receiving Allowance from Husband.**]—The court required an affidavit negativing the wife's receipt of any allowance from her husband. *Fish, Ex parte*, 9 C. B. (N.S.) 715; 3 L. T. 631. *And cases*, ante, col. 62.

An order will not be granted where it appears that the husband is in correspondence with his wife, and remitting sums of money for her support, however small. *Squires, In re*, supra.

—— **Parties living Apart by Mutual Consent.**]—The court refused to grant a rule to enable a married woman to execute a conveyance without the concurrence of her husband, upon an affidavit merely stating that the parties were living apart by mutual consent, but required an affidavit showing that an application had been made to the husband to execute the deed, and that he had refused to do so. *Trenery, Ex parte*, 1 C. B. (N.S.) 187.

—— **Before whom Taken.**]—An affidavit of a married woman is sufficient if sworn (where the party is residing abroad) before an officer whom the certificate of a notary public certifies to be a person empowered by law to take affidavits. *Schiff, In re*, 1 D. & L. 911.

—— **Verifying Certificates,**]—*See* infra.

e. Affidavit verifying Certificate of Acknowledgment.

Form of.]—The Reg. Gen., C. P. M. T. 1862, as to the form of affidavits, are directory only. *Hall, Ex parte*, 19 C. B. (N.S.) 369.

A statement in the affidavit of verification of an acknowledgment that it was taken at Madeira, is sufficiently precise. *Hutchinson, Ex parte*, 5 C. B. 499; 5 D. & L. 523; 17 L. J., C. P. 111.

The court allowed a special commission for taking the acknowledgment in America, the certificate of the taking thereof, and the affidavit of verification to be filed, notwithstanding that there was a slight defect in that part of the affidavit which negatived the interest of the commissioners, and that the jurat did not show where the affidavit was sworn. *Chandler, In re*, 1 C. B. (N.S.) 323; 5 W. R. 122.

An affidavit is not sufficient, unless it clearly states that the acknowledgment was made before two duly appointed commissioners, one of whom was not interested in the transaction for which the acknowledgment was required. *Kay, In re*, 19 L. T. 356.

The court ordered a certificate of acknowledgment of a deed by a married woman, and affidavits verifying it, to be filed, although the affidavits did not strictly comply with the rules of H. T., 1834, it being shown that under the circumstances it was impossible to obtain affidavits in accordance with those rules, and that the affidavits did comply with all the provisions of the Fines and Recoveries Act. *Packer, In re*, 39 L. J., C. P. 238; L. R. 5 C. P. 424; 22 L. T. 406; 18 W. R. 696.

The omission of the description of a special commissioner to take the acknowledgment of a married woman is an irregularity, when it occurs in the affidavit of verification; but it may be cured by a statement of identity. *Howard, In re, Ashcroft, In re*, 43 L. J., C. P. 245; L. R. 9 C. P. 347; 30 L. T. 471; 22 W. R. 653.

An unsigned affidavit of verification, sworn in a foreign possession of the British crown, may be sufficient, if the jurat contains a statement that the oath was administered before a court, judge, magistrate, commissioner, or notary public. *Ib.*

The court allowed a certificate of acknowledgment, taken at Loch Haven, Pennsylvania, to be filed, notwithstanding that the jurat of the affidavit of verification was defective in not naming the place where the acknowledgment was taken, or describing the deponent, there being a notarial certificate identifying the place and the parties. *Coldwell, In re*, L. R. 10 C. P. 667.

Erasures—In Jurat.]—The court directed the registrar to file the acknowledgment by a married woman, although it was doubtful whether there was not an erasure in the jurat of the affidavit of acknowledgment, it being certain that there was a rasure in it. *Millard, In re*, 6 D. & L. 86; 5 C. B. 753.

In the jurat of an affidavit of the due taking of an acknowledgment at Calcutta, the name of one of the deponents was interlined:—Held, that the affidavit could not be received. *Fagan, In re*, 5 C. B. 436.

The jurat of an affidavit of the due taking of an acknowledgment at Sydney had an interlineation in the body of it, and an erasure in the jurat. The court refused to allow it to be filed. *Tierney, In re*, 15 C. B. 761.

The court refused to enlarge the time for returning the commission in order to get the defects remedied, the time for the return having expired. *Ib.*

The court permitted an affidavit, verifying the notarial certificate of an acknowledgment, to be received notwithstanding an erasure in the jurat,

being satisfied that there had been a substantial compliance with the statute, and the erasure arising from circumstances over which the parties had no control. *Denton, In re*, 6 C. B. (N.S.) 287; 28 L. J., C. P. 255; 5 Jur. (N.S.) 650.

—— **Elsewhere.**]—The court refused to direct the officer to receive a certificate and an affidavit of an acknowledgment, the affidavit having an interlineation in an important part, without anything to denote that the interlineation had been made before the affidavit was sworn. *Worthington, In re*, 5 C. B. 511. S. P., *Page, In re*, 5 D. & L. 475.

The court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed notwithstanding an erasure in a material part of the affidavit, there being satisfactory evidence that the erasure was made before the acknowledgment and affidavits were taken and sworn. *Bingle, In re*, 15 C. B. 449; 2 C. L. R. 1793.

An affidavit verifying the certificate of the due taking of an acknowledgment of a married woman may be sworn in Guernsey, before the chief bailiff and two jurats of that island. *Mann, In re*, L. R. 10 C. P. 473.

Omission of Date in Jurat.]—The court allowed a commission, with the certificate of acknowledgment, and affidavit of verification, to be received and filed, notwithstanding the omission of the month in the jurat of the affidavit. *Van Ufford, In re*, 9 C. B. (N.S.) 789.

Before whom taken.]—The affidavit of the due taking of the acknowledgment of a married woman may be made by one of the commissioners before whom it was taken, notwithstanding he is the attorney concerned in the transaction. *Scholefield, In re*, 3 Scott, 657; 2 Bing. (N.C.) 293; 5 D. P. C. 363; 2 Hodges, 236; 6 L. J., C. P. 28.

Identity of Commissioners.] — An affidavit verifying the certificate of acknowledgment before special commissioners ought to show clearly that the persons who purported to have taken the acknowledgment were the commissioners named in the commission. *Vaughan, In re*, 1 C. B. (N.S.) 314.

The court allowed a defect in that respect to be supplied by affidavit. *Ib.*

The acknowledgment of a married woman taken abroad must be taken by the persons mentioned in the commission; and therefore, where there were variances between the names of the persons designated in the commission as commissioners, and the names in the signatures attached, the court required that there should be an identification, by affidavits of persons on the spot bearing positive testimony to the fact. *Booth, In re*, 5 C. B. (N.S.) 541; 28 L. J., C. P. 138; 4 Jur. (N.S.) 1301; 7 W. R. 288.

A commission for taking the acknowledgment was addressed to "Robert Roger Strong, registrar of the Supreme Court of Wellington, New Zealand," and on its return the acknowledgment was found to have been taken by "Robert Rodger Strang, registrar of the Supreme Court of Wellington":—Held, that the objection might be got over by a slight explanation on affidavit showing the identity of the party. *Smith, In re*, 10 C. B. (N.S.) 344; 4 L. T. 246; 9 W. R. 556.

Held, also, that an objection that the affidavit was sworn before "J. K., a solicitor of the Supreme Court of Wellington, and a commissioner for taking affidavits there," was insurmountable. *Ib.*

The court, under very peculiar circumstances, allowed a commission for taking the acknowledgment of a married woman in India to be amended by inserting therein the names of two gentlemen before whom the acknowledgment had been taken, and who were not originally named therein as commissioners, and also dispensed with a notarial certificate, and received an affidavit sworn before a political agent; the place at which the acknowledgment was taken being a very remote part of India, and it appearing (though not by affidavit) that there was no notary public, nor any magistrate before whom an oath could be taken, within several hundred miles. *Stubbs, In re*, 5 Scott (N.R.) 327; 4 Man. & G. 609.

A commission for taking the acknowledgment of a married woman was addressed to "Judge M'Roberts and W. Pythian," in Illinois, in the United States, and was certified by "W. Pythian and Samuel M'Roberts." The court required an affidavit showing the identity of Judge M'Roberts and Samuel M'Roberts. *Mann, Ex parte*, 7 Scott, 142; 5 Bing. (N.C.) 226; 1 Arn. 502; 3 Jur. 125.

A commission to take the acknowledgment of a deed by a married woman at Poonah, in the East Indies, was addressed to commissioners, one of whom was described as "Edward C. Jones," a collector and magistrate at that place. The acknowledgment was duly taken by Mr. Jones and one of the other commissioners, but Jones signed the certificate and affidavit of verification, "Edmund C. Jones." The court allowed the document to be received and filed, upon the production of affidavits showing that Edmund C. Jones was the person to whom the communication was intended to go, that he had always been described in the register at the India House as "Edward C. Jones," and that there was no other collector of that name in the Company's service. *Price, In re*, 17 C. B. 708.

Taken in Ireland.]—The affidavit verifying the certificate of a married woman's acknowledgment must, even in Ireland, be made before a commissioner of the court. *Anderson, In re*, 2 Bing. (N.C.) 435; 2 Scott, 626; 1 Hodges, 418.

Taken in India.]—In the case of an acknowledgment taken in a remote part of India, the court, in lieu of a notarial certificate, received the certificate of the major-general in command of the district, upon production of an affidavit stating his rank and verifying his handwriting. *Daly, In re*, 5 C. B. 128; 5 D. & L. 333; 17 L. J., C. P. 1.

Taken in Foreign Countries.]—An affidavit of an acknowledgment of a deed in foreign parts is sufficient. *Birch, Ex parte*, 4 Bing. (N.C.) 394; 6 Scott, 185; 1 Arn. 172.

Where an acknowledgment is taken abroad, the affidavit verifying the certificate need not name the place where it is taken. *Shufflebottom, In re*, 6 Scott, 898.

The affidavit verifying the certificate of an acknowledgment of a conveyance may be made

by a notary public. *Pearsall, In re*, 2 Scott (N.R.) 188 ; 1 Man. & G. 973 ; 9 D. P. C. 46.

The court permitted a certificate to be filed although the affidavit to excuse the want of a notarial certificate (which was sworn by one of the commissioners taking the acknowledgment, and was in other respects sufficient) erroneously stated, that the affidavit verifying the certificate was sworn by the other commissioner, when in fact it was sworn by the deponent himself. *Taylor, In re*, 4 Scott (N.R.) 328.

The court permitted a certificate of acknowledgment (taken at Philadelphia) to be received and filed, notwithstanding the affidavit of verification did not precisely conform to the rule of court. *Shaw, In re*, 3 Scott (N.R.) 647 ; 3 Man. & G. 236 ; 9 D. P. C. 839 ; 10 L. J., C. P. 322.

The court will not dispense with an affidavit of verification, sworn and authenticated according to the local law, unless it is distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule. *Crawford, In re*, 4 C. B. 626.

The court refused to direct the proper officer to receive and file an acknowledgment where the affidavit of verification was sworn before the British Minister at Florence, it not appearing that there was any difficulty in getting it sworn before some properly-constituted authority at that place. *Dunsany, In re*, 7 C. B. 119.

An affidavit which alleged that the magistrate, before whom a prior affidavit annexed thereto, verifying the certificate of the acknowledgment of a deed, had been sworn, and which sufficiently showed the authority of the magistrate before whom the first affidavit was sworn, and accounted for the absence of a notarial certificate, is not vitiated by its stating that the former affidavit was sworn by another commissioner, it having been, in fact, sworn by the deponent himself. *Warburton* v. *Warburton*, 3 Man. & G. 633.

The court dispensed with the notarial certificate in the case of an acknowledgment taken at Corfu, it being sworn that there was no English notary resident on the island. *Hurst, In re*, 15 C. B. 410.

There being sufficient upon the documents reasonably to satisfy the court that the commission had been bonâ fide executed, the court permitted them to be received, though the notarial certificate did not in terms verify the signature of the justices of the peace before whom the affidavit of verification purported to be sworn. *Foster, In re*, 5 C. B. (N.S.) 544 ; 28 L. J., C. P. 138 ; 4 Jur. (N.S.) 1301.

Where an affidavit verifying the certificate of an acknowledgment taken abroad by commissioners under a general commission, varied from the form given by Reg. Gen., H. T. 1834, in not stating where the acknowledgment was taken, but contained sufficient to satisfy the court that the commission had been bonâ fide acted on beyond the seas, the court allowed the certificate to be filed, as the rule of court is not a statutable rule. *Partridge, In re*, 17 C. B. 18 ; 25 L. J., C. P. 1 ; 1 Jur. (N.S.) 1140 ; 4 W. R. 12.

—— **Made before British Consul.**]—Prior to 18 & 19 Vict. c. 42, an affidavit sworn before the British consul at Paris, to obtain an order to dispense with the concurrence of the husband of a married woman, was not admissible. *Cooper, In re*, 16 C. B. 225 ; 3 W. R. 405.

The court allowed an acknowledgment to be received and filed, where the affidavit verifying the same was sworn before "The Provisional British Consul for the Society Islands," it appearing that there was no notary or any other official person before whom it could have been sworn within many hundred miles. *Darling, In re*, 2 C. B. 347.

Under 6 Geo. 4, c. 87, s. 20, a British consul has the same power as a notary public to certify that the affidavit in support of the certificate of a married woman's acknowledgment was sworn before a commissioner duly appointed. *Barber, In re*, 2 Bing. (N.C.) 268 ; 2 Scott, 436 ; 4 D. P. C. 640 ; 1 Hodges, 318 ; 5 L. J., C. P. 81.

An affidavit, verifying the due taking, in Russia, of the acknowledgment of a deed by a married woman, made before the British consul, is sufficient : it having been stated in a notarial certificate that the laws of Russia do not grant authority to any magistrate to administer an oath to any person whatsoever. *Darey* v. *Maltwood*, 2 Man. & G. 424. S. P., *Bayley, In re*, 2 Scott (N.R.) 823 ; 9 D. P. C. 380.

An affidavit of verification of the certificate of the acknowledgment, the parties being resident in Germany, must be sworn before a native court ; and an affidavit sworn before the English consul is not sufficient. *Eady, In re*, 6 D. P. C. 615 ; 1 Arn. 156.

The court received an affidavit sworn before the British consul, in the island of Madeira, the jurat describing him as being authorised by the laws of the island to administer oaths there ; and the affidavit being accompanied by a notarial certificate to the same effect. *Hutchinson, Ex parte*, 5 C. B. 499 ; 5 D. & L. 523 ; 17 L. J., C. P. 111.

—— **Before Minister of British Chapel.**]—The court directed an acknowledgment to be received and filed, where the affidavit verifying the certificate of the commissioners was sworn before A. B., minister of the British Chapel at Moscow, it being deposed to by the secretary of the Russia Company in London, that A. B. was in the habit of administering oaths to British subjects there, and certified by two merchants at Moscow that there was no English notary public, or British consul or vice-consul within four hundred miles of that city. *Pickersgill, In re*, 6 Man. & G. 250 ; 6 Scott (N.R.) 831.

—— **Before Prothonotary.**]—Upon an acknowledgment taken in Pennsylvania, the court, in lieu of a notarial certificate, received a certificate of "the prothonotary and clerk of the Court of Common Pleas in and for the centre county, Pennsylvania," it being sworn that there was no notary public within eighty miles of the place. *Way, In re*, 7 Scott (N.R.) 999 ; 6 Man. & G. 1046 ; 1 D. & L. 950.

—— **Before a Solicitor.**]—The court refused to allow a certificate of acknowledgment taken in Ontario to be filed, when the affidavit of verification purported to be sworn before "J. S., an attorney of the supreme court." The affidavit must be sworn before a magistrate, and his authority to administer oaths be certified by a notary public. *Woodman, In re*, 11 C. B. (N.S.) 630.

—— **Before a Notary.**]—A deed was acknowledged by a married woman in Wisconsin, in the United States of America. The affidavit of ac-

knowledgment was sworn before a notary public, and not before a magistrate, as required by a rule of H. T., 14 Geo. 3. There was a certificate of the secretary of state of Wisconsin, certifying that in that state a notary public is officially authorised to administer oaths. On motion to enrol the acknowledgment and affidavit, the court directed the same to be enrolled. *Cooper, In re*, 18 C. B. (N.S.) 220; 34 L. J., C. P. 145; 11 Jur. (N.S.) 114; 11 L. T. 605; 13 W. R. 292.

Copy of Foreign Record.]—Where an acknowledgment of a married woman was taken at Milan, the court allowed a certified copy of an act of the Imperial Royal Civil Tribunal of that city to be received and filed in lieu of the affidavit verifying the certificate of the commissioners, upon the production of an affidavit from a competent party, showing that, by the law of that country, depositions on oath are always deposited amongst the records of the court, and office or certified copies only delivered out to the parties. *Clericetti, In re*, 15 C. B. 762.

f. Certificate.

On Paper or Parchment.]—In an acknowledgment to bar dower, the affidavit of verification and notarial certificate may be upon paper instead of parchment. *Carr, Ex parte*, 5 C. B. 496; 5 D. & L. 488; 17 L. J., C. P. 107.

It is no objection that the notarial certificate is on paper instead of parchment. *Cock, In re*, 5 C. B. (N.S.) 543; 28 L. J., C. P. 138.

Under Seal.]—The notarial certificate required in the case of a fine acknowledged in a foreign country must be under seal; a defect in this particular could not be supplied by proof of the handwriting of the conusors. *Cruttenden* v. *Bourbell*, 1 Taunt. 144.

Lady of Full Age.]—A certificate of an acknowledgment cannot be filed without a positive affidavit that she is of full age. *Coverley, In re*, 8 Scott, 147.

A certificate of acknowledgment of a deed was allowed to be filed where, in lieu of the form given in s. 84, the commissioners merely certified that the lady was, as they believed, of full age. *Wallis, Ex parte*, 7 C. B. (N.S.) 303; 29 L. J., C. P. 29; 6 Jur. (N.S.) 201; 8 W. R. 48.

Special Order as to Form of.]—Where the form of certificate to be made by commissioners for taking the acknowledgments of married women to deeds prescribed by 3 & 4 Will. 4, c. 74, s. 84, does not suit the peculiar circumstances of the case, the court will make a special order for the alteration of the form. *Luke, In re*, 3 D. P. C. 112; 1 Scott, 80; 1 Bing. (N.C.) 265.

To meet the special circumstances of the case, the court directed the commissioners for taking the acknowledgment of a married woman (an infant) in their certificate, to omit "of full age." *Ib.*

By order of a vice-chancellor indentures of settlements were directed to be executed by a married woman who was an infant. The queen's bench division allowed the certificate of acknowledgment under 3 & 4 Will. 4, c. 74, s. 84, to be varied by omitting the words "of full age." *Lacey, In re*, 6 Q. B. D. 154; 44 L. T. 110; 29 W. R. 442.

Reputed Wife.]—In a certificate, the party was described as "Mary, the reputed wife of A. B., otherwise Mary S., spinster"; she was similarly described in the affidavit of verification, and in the deed itself. The court allowed the documents to be received and filed. *Francis, Ex parte*, 5 C. B. 498; 17 L. J., C. P. 110.

Date of.]—It is no objection to the filing of the certificate of acknowledgment that the date of the certificate is written on an erasure. *Anon.*, 16 C. B. 574.

Where Executed.]—The documents connected with a married woman's acknowledgment of a deed, made abroad, were received and filed, though, by a mistake, it did not appear from them where the commission was executed; the court being satisfied, aliunde, as to that. *Saunderson, In re*, 8 C. B. (N.S.) 93; 29 L. J., C. P. 264; 6 Jur. (N.S.) 1373; 8 W. R. 417.

Amending.]—The certificates of the acknowledgment of two married women stated them to have executed deeds of lease and release, whereas they were parties only to the release. The court refused to amend the certificates. *Whitty* or *White, Ex parte*, 3 Man. & G. 201; 3 Scott (N.R.) 591; 9 D. P. C. 838.

The court refused to allow the amendment of the certificate of the acknowledgment, where the commission issued in January, 1848, and the certificate erroneously stated the acknowledgment of the deed to have been taken in February, 1847. *Millard, In re*, 5 C. B. 753; 6 D. & L. 86.

g. Filing.

When.]—The affidavit verifying the certificate of the acknowledgment, may be filed subsequently to the filing the certificate. *Anon.*, 1 Scott, 52.

Delay in.]—An acknowledgment of a deed by a married woman was taken in 1842, and the certificate and memorandum thereof duly signed by the commissioners; but, by some inadvertence on the part of the solicitor employed in the transaction, there was no affidavit of verification, and the documents were not filed. After the lapse of thirteen years the court allowed the certificate to be received and filed, upon an affidavit by the surviving commissioner, stating that it had always been his practice, and as he believed, that of his co-commissioner, to make all inquiries of the married woman before taking her acknowledgment; and that, from the circumstance of his having signed the certificate and memorandum, he verily believed that all proper inquiries had been made on this occasion, though from the lapse of time, he was unable positively to state what the answers were. *Warne, In re*, 15 C. B. 767; 3 C. L. R. 341.

When an acknowledgment had been duly taken, but through inadvertence the certificate and affidavit had not been filed for two years afterwards, the court allowed them to be filed. *Stevens, Ex parte*, 3 Hodges, 13.

So where there had been an omission for six years to file a certificate of acknowledgment by a married woman, and the affidavit verifying the same, the court allowed the same to be filed on being satisfied that the delay was unintentional, and that during the interval there had been no

dealings with the property, and that, therefore, no person had acquired an interest which could be prejudiced by filing the acknowledgment and affidavit. *Edge, In re*, 35 L. J., C. P. 263 ; L. R. 1 C. P. 533 ; 12 Jur. (N.S.) 741.

A married woman joined in selling land in 1844. The necessary certificate of acknowledgment and affidavit of verification were signed and sworn, but not filed. A successor of the purchaser having resold in 1875, the defect in title was discovered, and the intending purchaser declined to complete unless it should be remedied. She had died in 1857 :—Held, that the certificate and affidavit might be filed nunc pro tunc. *Blair, In re, Waring, Ex parte*, 32 L. T. 731.

A married woman executed a deed in 1857, which was duly acknowledged before two commissioners at the time under 3 & 4 Will. 4, c. 74 (The Fines and Recoveries Act), but no certificate of such acknowledgment was then registered or executed. Upon uncontradicted affidavits stating the facts, and that the omission to make the required certificate was merely an accidental oversight, there being no suggestion of malâ fides :—The court directed that the certificate which was now offered should be received and filed. *Chalker, In re*, 47 L. J., C. P. 378 ; 37 L. T. 502 ; 26 W. R. 128.

Without Commission being Annexed.]—The acknowledgment of a deed by a married woman was taken before special commissioners in Melbourne, but the documents were by mistake returned to this country without having the commission annexed to them. The court, upon being satisfied by affidavit that the acknowledgment had been properly taken by two of the persons to whom the commission was addressed, allowed the documents to be filed. The omission of one of three christian names of one of the commissioners was allowed to be supplied by an affidavit of identity. *Edsall, In re, Thomas, In re*, 44 L. J., C. P. 228 ; L. R. 10 C. P. 472 ; 23 W. R. 790.

Lost—Second Certificate.—But the court has no power to authorise a judge, before whom an acknowledgment has been taken, to sign a second certificate of such acknowledgment after the first certificate has been lost, in order that the second certificate and affidavit verifying the same may be filed after the time limited for filing of the certificate has elapsed. *Married Woman, In re*, 36 L. J., C. P. 233 ; L. R. 2 C. P. 510 ; 16 L. T. 323 ; 15 W. R. 745.

Effect of.]—A deed executed by a married woman to pass real estate, and indorsed with a memorandum of acknowledgment before a judge, under 3 & 4 Will. 4, c. 74, s. 34, is not effectual, unless a certificate of that acknowledgment is filed of record in the court, as required by s. 85. *Jolly* v. *Hancock*, 7 Ex. 820 ; 22 L. J., Ex. 38 ; 16 Jur. 550.

The certificate is conclusive in its operation. *Banks* v. *Ollerton*, 10 Ex. 168 ; 2 C. L. R. 1090 ; 23 L. J., Ex. 285 ; 2 W. R. 622.

7. Other Matters relating to.

Fine Levied by Trustee.]—A fine might be levied by a trustee substituted for a missing trustee, under 6 Geo. 4, c. 74, s. 5. *Jackson* v. *Warde*, 9 Bing. 399 ; 2 M. & Scott, 566.

—— **By Lunatic.**]—At law it cannot be shown that a fine levied by a lunatic was void on account of fraud. *Murley* v. *Sherren*, 1 P. & D. 126 ; 1 W. W. & H. 678 ; 8 A. & E. 754 ; 8 L. J., Q. B. 152.

A fine levied by a lunatic is binding upon his heirs in a court of law. *Ib.*

—— **By Copyholder.**]—A fine levied by a copyholder, who continued in possession, was void as against the lord. *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 162 ; 1 R. R. 680.

—— **By Others.**]—Any number of persons having separate interests in one tenement, of whatsoever value, might concur to pass their interests to any number of purchasers by one fine. *Appleyard* v. *Brown*, 5 Taunt. 265.

Where fines were levied while the estates were contingent, the interest was not thereby extinguished. *Doe* d. *Brune* v. *Martin*, 8 B. & C. 497; 2 M. & Ry. 485.

Vouchee Dead when Judgment given.]—If a writ of summonses ad warrantizandum was returnable on a Sunday, and the vouchee died on that day, the recovery was void ; because Sunday being a dies non juridicus, judgment could not possibly have been given until the Monday following, consequently the judgment must have been given after the death of the vouchee ; and as a common recovery pursued the forms of a real action, it was of absolute necessity that the vouchee, against whom the judgment was obtained, should be living on the day when such judgment was given by the court, for otherwise the judgment was erroneous. *Brown* v. *Swann*, 6 Bro. P. C. 333 ; 1 W. Bl. 496, 526 ; 3 Burr. 1595.

Barring Entail.]—The term "disposition" in 3 & 4 Will. 4, c. 74, s. 38, is not restricted to the deed barring the entail, enrolled in chancery under the act, but comprises it and all other instruments by which the arrangement between the vendor and purchaser is carried out. *Crocker* v. *Waine*, 5 B. & S. 697 ; 33 L. J., Q. B. 316 ; 10 L. T. 600 ; 12 W. R. 905.

A conveyance executed by a tenant in tail to himself or to his own use is a disposition under that statute. *Ib.*

A disentailing deed executed in pursuance of the 3 & 4 Will. 4, c. 74, is valid if enrolled within six months from the time of its execution, although such enrolment has not taken place until after the death of the tenant in tail who executed the deed. *Piers, In re*, 14 Ir. Ch. Rep. 452.

Seisin of Conusor and Tenant.]—The tenant to the præcipe must have had a freehold in possession, otherwise a recovery suffered was invalid. *Roe* d. *Hale* v. *Wegg*, 6 Term Rep. 708.

A recovery suffered by a person not in possession had no operation. *Wynne* v. *Cookes*, 1 Bro. C. C. 515.

A plaintiff, in ejectment for land, proved acts of ownership, and a fine levied by the ancestor of his lessor. The defendant proved that the land was formerly part of the churchyard, and proved acts of ownership by the vicar :—Held, that the fine was not a conclusive bar to the vicar, without clear evidence that the party levying it had then an estate of freehold in the land. *Runcorn* v. *Doe* d. *Cooper*, 8 D. & R. 450 ; 5 B. & C. 696 ; 4 L. J. (O.S.) K. B. 281.

A tenant in tail in possession of hereditaments and premises subject to an outstanding term, by an indenture, for the barring all estates tail, and all remainders thereon expectant, and for limiting the same to himself, his heirs, and assigns for ever, and in consideration of 10*s.* to him paid, granted, bargained, and sold the hereditaments and premises, and the reversion, remainder, &c., thereof, to L. & B., their heirs and assigns, to the use of L., that he might become tenant of the freehold, in order to suffer a recovery. The deed was duly enrolled as a bargain and sale :—Held, that by that deed L. became solely seised of the premises, so as to be a good tenant of the freehold for suffering a recovery of the entirety of the premises. *Huggerston* v. *Hanbury*, 7 D. & R. 723 ; 5 B. & C. 101 ; 4 L. J. (o.s.), K. B. 269 ; 29 R. R. 176.

In ejectment a fine is no evidence of ownership on the conusor, and without proof that he was in possession when it was levied, it is no evidence at all. *Brassington* v. *Llewellyn*, 1 F. & F. 27.

In 1768, T. J. Selby devised as follows :—"I give and devise to my right and lawful heir-at-law (for the better finding out of whom I direct advertisements to be published immediately after my decease in the public papers) all my manors, lands, &c., in B., to hold the same, to my heir-at-law, his heirs, executors, administrators, or assigns, for ever, subject to, and chargeable with, the payment of all my debts, funeral charges, bonds, annuities, and legacies ; which I direct to be paid by my heir-at-law within twelve months after my decease. But should it so happen that no heir-at-law is found, I then constitute and appoint W. Lowndes my lawful heir, on condition he change his name to Selby ; and I give the estates and all the manors before mentioned to W. Lowndes." The testator died in 1772. In 1773, W. Lowndes was appointed receiver of the estates ; and in 1783 he took possession under a decree of March, 1783, and thence to the time of his death retained it, claiming the freehold and exercising dominion over the property as his own. In April, 1784, the devisee executed two deeds in the name of Selby, and the manor courts held by him after that date were held in that name :—Held, that the devisee had, at the time of levying the fine, such an estate of freehold as would make the fine operate as a bar. *Davies* v. *Lowndes*, 7 Scott (N.R.) 141 ; 6 Man. & G. 471—Ex. Ch.

Misdescription of Estate.]—A deed to lead the uses of a recovery, by mistake, treated an advowson as in gross, and as vested as to one moiety in A. for life, with remainder to his first and other sons in tail general ; and as to the other moiety, as vested in A. in fee. The whole advowson was in fact appendant to a manor, and the manor and appendant advowson were, with other hereditaments, vested in A. for life, with remainder to his first and other sons in tail male. A.'s eldest son joined with A. in making a tenant to the præcipe :—Held, that, notwithstanding the language of the recovery deed was large enough to have passed the whole advowson, as an advowson appendant, yet that, by reason of the apparent intention of the parties (although arising out of a mistake) the tenancy in tail was not barred in one moiety of the advowson. *Moseley* v. *Motteux*, 10 M. & W. 533 ; 12 L. J., Ex. 136.

Default of Power of Appointment.]—A., being entitled in fee-simple to estates in the county of D., in 1773, married B., who had freehold estates in the county of M., and also in the county of D., including Plas Madoc, in the county of D. Prior to the marriage, articles were executed between these parties and trustees on the 18th of October, 1773, by which it was stipulated, that, in case the marriage took place, A.'s estate should be settled, subject to a term of 500 years ; and B.'s estate (not including Plas Madoc) to the use of A. and B. for their lives and the life of the survivor, and to the use of the first and other sons of the marriage, in tail. There were two sons of the marriage, W. and E., and two daughters. The eldest son, W., having come of age on the 11th or 12th August, 1801, the property of A., the father, was, by lease and release, conveyed to W. for 2,000 years, by way of mortgage, and subject to that term to such uses as A. should appoint ; and in default, to the use of A. and B. for their lives, and afterwards to such uses as A. should appoint ; or in default, to such uses as the estates were then limited to. On the 1st and 2nd April, 1802, A. and B. and W. conveyed, by lease and release, to J. all the estates of A. and B. and W. in the counties of M. and D., and certain tithes theretofore the inheritance of A., in order to make J. tenant to the præcipe ; and the recovery was to enure to such uses as A. and B. and W. should appoint ; and in default, then to and for and upon such and the same powers, provisoes, limitations and agreements as the hereditaments and premises were and stood limited to, immediately before the execution of that indenture by virtue of the articles of settlement of the 18th October, 1773, or to or for and upon such and so many of them as should be then existing, undetermined and capable of taking effect. Common recoveries were suffered in 1802, and A. died soon after :—Held, that, in default of appointment, the deed of 1802 and recovery did not create any other legal limitations, and that Plas Madoc was not affected thereby. *Youde* v. *Jones*, 13 M. & W. 534 ; 14 L. J., Ex. 70 ; 9 Jur. 910.

By deed, dated 22nd December, 1809, B. and her son W. exercised the power of appointment given by the deed of 1802 over all the estates in the county of D., except Plas Madoc (which was stated to be thereinafter more particularly described, but was not). By the same deed B. released all her estates (save and except to her and her assigns, during her life, Plas Madoc) to J. and his heirs, to uses, for 1,000 years ; and subject thereto, to the use and intent that B. might receive an annuity of 400*l.* ; and subject thereto, to the use of W., his heirs and assigns for ever :—Held, that Plas Madoc passed under the conveyance from B. to W. in fee, subject to the term of 1,000 years, and that the exception of the life estate of B. was repugnant and void. *Ib.*

Chirograph and Proclamations.]—In order to prove a fine levied at one of the abolished courts of great session in Wales, a party put in evidence the chirograph with only one proclamation indorsed, and also a plea-roll of the same session, which showed a licentia concordandi between the same parties respecting the same premises :—Held, that the fine was sufficiently proved under 5 Vict. c. 32, s. 2. *Doe* d. *Cadwalader* v. *Price*, 16 M. & W. 603 ; 16 L. J., Ex. 159 ; 11 Jur. 131.

By the chirograph of a fine, the caption appeared to be on the 23rd of October, 1701, whereas in fact the fine was not acknowledged

till the 2nd of March following, and this was offered to be proved; but the court refused to admit the evidence, being of opinion that no proof of the time of acknowledging a fine ought to be admitted contrary to or against the chirograph, and that the record, which was the chirograph of a fine, could not be falsified until it was vacated or reversed. *Say and Seale* (*Lord*) v. *Lloyd*, 4 Bro. P. C. 73.

The indorsement of proclamations on a fine was not alone sufficient evidence of their having been made. *Doe* d. *Hatch* v. *Buck*, 2 Marsh. 170; 6 Taunt. 487.

An examined copy of the record of a fine, levied with proclamations, was as good evidence of the fine as the chirograph itself certified by the officer. *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; 10 L. J., Ex. 201.

An entry to avoid a fine with proclamations, though not authorised by the party in whose behalf it was made, is sufficiently ratified by an ejectment founded on it. *Doe* d. *Blight* v. *Pett*, 4 P. & D. 278; 11 A. & E. 842.

A fine with proclamations was levied in the great sessions for the county of Denbigh. The proclamations indorsed on the fine were headed with the words "according to the form of the statute." The second proclamation was stated to be made at Ruthin, in the county of Denbigh, without stating that it was made at the great sessions, as required by 34 & 35 Hen. 8, c. 26, s. 41:—Held, that that was sufficient, and that, from the previous words, the proclamation must be understood to have been made at the great sessions. *Doe* d. *Jones* v. *Harrison*, 3 B. & Ad. 764; 1 L. J., K. B. 234.

The date of the chirograph of a fine was two days later than the day of the first proclamation, both days being in the same term; three other proclamations were duly made in the three following terms:—Held, to be a good fine with proclamations. *Doe* d. *Fleming* v. *Ford*, 1 A. & E. 758; 3 N. & M. 813; 3 L. J., K. B. 214.

Covenant to Levy.]—A covenant to do all lawful and reasonable acts for further assurance, includes a covenant to levy a fine, though not particularly named. *King* v. *Jones*, 5 Taunt. 418; 1 Marsh. 107; 4 M. & S. 188; 15 R. R. 533.

Amendment of Fine.]—The court amended a fine levied at the Carmarthen great sessions, in 1830, by indorsing the first and third proclamations, of which there was no entry, it appearing that such proclamations had been made, but the entry of them omitted by the clerk of the court. *Lloyd* v. *Nicholas*, 4 Bing. (N.C.) 633; 1 Arn. 237; 6 Scott, 355; 7 L. J., C. P. 259.

An estate stood limited, subject to a life estate, to five persons, as tenants in common in tail, with cross remainders between them in tail. One of these persons, a married woman, concurred with her husband in a deed mortgaging her fifth share and all other the share and interest to which she might become entitled by the death of any of the other tenants in tail without issue; and the deed contained a covenant to levy a fine of the property expressed to be conveyed by the deed. A fine was levied, purporting to extend only to the fifth share. Afterwards, one of the other tenants in tail died without issue, and without having barred his estate tail:—Held, that there was an error in the fine, which was cured by 3 & 4 Will. 4, c. 74, s. 7, and that the fine was effectual as to one-fourth, and not as to one-fifth only. *Life Association of Scotland* v. *Siddal*, 3 De G. F & J. 58.

The court amended a fine levied in 1771, at the great sessions for the county of Cardigan, by indorsing the second and third proclamations (it appearing that there was no entry of them by the clerk of the court), and this, upon an affidavit of the clerk to the deputy prothonotary of that court, to the effect, that the proclamations were always duly made according to the practice of the court, but very often not registered; and on an affidavit of the surviving deforciant that the fine was intended between the parties, she (the survivor) wishing to transmit a good title to a purchaser; and although no affidavit was produced of the fact of the proclamations in this particular case. *Price* v. *Watkins*, 6 Jur. 170.

—— **Of Recovery.**]—The court refused to permit an old recovery to be amended by the insertion of a parish, the words of the deed being large enough to embrace it, and the omission being cured by 3 & 4 Will. 4, c. 74, s. 8. *Evans, In re*, 2 Scott (N.R.) 83. *S. C.*, nom. *Heming* v. *Griffiths*, 1 Man. & G. 879. *S. C.*, nom. *Watkins, In re*, 9 D. P. C. 58.

A recovery was amended under 3 & 4 Will. 4, c. 74, s. 8, by inserting the words "right of free warren," the right having always gone with the property in question, and the deed to lead the uses conveying all hereditaments. *Twisden, In re*, 4 Bing. (N.C.) 253; 5 Scott, 638; 1 Arn. 64; 7 L. J., C. P. 143.

The officer of the court of great sessions having omitted to enter of record a recovery duly suffered at bar, in 1804, the court ordered it to be done nunc pro tunc, under 1 Will. 4, c. 70, s. 27, which gives that court the like power to amend a recovery of the court of great sessions, as if it had been suffered in C. P. *Evans* v. *Griffith*, 9 Bing. 311; 2 M. & Scott, 383; 2 L. J., C. P. 9.

The court refused to amend a fine in a case of misdescription, cured by 3 & 4 Will. 4, c. 74, s. 7. *Lockington* v. *Shipley*, 1 Bing. (N.C.) 355; 1 Scott, 263; 4 L. J., C. P. 48.

In the exemplification of a recovery, the name of the tenant was inserted in the place of that of the demandant, and vice versâ:—Held, that the defect, which was apparent on the production of the deed to lead the uses, was cured by 3 & 4 Will. 4, c. 74, s. 8. *Wickens* v. *Windus*, 9 C. B. 711; 19 L. J., C. P. 329; 14 Jur. 836.

—— **Indorsement of Proclamations.**]—A fine was levied at the autumn great sessions held for the county of Cardigan in 1830. The roll of fines levied at those sessions was then proclaimed, and also at the autumn assizes for that county in 1831; and it appeared that the fine was then upon the proper roll. There was no evidence as to any proclamation having been made at the spring assizes 1831; and there was no indorsement of any of the proclamations, the officer whose duty it was to indorse them on the roll having omitted to do so:—The court allowed the proclamations to be indorsed by the clerk of the peace, into whose hands the records of fines for the county of Cardigan, by the 11 Geo. 4 & 1 Will. 4, c. 70, came on the death of the late deputy prothonotary; and this after an ejectment brought to recover the premises comprised in the fine. *Evans* v. *Davies*, 5 Bing. (N.C.) 229; 7 D. P. C. 259; 6 Scott, 372; 1 Arn. 486; 8 L. J., C. P. 132; 3 Jur. 223.

E. M.

FIRES AND FIREARMS.

1. *Liability for Fire*, 81.
2. *Firemen and Brigades*, 81.
3. *Firearms*, 83.
4. *Fire Insurance*. *See* INSURANCE (FIRE).

1. LIABILITY FOR FIRE.

Adjoining Owners.]—An action lies against a party for so negligently constructing and keeping a hayrick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house is burnt down. *Vaughan* v. *Menlove*, 3 Bing. (N.C.) 468; 4 Scott, 244; 3 Hodges, 51; 6 L. J., C. P. 92; 1 Jur. 215. *S. C.*, at nisi prius, 7 Car. & P. 525.

An action lies against an owner of a close for negligently lighting a fire there, which spreads to his neighbour's close, notwithstanding 14 Geo. 3, c. 78, s. 86, by which no action shall be maintained against any person on whose estate any fire shall accidentally begin. *Filliter* v. *Phippard*, 11 Q. B. 347; 17 L. J., Q. B. 89; 12 Jur. 202.

Section 86 of 14 Geo. 3, c. 78, is a public act. *Richards* v. *Easto*, 15 M. & W. 244; 15 L. J., Ex. 163.

And is not confined in its operation to the districts to which the limited clauses of the act were restricted. *Filliter* v. *Phippard*, 11 Q. B. 347; 17 L. J., Q. B. 89; 12 Jur. 202.

It does not apply where a fire is produced by negligence; and in that case, by the common law, an action lies against the party by whose negligence, or that of his servants, a fire arises on his premises, and damages the property of another. *Ib.*

It does not apply where the fire is lighted intentionally, and mischief happens to result. *Ib.*

Whether the protection given by the stats. 6 Ann, c. 31, and 14 Geo. 3, c. 78, to a party in whose house, or on whose estate, a fire shall accidentally begin, extends to fires occasioned by the negligence of the owner or his servants, or whether it is confined to fires arising from pure accident, in the limited sense of the word—quære? *Canterbury* (*Viscount*) v. *Att.-Gen.*, 1 Ph. 306; 12 L. J., Ch. 281; 7 Jur. 224.

Lightermen.]—Goods were delivered at M. to the owner of a ship "B." to be conveyed on board the ship "B.," and then to be carried in her to L. The goods were destroyed by a casual fire on board a lighter, employed by the owners of the "B." to convey them from M. to the ship "B.": —Held, that the 26 Geo. 3, c. 86, s. 2, did not protect the owners of the "B.," as the fire was not on board their ship. *Moorewood* v. *Pollok*, 1 El. & Bl. 743; 22 L. J., Q. B. 250; 17 Jur. 881; 1 W. R. 304.

Carriers.]—*See* CARRIERS.

Pawnbrokers.]—*See* BAILMENT.

Railway Companies.]—*See* RAILWAY.

2. FIREMEN AND BRIGADES.

Power to take Possession of Property on Premises.]—A fire broke out on premises in a part of which the plaintiff carried on the business of a licensed victualler, but the plaintiff's goods were not destroyed by the fire. In an action against the defendants for the wrongful conversion of the plaintiff's goods by their servants, the men of the fire brigade, the jury found that the fire brigade had custody of the premises for the purpose of extinguishing the fire; that the injury to the plaintiff's goods was caused by the felonious acts of the men of the fire brigade; that the officers were guilty of negligence in not preventing the felonious acts by the men, and they assessed the damages at 15*l.*:—Held, that under 28 & 29 Vict. c. 90, it is not the imperative duty of the fire brigade to take possession of property on premises where a fire breaks out, but the statute gives them power to do so. *Joyce* v. *Metropolitan Board of Works*, 44 L. T. 811; 45 J. P. 667.

Right to Control of Premises—Exclusion of Public.]—Section 171 of the Public Health Act, 1875, incorporating s. 32 of the Towns Police Clauses Act, 1847, empowers a fire brigade established by an urban authority to exclude all persons whose presence would interfere with their operations from the premises on fire. *Carter* v. *Thomas*, 62 L. J., M. C. 104; [1893] 1 Q. B. 673; 5 R. 343; 69 L. T. 436; 41 W. R. 510; 17 Cox, C. C. 664; 57 J. P. 438.

—— **Chimneys in Dangerous Condition.**]—In an action for throwing down a stack of chimneys, and thereby damaging the plaintiff's house, the defendant may justify that he was a fireman, and that the chimneys were in danger of falling on a public footpath, the adjoining house having been burnt down. *Dewey* v. *White*, M. & M. 56. *See* 28 & 29 Vict. c. 90, s. 12.

Expenses of Use of Fire-Engine—"Owner."]—By section 33 of the Town Police Clauses Act, 1847, the expense incurred by the commissioners in sending engines beyond the limits of the special act for extinguishing fire in the neighbourhood is to be borne by "the owners of the land or building where such fire shall have happened." By s. 171 of the Public Health Act, 1875, the provisions of the Town Police Clauses Act, 1847, with respect to fires are incorporated with that act, and by s. 4 of that act "owner" is defined as "the person receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent":—Held, overruling *Lewis* v. *Arnold* (L. R. 10 Q. B. 245) that the expense incurred by the commissioners was to be borne by the "owners" of the land or buildings as defined in the Public Health Act, 1875, and that the definition did not include an occupier of such land or buildings as tenant from year to year. *Sale* v. *Phillips*, 63 L. J., M. C. 79; [1894] 1 Q. B. 349; 70 L. T. 559; 58 J. P. 460.

The occupier was the "owner" of lands within the meaning of s. 33, and liable for the expenses incurred in sending an engine to extinguish a fire at a haystack belonging to him. *Lewis* v. *Arnold*, 44 L. J., M. C. 68; L. R. 10 Q. B. 245; 32 L. T. 553; 23 W. R. 729.

A local government board is not entitled, under the Towns Police Clauses Act, 1847, s. 32, to charge for the use of apparatus employed and the value of water consumed on the occasion of a

fire in premises situate within the district of such board. *Drightlington Local Board* v. *Bower*, 22 W. R. 165.

—— **In Metropolis.**]—Under 14 Geo. 3, c. 78, ss. 76, 77, a magistrate had jurisdiction to fix the amount of reward to be paid to the keepers of engines brought to extinguish fires, and order it to be paid, although the parish officers did not originate any proceeding before him for that purpose. *Reg.* v. *Combe*, 3 New Sess. Cas. 394; 13 Q. B. 179; 18 L. J., Q. B. 94; 13 Jur. 192.

The occupier of a building within the metropolis, in the chimney of which a fire originated, and in which there was at the time of the fire no inmate, is liable to repay to the overseers of the parish such reward as has been paid by them to the firemen attending at such fire, and which has been allowed under ss. 76, 77, and 78 of 14 Geo. 3, c. 78, by a justice of the peace having jurisdiction in the case. *Reg.* v. *Pontifex*, 4 W. R. 505.

Fire-plug fixed by Waterworks Company—Local Authority—"Request."]—Though s. 66 of the Public Health Act, 1875, makes it the duty of the urban authority to provide proper fire-plugs in their district, it does not impose upon them any statutory obligation to pay for fire-plugs erected by a waterworks company without a previous request from the urban authority; and a "request" by such authority, within the meaning of s. 38 of the Waterworks Clauses Act, 1847, cannot be implied from the fact that the urban authority have used fire-plugs erected within their district by a waterworks company, and that such plugs comply with the requirements of that section. *Grand Junction Waterworks Co.* v. *Brentford Local Board*, 63 L. J., Q. B. 717; [1894] 2 Q. B. 735; 9 R. 788; 71 L. T. 240; 59 J. P. 51—C. A.

3. Firearms.

Proof of.]—Previously to 18 & 19 Vict. c. 148, there were two independent companies for the proof of firearms, viz., the Gun-maker's Company and the Birmingham Company. That act, passed for the proof of small arms by the two companies, and in order to avoid the inconvenience of several acts relating to the same matter, but without amalgamating the two companies, required double barrels to be proved, first by provisional and afterwards by definitive proof. The act declares that each of the two companies shall receive all barrels brought to the proof-house of that company in the proper state for proof, and whether or not theretofore proved, and shall duly prove the same thereat, according to the scale in force, and shall duly mark such barrels, when proved (if found of proof), as duly proved according to such scale; and that a barrel shall not be used in making any small arm unless the barrel has been duly proved at the Gun-makers' Company or at the Birmingham proof-house:—Held, that in the absence of any provision in the act making it obligatory on one company to receive and prove guns by the definitive proof which have been provisionally proved by the other company, the Gun-makers' Company could not be compelled to prove by definitive proof double barrels provisionally proved at the Birmingham proof-house, but which had not been provisionally proved by the Gun-makers' Company. *Goodman* v. *Spencer*, 2 C. B. (N.S.) 93; 26 L. J., C. P. 177; 3 Jur. (N.S.) 414; 5 W. R. 524.

FISH AND FISHERIES.

See also Sea and Seashore—Water.

1. *Public Rights*, 84.
2. *Fishery Acts*, 90.
3. *Private Fisheries.*
   a. Origin and Existence, 91.
   b. Nature of Right, 95.
   c. Rights, how Affected, 98.
   d. Actions for Interference with, 99.
   e. Prosecutions, 101.
4. *Salmon Fishery.*
   a. Districts, 103.
   b. Rights of, 105.
   c. Regulation of, 107.
   d. Weirs and Obstructions, 113.
5. *Licences*, 116.
6. *Fence Season*, 117.
7. *Whale Fishery*, 118.

Rating Fishery.]—*See* Poor Law.

1. Public Rights.

Sea Fisheries—Rights of Foreign Nations.]—The right of nations to take fish in the sea may be restrained or regulated by treaty or custom. *Fennings* v. *Granville*, 1 Taunt. 241; 9 R. R. 760.

By 6 & 7 Vict. c. 79, s. 1, the articles of the convention between her majesty and the king of the French concerning the fisheries in the seas between the British Islands and France, were declared to have the force of law. By these articles, all transgressions of the regulations are in both countries to be submitted to the exclusive jurisdiction of the tribunal or magistrates designated by law, who are to settle all differences and decide all contentions between fishermen of the two countries; and the trial and judgment are always to take place in a summary manner. This tribunal is always to have power to award damages for injuries over and above the penalties. By s. 11 of the act, all offences against the articles committed by British subjects are to be determined by justices of the peace, who are also declared to have power of awarding compensation for injuries:—Held, that no action could be maintained for an injury caused by a breach of any of the regulations, as exclusive jurisdiction in such matters was given to the tribunal specified in the act. *Marshall* v. *Nicholls*, 18 Q. B. 882; 21 L. J., Q. B. 343; 16 Jur. 1155.

—— **British Subjects.**]—Primâ facie, every subject has a right to take fish found upon the seashore between high and low water mark. *Bagott* v. *Orr*, 2 Bos. & P. 472; 5 R. R. 668. S. P., *Warren* v. *Matthews*, 6 Mod. 73.

But such general right may be abridged by the existence of an exclusive right in an individual. *Bagott* v. *Orr*, supra.

—— **Prescription.**]—The right of fishing in the sea is common to all the king's subjects; therefore a prescription for such a right as annexed to a certain tenement is bad. *Ward* v. *Cresswell*, Willes, 265.

Tidal Navigable Rivers.]—In navigable rivers or arms of the sea, fishery is common and public; in private rivers not navigable, it belongs to the lords of the soil on each side. *Carter* v. *Thurcot*, 4 Burr. 2163.

A tidal navigable river is a highway at all times and all states of tide, and is not suspended during such periods of the tide as leave the channel too shallow to float vessels; and the right of the crown to the soil in arms of the sea and public navigable rivers, is subject to the public right of passage, and any grantee of the crown must take subject to such right. *Colchester Corporation* v. *Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 59; 9 Jur. 1090.

Oysters deposited artificially, and not attached to the soil, may be a nuisance, and obstruct the navigation, as well as natural oyster-beds. *Ib.*

Tidal River—What is.]—An information was laid against the appellant for unlawfully fishing in a river wherein the respondents had a private right of fishery. It was proved that the river was navigable, and that at the place where the appellant fished the water was not salt, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide. The appellant contended that, the river being navigable and tidal at the place in question, there was a presumption that the public had a right to fish there, and that the jurisdiction of the justices was therefore ousted by a reasonable claim of right:—Held, that the river at the place in question could not be considered as tidal within the meaning of the rule of law which gives the public a right to fish in navigable tidal rivers, and therefore there was no claim of title set up sufficient to oust the justices' jurisdiction. *Reece* v. *Miller*, 51 L. J., M. C. 64; 8 Q. B. D. 626; 47 J. P. 37.

—— **Presumption.**]—In a tidal river the fishery is primâ facie common to all. Aliter, where there is no tide. *Fitzwalter's (Lord) Case*, 1 Mod. 105.

River made Navigable.]—A river was made navigable by a company, and the public allowed to navigate it on payment of tolls, under certain acts of parliament; but the soil and rights of the owners on each side of the river remained untouched. The public had fished for many years in the river without interruption by the owner of the soil; but he caused a notice to be set up forbidding all fishing. A person afterwards fished in the river, and an information was taken out against him under 24 & 25 Vict. c. 96, s. 24. At the hearing he set up the right in the public, and contended that the jurisdiction of the justices was ousted by this bonâ fide claim of right:—Held, that the right set up could not exist in law, and therefore title could not come in question, and the jurisdiction of the justices was not ousted. *Hargreaves* v. *Diddams*, 44 L. J., M. C. 178; L. R. 10 Q. B. 582; 32 L. T. 600; 23 W. R. 828.

The right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law. *Mussett* v. *Burch*, 35 L. T. 486.

M. was convicted under 24 & 25 Vict. c. 96, s. 24, of fishing in water which was private property. The water was part of a navigable river, which was not tidal, and which was navigated by means of locks. At the hearing he set up a public right of fishing, and argued that the jurisdiction of the justices was ousted by such bonâ fide claim of right:—Held, that no such right could exist in law, and therefore the jurisdiction of the justices was not ousted. *Ib.*

Non-tidal Waters.]—There can be no public right of fishing in non-tidal waters, even where they are to some extent "navigable rivers." *Pearce* v. *Scotcher*, 9 Q. B. D. 162; 46 L. T. 342; 46 J. P. 248.

The public cannot acquire by immemorial usage any right of fishing in a river in which, though navigable, the tide does not ebb and flow. *Murphy* v. *Ryan*, Ir. R. 2 C. L. 143; 16 W. R. 678.

The word "navigable," used in a legal sense, as applied to a river in which the soil primâ facie belongs to the crown, and the fishing to the public, imports that the river is one in which the tide ebbs and flows. *Ib.*

Inland Lakes.]—The crown has no de jure right to the soil or fisheries of an inland non-tidal lake. *Bristow* v. *Cormican*, 3 App. Cas. 641.

If there are acts in pais, which would be admissible as evidence of the title of the crown, they must be submitted to a jury. They cannot be taken by the judge and made the basis of a decision by himself alone. *Ib.*

A general grant by the crown of a several fishery in a non-tidal lake is not, without more, sufficient to establish the title thereto; and, where there is no evidence of acts of possession by the grantee at the particular part of the lake which is the place in dispute, can have no effect. *Ib.*

The public has not of common right a common of fishery in large inland waters in which the tide does not flow or reflow, although they are navigable. *Johnston* v. *Bloomfield*, Ir. R. 8 C. L. 88—Ex. Ch.

Right of public to fish in non-tidal river, see *Smith* v. *Andrews*, infra, col. 93.

Grant by Crown of a Several Fishery.]—The soil of navigable tidal rivers, so far as the tide flows and reflows, is primâ facie in the crown, and the right of fishery therein is primâ facie in the public. But the right to exclude the public therefrom, and to create a several fishery, existed in the crown, and might, lawfully, have been exercised by the crown before Magna Charta, and the several fishery could, lawfully, be afterwards made the subject of grant by the crown to a private individual. *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593; 9 Jur. (N.S.) 1135; 9 L. T. 93; 12 W. R. 178.

—— **When Presumed.**]—Where a grant of a several fishery had been made by the crown to a corporation, and rent received by the crown in respect thereof for a long period of time, the earliest grants describing it as an ancient inheritance of the crown:—Held, that the lawfulness of the origin of the several fishery might be presumed. *Ib.*

A prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a

borough corporation and its lessees; without any qualification except that the free inhabitants of ancient tenements in the borough had from time immemorial without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the locus in quo from the 2nd of February to Easter eve in each year, and of catching and carrying away the same without stint for sale and otherwise. This usage of the inhabitants tended to the destruction of the fishery, and if continued would destroy it:—Held (Lord Blackburn dissenting), that the claim of the inhabitants was not to a profit à prendre in alieno solo; that a lawful origin for the usage ought to be presumed if reasonably possible; and that the presumption which ought to be drawn, as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage. *Goodman* v. *Saltash Corporation*, 52 L. J., Q. B. 193; 7 App. Cas. 633; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276—H. L. (E.)

E. claimed to use a raise-net on a marsh, which in the reign of Elizabeth formed part of a manor of an attainted person. The inquisition and survey then made purported to give an inventory of his possessions, and mentioned a raise-net set up in another part of the manor from that in which E. used his, but made no specific mention of any other raise-net. Subsequently part of the manor was granted to a predecessor of E., and was enfranchised. Proof of user since 1797 was given, but the right had been contested by people in the neighbourhood. In 1812, a deed of compromise was entered into in which the owner of the part of the manor not granted away was recited to be lord of the manor, and entitled to the soil of the marsh, and the predecessors of E. were recited to be entitled to the sole herbage and pasturage, and to a concurrent right of lake fishery thereon. There was also evidence of subsequent user, and proof that this raise-net had been used by E. in 1857:—Held, that although long exclusive enjoyment of a right to a several fishery in a public navigable river is sufficient primâ facie evidence upon which to presume that the crown had granted a separate right before Magna Charta, yet the omission of all mention of the right in any probably true inventory, taken since that period, of all the possessions of the then alleged owner of that right, or any reasonable ground for considering that the user had not been exclusive, but in common with other persons, may be sufficient to negative such presumption. *Edgar* v. *English Fisheries Commissioners*, 23 L. T. 732.

That this claim, being made in respect of what was then a customary tenement of the manor, a prescriptive right to a fishery of so peculiar a kind as to be accompanied by the right of using a fixed engine would have been presented by the tenant in the name of the lord, and would in consequence probably have appeared in the inquisition; and, therefore, this omission was proof that the right was not in existence at that time. *Ib.*

—— **Appurtenant to a several Pasture.**]—Even if a fishery may pass as appurtenant to land, a several fishery cannot be appurtenant to a several pasture; and, therefore, whatever claim E. might have to this fishery, it could only be as appurtenant to demesne lands, which was here negatived by the omission in the inquisition. *Ib.*

Grant to Corporation—Effect of Reincorporation.]—A corporation which had an immemorial right to the oyster-fishery in a navigable river, to be managed by certain functionaries and courts of the corporation, became, by the ouster of several of its members, unable to continue itself, or to carry on the management of the fishery. Afterwards the corporation was reincorporated by charter under the old name; and the charter ratified, confirmed and restored to it all fisheries:—Held, that there having been no actual dissolution, the fishery had never come to the crown, and would therefore be in the corporation as it existed under the new charter. *Colchester Corporation* v. *Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 173; 10 Jur. 610.

Licence to Fish, whether a Demise.]—The corporation, by a written document, purporting to be an order of a court of the corporation, held for the conservancy of the fishery, granted a licence to certain dredgermen to dredge and take the oysters during the oyster season:—Held, that this did not operate as a demise of the fishery, putting the corporation out of possession. *Ib.*

—— **Grant of Licences.**]—Evidence of a continuous practice for upwards of sixty years, wholly unresisted, for a corporation to grant licences to fish in a navigable tidal river, and to appoint watchers in order to prevent unlicensed persons from fishing therein, is sufficient for a jury to infer the ownership of a free fishery in the corporation; and it is not a just conclusion, from the fact of their having recovered in a former trial, where a part only of the entire subject-matter of the free fishery was in issue, that at that time the corporation was not possessed of the whole, and that their claim to the remainder was therefore a usurpation. *Mannall* v. *Fisher*, 5 C. B. (N.S.) 856; 5 Jur. (N.S.) 389.

A claim of a right to obtain from a corporation a licence to fish in an oyster-fishery belonging to them, under an alleged custom for the corporation to grant such a licence, under rules made by them, to oyster dredgers living in a certain district, and having served an apprenticeship, upon payment of a reasonable fee, is bad, not because of the uncertainty of the fee, but because, if it is not lawful to fish without such licence, the claim is precarious, and not as of right, being an enjoyment of the leave and licence of the corporation at their will and pleasure as owners of the fishery, and long enjoyment in order to establish a right by custom must be as of right, and not by leave asked from time to time. *Mills* v. *Colchester Corporation*, 37 L. J., C. P. 278; L. R. 3 C. P. 575; 16 W. R. 987—Ex. Ch. Affirming, 16 L. T. 626. *S. C.*, on demurrer, 17 C. B. (N.S.) 635.

By Prescription.]—There may be a prescriptive right in a subject to a several fishery in any arm of the sea. *Orford Corporation* v. *Richardson*, 4 Term Rep. 439; 3 R. R. 579.

A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor. *Rogers* v. *Allen*, 1 Camp. 309; 10 R. R. 689.

To an action for fishing in the plaintiff's fishery, the defendant pleaded that the locus in

quo was an arm of the sea in which every subject of the realm had the liberty and privilege of free fishing; the plaintiff replied, a prescription for the sole and several right of fishing and traversed that every subject had the liberty and privilege of free fishing in the locus in quo: this was a bad traverse, and the defendant therefore might well pass it by in the rejoinder, and traverse the prescriptive right of the plaintiff stated in the replication. *Richardson* v. *Orford*, 2 H. Bl. 182; 1 Anst. 231; 4 Term Rep. 437; 3 R. R. 579.

——**Evidence—Ancient Suit.**]—In an action for trespass to a several fishery in a navigable tidal river in Ireland the defendants justified on the ground that the public had the right of fishing. The plaintiff's paper title (if the possession and enjoyment were consistent with it) afforded irresistible ground for a presumption that the fishery was put in defence before Magna Charta. As evidence of possession and user the plaintiff tendered (inter alia) the proceedings and decree in 1867 in a "possessory" suit brought in the court of chancery in Ireland by C. (the plaintiff's predecessor in title) against strangers to the present action; by which decree an injunction was awarded to quiet C. and his undertenants in such possession of their fishing as they had at the time of exhibiting the bill and three years before, to continue until evicted by due course of law, both parties being at liberty to take proceedings at law against each other for ascertaining their titles:—Held, that as the decree was a solemn and final adjudication not collusive, and as it could not have been made except upon proof of unbroken user and enjoyment for at least three years before the bill, inconsistent with any actual exercise at that time of a public right of fishing, the proceedings and decree were admissible; and that the effect of this evidence (not being met by any counter evidence applicable to the same period) was extremely strong to establish possession and enjoyment of the fishery in the latter part of the seventeenth century, consistent with the paper title and exclusive of the public. *Pim* v. *Curell* (6 M. & W. 234) discussed. *Neill* v. *Devonshire* (*Duke*), 8 App. Cas. 135; 31 W. R. 622—H. L. (Ir.)

Held, also, that a judgment obtained by the plaintiff in 1826 in an action against a stranger for trespass by fishing in the locus in quo, in which action the defendant appeared but allowed judgment to go by default of pleading, was evidence in the present action of possession in 1826. *Ib.*

The plaintiff sued the defendant for consequential injury to her reversionary interest in a several fishery in an arm of the sea, alleging her right to the soil between high and low water mark, into which she charged the defendant with cutting, and stating that such soil and fishery were in the possession of F., as her tenant. The defendant was tenant of a neighbouring property under G. In support of the plaintiff's title, evidence was offered of the proceedings in a former action, brought by F., while tenant to the plaintiff, against G., complaining of a similar injury to the same fishery. The declaration to the former action alleged that the present plaintiff was owner of the soil between high and low water mark, and charged G. with cutting the soil, and thereby injuring F.'s fishery. Not guilty being pleaded, the cause was referred to arbitration, and an award made in favour of F.:—Held, that these proceedings were not admissible either as evidence of reputation of the plaintiff's ownership of the fishery, or as proof or an admission by G. of the plaintiff's title to the soil or fishery. *Wenman* v. *Mackenzie*, 5 El. & Bl. 447; 25 L. J., Q. B. 44; 1 Jur. (N.S.) 1015, 1049, n.; 3 W. R. 626.

Right of Crown to grant to Subject—Exclusion of Owner of Soil.]—The crown can hold a river-bed throughout a manor and the fishery in the river flowing over the same as parcel of the manor, and may grant the manor with the river-bed and fishery to a subject, and the subject may grant the banks of the river with reservation of the river-bed and fishery. *Devonshire* (*Duke*) v. *Pattinson*, 57 L. J., Q. B. 189; 20 Q. B. D. 263; 58 L. T. 392; 52 J. P. 276—C. A.

Merger — Re-grant by Crown.]—A several salmon fishery in a tidal river, granted by the crown to a subject before Magna Charta, does not, if it reverts to the crown, merge in the prerogative of the crown, but may be re-granted by the crown to a subject. *Northumberland* (*Duke*) v. *Houghton*, 39 L. J., Ex. 66; L. R. 5 Ex. 127; 22 L. T. 49; 18 W. R. 495.

2. FISHERY ACTS.

Salmon Fishery.] — *See* 4. *Salmon Fishery*, infra.

Election of Fishery Conservators—Rejecting Votes.]—The defendant, as chairman of a meeting held, pursuant to the Fishery Laws, for the election of Fishery Conservators, rejected the vote of the plaintiff, which was duly tendered by proxy:—Held, that an action against him for not receiving the plaintiff's vote was sustainable without special damage. *Beecker* v. *Lucas*, Ir. R. 11 C. L. 517.

Undersized Shell-Fish — Removal from Fishery.]—The offence of removing undersized shell-fish from a fishery, contrary to by-laws framed under the Sea Fisheries (Shell-Fish) Regulation Act, 1894, is complete wherever such shell-fish have been taken up from any part of the fishery with the intention of eventually carrying them away. *Thomson* v. *Burns*, 66 L. J., Q. B. 176; 76 L. T. 58; 18 Cox, C. C. 491; 61 J. P. 84.

District Fisheries Committee—Expenses—Restrictions by Constituent Councils.]—The words of s. 6, sub-s. 1, of the Sea Fisheries Regulation Act, 1888, "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient for the purpose of enforcing the observance within their district of by-laws, &c." imply that such restrictions or conditions must be imposed by such council or councils at the time when such appointment is to be made, and not subsequently; provided that such council or councils have reasonable notice that such appointment is contemplated. The expenses of such local fisheries committee mentioned in s. 10 of the said act include the properly estimated expenses deemed to be required by such committee during their year of office, and not merely expenses actually incurred by them. *Reg.* v. *Plymouth*

Corporation, 65 L. J., Q. B. 258 ; [1896] 1 Q. B. 158 ; 44 W. R. 620.

Semble, any council by whom the committee is appointed may impose the restrictions or conditions mentioned in s. 6. *Ib.*

Exclusive Right of Fishery Officer to Prosecute.]—The Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), creates certain offences, and by s. 11: "The provisions of this Act . . . . shall be enforced by sea-fishery officers," who are defined by that section:—Held, that the effect of the above words is that no one except a sea-fishery officer can prosecute for an offence against the act, and a rule calling upon justices to hear and determine a summons for an offence against the act, taken out by a private individual, was discharged. *Reg.* v. *Cubitt*, 58 L. J., M. C. 132 ; 22 Q. B. D. 622 ; 60 L. T. 638 ; 37 W. R. 492 ; 16 Cox, C. C. 618 ; 53 J. P. 470.

Appeal against Decision of Commissioners—Costs.—Upon appeal against a decision of the commissioners for English fisheries, under 28 & 29 Vict. c. 121, s. 45, which incorporates the provisions of 20 & 21 Vict. c. 43, as to the power of the superior court to give costs, the respondent on the inquiry before the commissioners contested the legality of a fishing mill-dam, and argued the case on the appeal:—Held, that the court, on quashing the order of the commissioners, had power to order the respondent to pay the appellant his costs. *Garnett* v. *Backhouse*, 9 B. & S. 306 ; 37 L. J., Q. B. 228 ; L. R. 3 Q. B. 699 ; 19 L. T. 145 ; 16 W. R. 1203.

24 & 25 Vict. c. 96, s. 24—Destroying Fish.] — See *Caygill* v. *Thwaite*, infra, 3. *Private Fisheries*, col. 103.

Water Bailiff—Right to search before Apprehension.]—*Jackson* v. *Stevenson*, 24 Sess. Cas. 4th ser. ; Justic. Cas. 38.

Beam Trawling—High and Low Water-Marks.]—Herring Fishery (Scotland) Act, 1889. *Whyte* v. *Thompson*, 24 Sess. Cas. 4th ser. ; Justic. Cas. 55.

Destruction of Fish—Shell-fish.]—The 3 Jac. 1, c. 12 (repealed by 24 & 25 Vict. c. 109, s. 39), which prohibited persons from "wilfully taking, destroying, or spoiling any spawn, fry, or brood, of any sea-fish in any weir or other engine or device whatsoever," seemed not to comprehend shell-fish ; and if it did, it meant a taking for destruction, and not a taking of oysters' spawn for the purpose of removing it to beds, for further growth and maturity to make it marketable. *Bridger* v. *Richardson*, 2 M. & S. 568.

Dredging for oyster-spat, in a common navigable river was illegal under 13 Ric. 2, st. 1, c. 19 (repealed by 24 & 25 Vict. c. 109, s. 39). *Maldon Corporation* v. *Woolvet*, 4 P. & D. 26 ; 12 A. & E. 13 ; 9 L. J., Q. B. 370.

3. Private Fisheries.

a. Origin and Existence.

Ownership of Soil.]—An owner of a several fishery is primâ facie the owner of the soil. *Partheriche* v. *Mason*, 2 Chit. 658. S. P., *Anon.*, Lofft, 364. And see *Seymour* v. *Courtenay*, infra.

Grant of fishery held to pass the soil. *Scratton* v. *Bond*, 4 B. & C. 485 ; or an interest in the soil, so that the fishery is rateable to the poor. *Rex* v. *Ellis*, 1 M. & S. 652.

Semble, that an owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be the owner of the soil. *Somerset (Duke)* v. *Fogwell*, 5 B. & C. 875 ; 8 D. & R. 747 ; 5 L. J. (O.S.) K. B. 49 ; 29 R. R. 449.

To an action for fishing in the plaintiff's fishery the defendant pleaded that the locus in quo was the soil and freehold of S., and that he ought to have a common fishery there:—Held, that such plea was bad, as a common fishery might be applicable to the sea, and extends to all mankind, and that a common fishery implied a right of enjoyment with certain other persons. *Bennett* v. *Coster*, 8 Taunt. 183 ; 2 Moore, 83 ; 19 R. R. 491. And see *S. C.*, 1 Br. & B. 465 ; 4 Moore, 110.

It should have been a right of common of fishery. *Ib.*

A lord of a manor by deed granted and enfeoffed to M. part of his fishery, to hold to M., his heirs and assigns, at a yearly free or quit rent. On the deed, livery of seisin was indorsed:—Held, that M. was entitled to maintain an action against a wrongdoer for the erection of a pier on the soil of the part of the fishery so granted. *Ib.*

And see tit. Sea and Seashore.

—— **Allegation of Several Fishery.**] — An allegation of a several fishery, primâ facie, imports ownership of the soil, and the plaintiff can maintain trespass against the landowner erecting a jetty in the lake. *Marshall* v. *Ulleswater Steam Navigation Co.*, 3 B. & S. 732 ; 32 L. J., Q. B. 139 ; 9 Jur. (N.S.) 988 ; 8 L. T. 416 ; 11 W. R. 489.

—— **Mill-pond of a Manor.**]—In an action by the lord of the manor against the owner of an ancient mill, for breaking and entering the mill-pond (by fishing and taking fish), the pond having originally been a portion of the ancient waste of the manor, the mill being copyhold of the manor, and passing, with a house, by the words "mill, messuage, with appurtenances," and an inclosure act making no mention of the pond, and there being contradictory evidence of acts of ownership:—Held, that, primâ facie, if the pond was parcel of the ancient waste at the time of the act, the soil still continued to be in the lord, but that he could not recover unless he had exclusive right to the fishing, as well as to the soil, and the jury finding that the soil was in him, but that the millowner had a right of fishing, the verdict was entered for the plaintiff, on the pleas of not guilty and not possessed, but for the defendant on a plea justifying under a prescriptive right of fishing. *Clarke* v. *Mercer*, 1 F. & F. 492.

Customary Rights—Validity.]—There can be no valid custom for the inhabitants of a parish to angle for, catch and carry away fish in a private fishery. *Bland* v. *Lipscombe*, 4 El. & Bl. 713, n. ; 3 C. L. R. 261 ; 24 L. J., Q. B. 155, n. ; 1 Jur. (N.S.) 707, n. ; 3 W. R. 57. S. P., *Lloyd* v. *Jones*, 6 C. B. 81 ; 17 L. J., C. P. 206.

—— **Commoners.**]—A custom for the commoners, copyholders, and ancient freeholders of a manor and their tenants, and the dwellers in the parish and manor to have common of fishery over the lord's waters on the waste of the manor,

and to take and to carry away fish as a profit à prendre, is unreasonable and bad. *Allgood* v. *Gibson*, 34 L. T. 883 ; 25 W. R. 60.

Freeholder's Right—Custom of Manor.]—P., as servant of a freeholder, who held a conveyance of the manor and the right of fishery, cut the nets of a copyholder while fishing. P., on being summoned for assault, produced the conveyance, but no evidence was given of the freeholder ever having exercised the right, while evidence was given that all copyholders had the right to fish, and had exercised it for 50 years :—Held, that the justices were right in convicting P., and in overruling the claim of right set up by him in the name of his master. *Priest* v. *Archer*, 51 J. P. 725.

Under Canal Company's Acts.[—In an action for fishing on the reservoir of a canal, the defendant justified as claiming title under the lord of a manor, who claimed under the act of parliament of the company, by which lords of manors through which the canal was cut and reservoir made should be entitled to the right of fishery, and of so much as should be made in, over or through the common or waste lands within their manors, and over or through any other lands or grounds in the waters whereof such lords had the right of fishery. The ownership of the part of the land taken by the company for the reservoir, was not in the lord :—Held, that the true construction of the act was to give lords of manors there referred to the right of fishery only where the ownership of the soil was in them, where there was then no water, fish, or fishery, and to continue it in the lords where there were already water and fish, and the fishery was in the lord. *Grand Union Canal Co.* v. *Ashby*, 6 H. & N. 394 ; 30 L. J., Ex. 203 ; 3 L. T. 673.

The defendant also claimed, under their act of parliament, the right of fishery, as owner of the land through or adjoining which the reservoir was made :—Held, that such owners were limited to fishing in the canal and collateral cut, omitting reservoirs. *Ib.*

A canal act provided that it should be lawful for the owners of the lands on which any reservoir should be made, to let all the water out of such reservoir once in seven years, for the purpose of taking the fish therein :—Held, that each owner had separate interests and a several right of fishery in the water which covered his own land, and that all were not tenants in common of such fishery. *Snape* v. *Dobbs*, 8 Moore, 23 ; 1 Bing. 202 ; 1 L. J. (o.s.) C. P. 58 ; 25 R. R. 616.

Right of Public—Navigable Non-tidal River.]—The public cannot by prescription or otherwise obtain a legal right to fish in a non-tidal river, even though it be navigable. *Smith* v. *Andrews*, [1891] 2 Ch. 678 ; 65 L. T. 175.

Evidence of Ownership.]—S. was charged with unlawfully fishing in a river contrary to 24 & 25 Vict. c. 96, s. 24. The prosecutor produced a lease of the lands executed by the preceding owner, and proved execution by the lessee, but the witness of the lessor's signature was not called. The lease contained an express reservation of fishing and the term was still current. Both the original lessor and lessee were dead, but rent had been received and paid under the lease for seven years :—Held, that there was sufficient evidence of a private right of fishing without producing the probate of the original lessor's will, and that the justices ought to convict. *Greenbank* v. *Sanderson*, 49 J. P. 40.

—— **Tidal River—Norfolk Broad.**]—B. was charged under 24 & 25 Vict. c. 96, s. 24, with unlawfully taking fish in a private fishery. The water was part of a Norfolk broad or lake, 35 miles from the sea. The evidence showed that the tide did not reach the spot, though occasionally the fresh water was backed up so as to rise three or four inches when there was a high tide. Anglers had occasionally been turned off if no consent of the adjoining owners had been obtained by them :—Held, that there was sufficient evidence to support the finding of justices, that there was not a tidal navigable river where the public had a right to fish, but was a private fishery ; and the conviction was held right. *Blower* v. *Ellis*, 50 J. P. 326.

—— **Fishery appurtenant to Manor—Licences to Fish.**]—To prove a prescriptive right of fishery appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, in consideration of rents, to fish, are evidence, without proof of payment of the rents, if such rents have since been paid, or if the lords have exercised other acts of ownership. *Rogers* v. *Allen*, 1 Camp. 309.

—— **Grant from Crown—Surrender—User.**]—From the finding of an inquisition in 1540 there was clear evidence of the existence at and prior to that date of a several fishery in tidal waters, which had been surrendered to the crown. By subsequent instruments of title this several fishery was identified with that claimed by the plaintiff, who proved documentary title thereto. The evidence satisfied the court that a several fishery was in fact held and enjoyed in accordance with the documentary title :—Held, that the plaintiff had established his right to the several fishery claimed. *Tighe* v. *Sinnott*, [1897] 1 Ir. R. 140.

Prior to a grant in fee to T., a tenant in tail (one of the predecessors in title of the plaintiff), an inquisition was held in 1607. The jurors found inter alia that T. was entitled to a several fishery (describing it by metes and bounds), and found that the commons of J. were in the habit of fishing there :—Held, that the two findings must be taken together, and that as there was no allusion to any title existing in the commons of J. to fish in the several fishery found to exist, the latter finding must be looked on as a statement of fact, to be taken in connection with other circumstances in the case. Held also, that the several fishery found to exist in 1607 was not at that time subject to any rights, either of the public or of any specified or defined portion of the public, and that therefore the principle of *Goodman* v. *Saltash* (7 App. Cas. 633) was inapplicable. *Ib.*

—— **User by Public Rate Books.**]—In an action for trespass on a several fishery evidence of fishing by the public as of right was admitted in derogation of the plaintiff's title. Entries of the names of tenants in parish rate-books were admitted in proof of ownership of the fishery by the lessors, the plaintiff's predecessors in title. *Smith* v. *Andrews*, supra.

Lost Grant presumed Evidence of User.]—

Evidence of adverse user for sixty years of part of the plaintiff's fishery held to justify jury in presuming a grant to the defendant. *Little* v. *Wingfield*, 8 Ir. C. L. R. 279; 11 Ir. C. L. R. 63.

The plaintiff in support of a claim to a several fishery in the sea proved an adventurer's certificate of 1666, finding R. entitled to a salmon fishery and the lands of C. Acts of ownership over the fishery by A. and his grantee (between whom and R. no connection was shown), were proved, between 1668 and 1701. No such act was proved from 1701 to 1798; but from 1798 to 1857 there was proof of undisturbed user by the O'Neills from whom the plaintiff derived title. The O'Neill family were proved to have been entitled under A. to the C. lands from 1741 to 1857:—Held, that a several fishery in the plaintiff was rightly found. *O'Neill* v. *Allen*, 9 Ir. C. L. Rep. 152.

Weir—Obstructing River—Ancient Grant.]—A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the crown before the reign of Edward I. Such a grant may be inferred from evidence of its existence before that time. *Williams* v. *Wilcox*, 8 A. & E. 314; 3 N. & P. 606; 7 L. J., Q. B. 229.

Fishery in Gross—Crown Grant of Adjoining Lands.]—A grant by the crown of adjoining land with general words of fisheries does not pass an ancient several fishery in gross belonging to the crown. *Royal Piscerie of the Bawne*, Davys, 55.

Several Fishery — Oysters Reserved to Grantor.]—There may be a several fishery though oysters and fish for the grantor's table be reserved to the grantor. *Seymour* (*Lord*) v. *Courtenay* (*Lord*), 5 Burr. 2814.

Quære. Whether one can have a several fishery without ownership of the soil.

—— Right of Crown to Create.]—See *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593; 9 Jur. (N.S.) 1135; 9 L. T. 93; 12 W. R. 178.

Ireland—Landed Estates Court—Declaration of Title.]—Upon a petition filed in the landed estates court for a declaration of title to a several fishery:—Held, that, under the circumstances, the petitioner ought to have taken proceedings in a common law court to have the nature of the fishery ascertained, and its limit defined before coming to the landed estates court. *Acheson's Estate, In re*, Ir. R. 3 Eq. 107.

b. Nature of Right.

See also 4. *Salmon Fishery*, infra.

Creation of.]—Where a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted to him (as must be presumed) before Magna Charta, by the description of separatum piscarium, that is an incorporeal and not a territorial hereditament, and a term of years in it cannot be created without deed. *Somerset* (*Duke*) v. *Fogwell*, 5 B. & C. 875; 8 D. & R. 747; 5 L. J. (O.S.) K. B. 49; 29 R. R. 449.

The right of fishing, being an incorporeal hereditament, cannot be the subject of an exception in a deed or a lease. *Corker* v. *Payne*, Ir. R. 4 C. L. 380; 18 W. R. 436.

Use and Occupation.]—By agreement in writing, the plaintiff let to the defendant, at a yearly rent, the right of fishing in a certain river with rod and line only. The defendant having so used the fishery:—Held, that the plaintiff might recover the rent, under a count, for the use and occupation of the fishery, and that there was no objection to the particulars so describing his claim. *Holford* v. *Pritchard*, 3 Ex. 793; 18 L. J., Ex. 315.

In Respect of what Lands.]—In an action of trespass to a several fishery and to a free fishery, pleas of justification alleged prescriptive rights in the defendant (1) to a free fishery, (2) a common fishery, (3) to angle and fish with rod and line in the locus in quo, as appurtenant to lands of the defendant, which the pleas did not allege to be adjacent to the locus in quo; and, in other pleas of justification, grants in fee of a right to enter and fish in the locus in quo were alleged to have been made by a former owner in fee of the fisheries in the summons and plaint mentioned, to a former owner in a fee to certain lands, "whose estate therein," it was averred, "the defendant had" at the times of the alleged trespasses, without describing the situation of the lands, or deducing the defendant's title from the original grantee:—Held, first, that the absence of averments, showing proximity between the locus in quo and the lands in respect of which the alleged rights were claimed, was not a valid ground of demurrer; and that a sufficient appropriateness of position would, if necessary, be presumed. *Acheson* v. *Henry*, Ir. R. 7 C. L. 486.

Held, secondly, that the transmission of the rights conferred by the alleged grants to the defendant, as owner in fee of the lands, was sufficiently stated. *Ib.*

Construction of Patent for the Judge.]—The words "libera piscaria" in a patent do not mean an exclusive fishery, and are not to be so construed by a judge; and he ought not to leave it to the jury to say whether, from the acts and usage of the grantees, a several fishery was intended to pass. *Johnston* v. *Bloomfield*, Ir. R. 8 C. L. 68—Ex. Ch.

Right not Exclusive.]—The grant by the owner of the soil covered with water to another of a free fishery over the soil of the grantor is, as matter of construction, and especially in the case of the crown, the grant of a fishery not exclusive; and evidence cannot be received to show that it was intended to exclude the grantor. *Ib.*

Right of Public—Inland Waters.]—The public have not of common right, a common fishery in inland, non-tidal, navigable waters. *Ib.*

Easement—Profits à prendre.]—The 2 & 3 Will. 4, c. 71, does not apply to easements or profits à prendre in gross, e.g. to a claim of a free fishery in the waters of another. *Shuttleworth* v. *Le Fleming*, 19 C. B. (N.S.) 687; 34 L. J., C. P. 309; 11 Jur. (N.S.) 840; 14 W. R. 13.

Grant—Reservation in.]—A. being seised of a mill, and having a sole fishery in the waters, granted the mill, with all waters, streams, &c. necessary in working the same, "except and always reserving the right and privilege of fishing in the waters of the mill":—Held, that this was an exception of the sole fishery, and not a

reservation of a new easement. *Paget* (*Lord*) v. *Milles*, 3 Dougl. 43.

Right of—Norfolk Broads—Public Right of Way — Tidal Waters.] — A landowner who claimed to be owner of part of one of the Norfolk broads, brought an action for an injunction to restrain a person, claiming (inter alia) as one of the public, from shooting or fishing over the plaintiff's part of the broad, and from boating over such part, except within certain limits comprising what was called "the channel." The plaintiff claimed to be owner under an award made in 1808 by commissioners under a local inclosure act of 1801, and which award purported to allot the part of the broad so claimed to one of his predecessors in title. The defendant impeached the validity of the award, and challenged the claim to ownership on various grounds alleging (inter alia) that the broad was a tidal water, and therefore crown property, and open to the public for all purposes:—Held, upon the evidence, that the broad was not tidal, that the defendant's other contentions against the plaintiff's claim to the ownership and exclusive right of shooting and fishing failed, and that an injunction must be granted accordingly; but that the plaintiff had not made out his claim to restrict the public right of way and boating to the so-called "channel." *Micklethwait* v. *Vincent*, 67 L. T. 225.

Inland Non-tidal Lake—Right of Riparian Owners.]—The plaintiffs were the respective owners of the several lands adjoining and surrounding Lough Conn, in the county of Mayo (with the exception of a small portion of such lands), and of the islands in the lake. The defendants held portions of one of the islands as judicial tenants to one of the plaintiffs. The lake is a freshwater lake, some eight miles in length, and varying in breadth from one to four miles. Its waters discharge into a smaller lake known as Lough Cullen, and flow thence by the river Moy to the sea, the tide of which does not rise beyond a point some fifteen miles from Lough Cullen. For many years the public had, without interruption from the plaintiffs, fished the lake with rod and line, but in recent years the practice of fishing with cross-lines had been begun or become general. This mode of fishing, which is carried on by means of a long line with a large number of hooks attached, stretched between two boats, is very destructive to fish. The defendants obtained cross-line licences, and fished all parts of the lake. The plaintiffs cautioned them against so doing, but the defendants continued the practice. The plaintiffs brought an action to restrain the defendants from using such cross-lines. The defendants pleaded that the lake was a public navigable lake, in which every subject of the realm had the right of fishing. They gave some evidence that cross-lines had been used upon the lake for over twenty years:—Held, that the plaintiffs were entitled to an injunction to restrain the defendants from using such cross-lines. *Pery* v. *Thornton*, 23 L. R., Ir. 402.

Copyholder's Right to Fish—Right of Way to reach Fishery—Prescription.]—See *Tilbury* v. *Silva*, 45 Ch. D. 98; 63 L. T. 141.

Grant of Exclusive Right of Fishing—Pollution of Stream—Profit à prendre.]—The grant by deed of an "exclusive right of fishing" with rod and line in a non-navigable river implies a right to take away the fish when caught, and is not a mere licence, but confers a profit à prendre. The grantees under such a deed have a right of action for an injunction and damages against a person who by discharging water polluted with sand, mud, and gravel into the river has driven away the fish and injured the spawning beds. *Fitzgerald* v. *Firbank*, 66 L. J., Ch. 529; [1897] 2 Ch. 96; 76 L. T. 584—C. A.

Custom for Inhabitants of Parish to Fish.]—See *Lloyd* v. *Jones*, and cases, supra, col. 92.

Right of landing Nets—Grant presumed to Lessees of Fishery.]—Where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had often dressed and improved the landing-place (which with the fishery originally belonged to the same person, but there being no evidence that he or those who under him owned the shore at A. knew of the landing of nets):—Held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery by some former owner of A. *Gray* v. *Bond*, 2 Br. & B. 667; Moore, 527.

c. Rights, how Affected.

Grant of Land.]—A fee-farm grant by the ecclesiastical commissioners under 3 & 4 Will. 4, c. 37 (Ir.) of lands bounded by a river, does not affect the right of a third person to a several fishery in the river under a bishop's lease then existing and subsequently converted into a perpetuity. *Hamilton* v. *Musgrove*, Ir. R. 6 C. L. 129; 19 W. R. 443.

Change of Channel.]—The several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course and flow through a new channel to the sea, where the soil and the land on both sides of the new channel belong to another subject, is not transferred from the old to the new channel. *Carlisle Corporation* v. *Graham*, 38 L. J., Ex. 226; L. R. 4 Ex. 361; 21 L. T. 133; 18 W. R. 318.

The plaintiff and defendant, and their respective predecessors in title, had respectively exercised the exclusive right of fishing in an estuary, each to the middle thread of a river flowing through it. No grant from the crown of the fisheries was proved, but it was the common case of both parties that the right of fishing in the entire estuary was vested in them, to the exclusion of the public. The river changed its course and formed a new channel, still passing through the estuary:—Held, per Ball, C., and Deasey, L.J., May, C.J., diss., that the local limit of each fishery was the middle of the new channel of the river, and not a landmark corresponding to what had been the medium filum aquæ of its former course. *Miller* v. *Little*, 4 L. R., Ir. 302—C. A.

—— **When Gradual.**]—The plaintiff, lord of the manor, claimed the exclusive right to fish in part of a river which was formerly locally situate within the manor, but which by gradual alteration of its course now flowed over land of the defendant. The manor had been granted by the crown to the predecessors in title of the plaintiff with the right of fishery in all its waters

afterwards certain lands of the manor were enfranchised and now became vested in the defendant. At the time of the enfranchisement the river flowed wholly within the manor, but since then its course had gradually changed, approaching nearer and nearer to the defendant's land, until some portion of that land became part of the river bed. This part could be identified. The changing of the river course and consequent shifting of the bed was so gradual as not to be perceptible from day to day, but only by comparing its position of recent years with its position many years before :—Held, that the plaintiff had an exclusive right of fishery which extended over that part of the river flowing over the defendant's land. *Foster* v. *Wright*, 49 L. J., C. P. 97 ; 4 C. P. D. 438 ; 44 J. P. 7.

New Channel made.]—By letters patent of Jac. I and Car. 2, the crown granted a several fishery within certain limits in the river Bann, in Ireland. A channel, called the New Cut, divides the river within the limits of the fishery into two branches. It was found by a verdict on an issue directed by the court, that the New Cut is now part of the river Bann, but that there was no evidence to show whether it existed at the time of the grant, or whether it was a natural or an artificial channel :—Held, that the letters-patent did not give the right to a several fishery in the New Cut, unless it was a branch of the river Bann at the time of the grant. *O'Neill* v. *M'Eilaine*, 16 Ir. Ch. R. 280.

See also *George* v. *Carpenter*, infra, col. 105 ; *Zetland* (*Earl*) v. *Glover Incorporation*, infra, col. 106.

d. Actions for Interference with.

In Tidal River.]—The plaintiff, who was licensed to fish in the upper waters of a tidal river, held entitled to maintain an action against a person (not the owner of a several fishery) who, by unlawfully fishing in the lower waters of the river, within the prohibited limits of the mouth, as defined by the fishery commissioners, caused damage to the plaintiff in the exercise of his right to fish. *Whelan* v. *Hewson*, Ir. R. 6 C. L. 283.

Arm of the Sea—Pleading.]—To an action for trespass to a several fishery the defendant pleaded that the locus in quo was an arm of the sea, wherein all had a right to fish. The plaintiff joined issue :—Held, that the defendant was entitled to a verdict if it appeared that the locus in quo was in fact an arm of the sea ; and that if the plaintiff, admitting that the locus in quo was an arm of the sea, still claimed a several fishery, then he was bound to set up the claim in a replication. *Critchton* v. *Collery*, 19 W. R. 107.

Sea Fishing—Special Custom.]—The plaintiff, while fishing for pilchards, had nearly encompassed the fish with a net ; but the defendant, by rowing his boat to the opening, disturbed the fish and prevented the capture. The plaintiff brought trespass, and issues being joined on the plaintiff's possession of the fish, and on the fish being his :—Held, that he was not entitled to recover ; no special custom of the fishery being proved. *Young* v. *Hitchins*, D. & M. 592 ; 6 Q. B. 606.

In Inland Waters.]—In trespass to a several fishery in a large inland non-tidal lake at a place called Fenmore, the issue was, whether the fishery was the several fishery of the plaintiff ; the plaintiff gave evidence by documents of his title to a several fishery in the whole lake, and parol evidence of acts of ownership in portions of the lake, but not at Fenmore ; and the judge having, contrary to the requisition of the counsel of the defendant, directed a verdict for the plaintiff :—Held, that it ought to have been submitted to the jury to say, whether the plaintiff had a several fishery at Fenmore. *Bristow* v. *Cormican*, 3 App. Cas. 641—H. L.

Injunction.]—Where parties have established a right to a several fishery in part of a tidal river, the court of chancery will grant an injunction to restrain a party from inclosing the bed of the river (the effect of such inclosure being to destroy the fishery) without necessarily deciding or entering upon the question as to the ownership of the soil. *Bridges* v. *Highton*, 11 L. T. 653.

By letters patent of Charles II., the fishery of the river of Galway, from Lough Carrib to the sea, was granted to B., under whom A. claimed. The title of the crown and its grantees to the fishery was deduced from the reign of John ; and acts of ownership, and convictions of persons who had trespassed on the fishery, were given in evidence. The title of A. had been established by the verdict of a jury in a prohibition suit at law, to which some of the respondents were parties. The respondents admitted the right to a fishery in a part of the river, but contended that in other parts they and the public, from time immemorial, had exercised a right of angling ; and they proved that for many years persons had been in the habit of angling in all parts of the river. The court granted a perpetual injunction to restrain the respondents from fishing, without directing an issue or an action. *Ashworth* v. *Browne*, 10 Ir. Ch. R. 421.

—— **Pollution.**]—Injunction granted to restrain a board of health from discharging a sewer into a river where there was a several fishery. *Oldaker* v. *Hunt*, 6 De G. M. & G. 376 ; 1 Jur. (N.S.) 785 ; 3 Eq. R. 671 ; 3 W. R. 297.

Breaking and Entering Fishery on another's Land.]—Action for breaking and entering a fishery, to wit, the sole and exclusive fishery of the plaintiff, in a certain part of a river, flowing and being over the soil of F., and fishing for fish in the fishery of the plaintiff, and the fish of the fishery of the plaintiff there found, and being in the fishery, chasing and disturbing :—Held, first, that trespass lies for breaking and entering the several fishery of A. on the soil of B., and disturbing the fish. *Holford* v. *Bailey*, 13 Q. B. 426 ; 18 L. J., Q. B. 109 ; 13 Jur. 278—Ex. Ch.

Held, secondly, that the words "sole and exclusive fishery" were equivalent to several fishery. *Ib.*

Damage to Upper Fishery by Owner of Lower Fishery.]—A., the owner of a sole and several fishery in the upper part of a river brought an action against B., the owner of a sole and several fishery in the lower part of the river for keeping certain buildings across the river which prevented fish from coming into A.'s fishery. It was held that A. had a good cause of action. *Hamilton* v. *Donegal* (*Marquis*), 3 Ridgw., 311.

Bond not to Trespass on Fishery—Forfeiture—Relief.]—Bill was for relief against judgment on bond, in which plaintiff was jointly bound with his son in the penalty of 100*l.*, that the son should not commit trespass in the Duke of Beaufort's royalty, by shooting, hunting, fishing, &c., except with the licence of the gamekeeper, or in company with a qualified person. The son having caught two flounders with an angling rod, the bond was put in suit, and judgment for the penalty. The gamekeeper's brother-in-law, and another servant of the duke's, asked the plaintiff's son to angle with them, when he caught the two flounders, and the verdict was found merely on their evidence:—Decreed, that plaintiff should be relieved against the verdict, and that the duke should refund the 100*l.* recovered on the bond, and the 40*l.* damages. *Roy* v. *Beaufort* (*Duke*), 2 Atk. 190.

Bill to Quiet Possession—Right at Law not Established.]—Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it may bring a bill to be quieted in the possession, though he has not established his right at law; and it is no objection on demurrer to such bill, that the defendants have distinct rights, for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights. *York Corporation* v. *Pilkington*, 1 Atk. 282; 9 Mod. 273.

Demurrer—Bill to Establish Right.]—Demurrer to bill to establish a right to an oyster fishery, being a matter suable at law, allowed; the dispute, between only the lords of manors. *Tenham* (*Lord*) v. *Herbert*, 2 Atk. 483.

—— **Bill for Injunction.**]—Demurrer to a bill for an injunction to restrain injury to fishponds overruled. *Bathurst* v. *Burden*, 2 Bro. C. C. 64.

Trespass — Free Fishery.] — Trespass lies against the owner of the soil for fishing in liberâ piscariâ and taking fish. *Smith* v. *Kemp*, 2 Salk. 637; Carth. 285; Comb. 11, 433, 464; 4 Mod. 186.

Trespass for taking fish in liberâ piscariâ is not good, though after verdict. *Upton* v. *Dawkins*, 3 Mod. 97.

The owner of a several fishery hath a priviledged property in the fish therein. *Child* v. *Greenhill*, Cro. Car. 553.

And see next sub-head.

e. Prosecutions.

Trespass—Question of Title—Jurisdiction of Justices.]—Upon hearing of an information against a defendant for fishing in the prosecutor's fishery, the latter proved the purchase by him from the crown of a manor, with the fishery appurtenant thereto, and that previously to the purchase the crown had from time to time granted leases of the right of fishing. For the defendant, it was shown that the locus in quo was a navigable river, subject to the ebb and flow of the tide, and witnesses were called, who proved that for forty years they had exercised, without molestation, the right of fishing there:—Held, that the question of title fairly arose, and that the jurisdiction of the justices to determine the case was at an end. *Reg.* v. *Stimpson*, 4 B. & S. 307; 32 L. J., M. C. 208; 10 Jur. (N.S.) 41; 8 L. T. 536; 9 Cox, C. C. 356.

In answer to an information before two justices, under 24 & 25 Vict. c. 96, s. 24, for unlawfully and wilfully attempting to take fish in water where another person had a private right of fishery, by angling at an hour not between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, the accused justified under a supposed right on the part of the public to fish in that water:—Concessum: that such a right of fishing by the public in a non-navigable river could not exist in law. Held, that the accused justifying himself under the bonâ fide, though mistaken notion, of such a right did not make such a claim of right as ousted the jurisdiction of the justices. *Hudson* v. *M'Rae*, 4 B. & S. 585; 33 L. J., M. C. 65; 9 L. T. 678; 12 W. R. 80.

Held, also, that it was no defence that the accused having acted without criminal intent, there was no mens rea. *Ib.*

Upon an information for attempting to take, otherwise than by angling, fish in part of a navigable tidal river, where the complainant had a private right of fishery, the appellant called a witness who said that during 1846 or 1847 he had fished with the appellant in the place in question, and had assisted him to fish there several times during the four years succeeding, and had seen him fish there once about eight or ten years ago. The appellant was aware that the lessees of the prosecutor had the exclusive occupation of the fishery for six years previous. The justices were of opinion that the appellant had not shown a bonâ fide claim of right so as to oust their jurisdiction, and convicted him:—Held, first, that 24 & 25 Vict. c. 96, s. 24, applied to a navigable tidal river in which there was a private right of fishery. *Paley* v. *Birch*, 8 B. & S. 336; 16 L. T. 410.

Held, secondly, that the justices were justified in finding that the appellant had not shown a bonâ fide claim of right so as to oust their jurisdiction. *Ib.*

Where justices convicted a party of unlawfully taking fish in a private fishery, the court refused to issue a prohibition against their proceeding to enforce it, on the ground that the defendant claimed a right of fishing before the justices; and they refused to require the informant to produce his title-deeds. *Higgins*, *Ex parte*, 10 Jur. 838.

—— **Arrest—Action for—Protection.**]—The servants of P. apprehended the plaintiff while fishing in the night-time, near the mouth of the river Ogwen, in Carnarvonshire, in which river P. had a several fishery. In an action for this arrest they gave much evidence, to show that P.'s fishery included the place where the plaintiff was apprehended. The jury, however, defined the limits of the fishery so as to exclude that place by a few yards, but they also found that P. and his servants reasonably believed that it included that place:—Held, that they were entitled to the protection of 7 & 8 Geo. 4, c. 29, ss. 35, 36. *Hughes* v. *Buckland*, 15 M. & W. 346; 3 D. & L. 702; 15 L. J., Ex. 233; 10 Jur. 884.

A defendant formed an oyster-bed in a part of the Menai Straits where persons had been accustomed to dredge for oysters. The plaintiff bought of a dredger a quantity of oysters, when the defendant, having been informed that the

oysters were taken from his bed, gave the plaintiff into custody on a charge of having in his possession stolen oysters. The plaintiff having been discharged, brought an action for false imprisonment, when the defendant relied on 7 & 8 Geo. 4, c. 29, s. 36; and, in order to show that he acted bonâ fide, and under the belief that the oysters were stolen, he tendered in evidence the record of the conviction of a person who had shortly before been tried for taking oysters from the same bed of the defendant:—Held, that the record, merely as such, was inadmissible. *Thomas* v. *Russell*, 9 Ex. 764; 2 C. L. R. 542; 23 L. J., Ex. 233; 2 W. R. 418.

—— **"Catching" Fish during Close Season—Angling by Leave of Owner.**]—By the Freshwater Fisheries Act, 1878, s. 11, any person who, during the close season fixed by the act, fishes for, catches, or attempts to catch or kill any freshwater fish is liable to summary conviction. By the same section, its provisions shall not apply "to any person angling in any several fishery with the leave of the owner of such fishery." The respondent was seen fishing in a several fishery, and on his being searched fish were found upon him:—Held, that in the absence of any explanation on his part, there was evidence upon which he might be convicted of "catching" fish. *Swanwick* v. *Varney*, 45 L. T. 716; 30 W. R. 79; 46 J. P. 613.

The respondent was fishing with the leave of the "occupier" of the land by the water-side:—Held, that he was not within the exemption in s. 11, inasmuch as the "occupier" was not necessarily the "owner." *Ib.*

Crayfish—Unlawful Fishing.]—By 24 & 25 Vict. c. 96, s. 24, whosoever shall unlawfully take or destroy, or attempt to take or destroy, "any fish" in any private fishery is liable on conviction to a penalty. The respondent took, or attempted to take, "crayfish" in a private fishery:—Held, that he had been guilty of an offence under this section. *Caygill* v. *Thwaite*, 33 W. R. 581; 49 J. P. 614.

Indictment — Taking and Carrying away Fish.] — An indictment lies for fishing in another's private ponds and taking and carrying away carps. *Reg.* v. *Steer*, 6 Mod. 183.

4. Salmon Fishery.

a. Districts.

Formation of.]—Where justices at quarter sessions, under 28 & 29 Vict. c. 121, ss. 3, 4, 5, make application to a secretary of state for the formation into a fishery district of salmon rivers lying wholly or partly in their county, the secretary of state is not bound to adopt the boundaries as proposed by the justices, but may vary them, as he may be advised, and make his certificate accordingly. *Reg.* v. *Grey*, 6 B. & S. 65; 35 L. J., M. C. 198; L. R. 1 Q. B. 469; 12 Jur. (N.S.) 685; 14 L. T. 477; 14 W. R. 671.

Definition of—Certificate of Secretary of State—Tributary.]—The Severn fishery district was defined by the certificate of the secretary of state as "so much of the river Severn and of the rivers Vyrnwy and Teme, and of all other tributaries of the said river Severn," &c. The rivers Vyrnwy and Teme both flow directly into the Severn. On an information charging the respondents with taking trout within the district without a licence, it appeared that the offence charged was committed in a tributary of a tributary of the river Teme:—Held, that the words "all other tributaries" mean all others of the same nature as the Vyrnwy and Teme, i.e. those which flow directly into the Severn and do not extend to the tributaries of those rivers. *Merricks* v. *Cadwallader*, 51 L. J., M. C. 20; 46 L. T. 29; 46 J. P. 216.

By 28 & 29 Vict. c. 121, the limits of a river shall be defined, and a fishery district shall be formed, for the purpose of the Salmon Fishery Acts, by a secretary of state's certificate describing the limits of the river and district, and by s. 3, "river" shall include "such portion of any stream with its tributaries" as may be declared in the certificate. Prior to 1845 the Whittle Burn in the county of Northumberland was a tributary of the Tyne. In 1845 a water company, under powers given by local acts, constructed works for the supply of water to a neighbouring town, by placing a dam across the stream of the Whittle Burn, and forming a series of reservoirs; the water being taken by underground pipes from the stream into the highest reservoir, and from thence to the others. All water not required for the reservoirs was allowed to pass down a watercourse running outside the reservoirs into the ancient watercourse of the burn, down which it flowed into the Tyne. Sometimes all the water coming down the Whittle Burn was taken into, and impounded in, the reservoirs, and none flowed into the Tyne. At other times all the water flowed into the Tyne without having entered the reservoirs. There were outlets with sluices from the reservoirs by which surplus water flowed into the Tyne down watercourses also running into the ancient watercourse of the burn. In 1866, the fishery district of the river Tyne was formed and the secretary of state's certificate defined the limits as "so much of the river Tyne with its tributaries" as was situate (inter alia) in the county of Northumberland:—Held, that the reservoirs were not tributaries of the Tyne within the meaning of the certificate. *Harbottle* v. *Terry*, 52 L. J., M. C. 31; 10 Q. B. D. 131; 48 L. T. 219; 31 W. R. 289; 47 J. P. 186. S. P., *Hall* v. *Reid*, 10 Q. B. D. 134, n.; 48 L. T. 221, n.

Jurisdiction of Justices.]—Upon an information on 7 & 8 Will. 4, c. 29, s. 34, which charged B. with having fished for salmon in certain waters in which A. had a private right of fishery, it appeared that the place where the offence was committed was part of the sea shore between high and low water mark, and at the time the offence was committed was covered with the sea:—Held, that the justices had jurisdiction to convict. *Embleton* v. *Brown*, 3 El. & El. 234; 30 L. J., M. C. 1; 6 Jur. (N.S.) 1298.

—— **Interest in Subject-Matter.**]—A. was convicted of an offence under the 24 & 25 Vict. c. 109, by three justices, of whom one was a riparian proprietor, another a leading member of the committee of an association formed for the preservation of salmon in the river in question, by whose direction the proceedings were instituted, and all three were members of the association:—Held, that the justices were incompetent to convict, being interested in the subject-matter of the information. *Reg.* v. *Allen*,

6 B. & S. 915; 33 L. J., M. C. 98; 10 Jur. (N.S.) 796; 9 L. T. 761; 12 W. R. 422.

Fishery District — Limits — River — "Tributary" — Reservoir formed by Embankment across Tributary.]—The river Severn fishery district included that river and all its tributaries. Under the provisions of the Liverpool Corporation Waterworks Act, 1880, an embankment was constructed across the river Vyrnwy, a tributary of the river Severn, and a reservoir was formed for the purpose of supplying water to the town of Liverpool. The act provided for a daily and monthly supply of "compensation" water from the reservoir into the part of the river Vyrnwy below the embankment:—Held, that so much of the river Vyrnwy as was above the embankment had ceased to be a tributary to the river Severn, and therefore was not within the jurisdiction of the conservators of the Severn fishery district. *Harbottle* v. *Terry* (supra) followed. *George* v. *Carpenter*, [1893] 1 Q. B. 505; 5 R. 266; 68 L. T. 714; 41 W. R. 366; 57 J. P. 311.

b. Rights of.

In Scotland.]—The salmon fishings in the open sea around the coast of Scotland, unless parted with by grant, belong exclusively to the crown, and form part of its hereditary revenue. *Gammell* v. *Woods and Forests Commissioners*, 3 Macq. H. L. 419.

By Barony Title and Immemorial Possession.]—In 1774, the crown granted to L. a barony charter to lands almost continuous on both sides of a river in Inverness-shire; included were older baronies containing express grants of salmon fishing to parts of the river, some above and some below certain falls, also an ancient barony grant giving the fishing on the Water of Forne, which was alleged to be the old name of the whole river from its source to the sea. From time immemorial L. had exercised his possession, up to 1862, taking all the fish in the whole river by means of close cruives just below the falls, which stretched right across the river, and which were narrower than then allowed by law. Above the falls he asserted his right (a) by occasionally fishing there; (b) by, during the spawning season, having watchers; (c) by making his tenants in their leases bound to protect the fishing, and prevent all others from fishing. All which he had done for a period much longer than forty years. Since 1862, when close cruives were abolished, he had regularly fished above the falls with net and coble. Neither the crown nor any one else had ever objected to L.'s entire possession of the whole salmon fishing in the river. The crown now, while admitting L.'s right to the salmon fishing below the falls to be incontestable, claimed, de jure coronæ, all the fishing above the falls:—Held, affirming the decision of the court below, that the river here was a unum quid—one continuous and connected subject—and that L.'s entire control and enjoyment of the whole profit of the fish in the whole river, for a time far beyond the period of prescription, coupled with his titles, gave him the right to the salmon fishing within the limits and ex adverso his barony lands wherever situated. *Lord Advocate* v. *Lovat* (*Lord*), 5 App. Cas. 273.

Held, also, that this decision was without prejudice to any right of the crown or its grantees to the salmon fishing ex adverso the ancient barony lands of C., which were lands on the banks of the above-mentioned river intermixed with L.'s barony lands. *Ib.*

See Lord Blackburn's opinion as to the extent of a grant to take fish by yairs or cruives. *Ib.* at p. 311.

Several Salmon Fishery—Reversion to Crown—Merger in Prerogative.]—See *Northumberland* (*Duke*) v. *Houghton*, supra, col. 90.

Scotch Law — Shifting Channel — Enjoyment for Forty Years—Merger.]—Where independent proprietors on the opposite banks of a river have rights respectively of fishing in the stream, each is entitled to fish from the bank of each, usque ad medium filum. If a shifting island springs up in the channel so as to impede or embarrass the fishings of one of the proprietors, he must submit, and hope for a change. The law can give him no redress. But if the shifting island becomes fixedly annexed to, and incorporated with, his bank, the permanent accretion will give rise to a new medium filum. Where a base right to salmon fishing has been followed by forty years' possession and enjoyment it is unimpeachable.—Per Lord Westbury: A thing surrendered by English law, so as to produce merger, is lost and destroyed; but a thing resigned by Scotch law is not lost, but simply surrendered to the superior. *Zetland* (*Earl*) v. *Glover Incorporation*, L. R. 2 H. L. (Sc.) 70.

Title by Prescription — Mode of Fishing.]—The prescriptive forty years' enjoyment may be by net and coble, as well as by stake-net.—Per Lord Cairns: The title, being baronial, will be a habile foundation for a claim to salmon fishing if the requisite enjoyment and user be established. A title by grant cum piscationibus will suffice if supported by the requisite enjoyment and user. The principle that stake-net fishing is the ordinary and well-understood mode of salmon fishing in the sea cannot be recognised.—Per Lord Hatherley: The mode must vary from time to time as improvements are suggested. *McDonall* v. *Lord Advocate*, L. R. 2 H. L. (Sc.) 431.

—— **Recent Grant by Crown.**]—Where a piece of land on the banks of a tidal river is exchanged, the right of salmon fishing therein being expressly reserved, a grant in 1873 of that salmon fishing, though from the crown, will not deprive the prior owner of his right. *Richardson* v. *Gray*, 3 App. Cas. 1—H. L. (Sc.)

—— **Right to Fish on one or other side of River.**]—It would seem that even a primâ facie title to fish for salmon on one side of a river will give a right of challenge against fishing for salmon on the opposite side. An ambiguous right of fishing may, upon evidence of user, be construed to embrace a right of fishing for salmon; and it is a mistake to suppose that for this purpose the evidence must establish the specific user of net and coble. *Stuart* v. *McBarnet*, L. R. 1 H. L. (Sc.) 387.

Grant of Fishings — Salmon Fishings.]—Salmon fishings are inter regalia; they belong to the class of regalia which the crown may give away. A grant of "fishings," merely, is not a grant of salmon fishings, but a grant of "fishings," merely, if followed by the requisite endurance of possession, will establish a right of

salmon fishing, even against the crown; for by the positive prescription of forty years under the Act 1617, c. 12, the rights of private parties are protected against all challenge, whether regal or popular. A party claiming a right of salmon fishings must either show a grant of salmon fishings, or a grant of fishings generally, followed, for the requisite period, by the exercise of the right of salmon fishing. *Lord Advocate* v. *Sinclair*, L. R. 1 H. L. (Sc.) 174.

Royal Charter—Competing Grants—Possession—Rod Fishing.]—The appellants were the proprietors of salmon fishings derived from the town of Inverness. They produced a crown charter, dated 1591, purporting to be a renewal grant confirming to the town of Inverness "all and whole the waters of Ness, with all the salmon fishings thereof from the stone 'C.' to the sea." Admittedly this grant did not include two fishings within those limits which had existed from a very early period under different grants. The respondent was the proprietor of the land "H.," which bordered one side of the river Ness, and is situated nearly equally above and below "C." He possessed one-half of "H." under a crown charter of confirmation on resignation, dated 1566, granting "Half the lands of 'H.,' with the salmon fishings pertaining to the same, on the water of 'Ness,'" with an infeftment taken in 1706, which ran, "Half the lands of 'H.,' and half the fishings." He held the other half of "H." under a grant which contained no mention of fishings. He and his predecessors had always enjoyed without question the salmon fishings opposite that part of "H." lying above "C." There was no exact description of the two halves of "H." The appellants claimed to have the exclusive right to the fishing below "C.," as against the respondent:—Held, that there was no contradiction between the two titles, and that the appellants were entitled to the exclusive enjoyment below "C.," as against the respondent; his possession of the fishings above "C." fully satisfying his title. *Warrand* v. *Mackintosh*, 15 App. Cas. 52—H. L. (Sc.)

Several Fishery—Grant of Adjoining Land—Extinguishment of Fishery.]—See *Hamilton* v. *Musgrove*, supra, col. 98.

c. Regulation of.

Weirs and Obstructions.]—*See next head.*

Net or Fixed Engine.]—A net six yards in length, and one yard sixteen inches in depth, and stretched across a river by means of corks and lead, and fastened at one end to a large stone on the bank of the river, which keeps the net in its place, but gives way as soon as a salmon touches the net, which then rolls up, and the salmon gets entangled and dies, is not a fixed engine or net temporarily fixed to the soil, and as such illegal, under 24 & 25 Vict. c. 109, s. 11. *Thomas* v. *Jones*, 5 B. & S. 916; 34 L. J., M. C. 45; 11 Jur. (N.S.) 306; 11 L. T. 450; 13 W. R. 154.

But a net secured at one end to a pole temporarily fixed to the soil on the margin of the channels of a tidal river, one-half of the net being stretched across the channel at low water from a boat anchored to a buoy, and the fisherman in the boat waited his opportunity, then let out the rest of the net, and rowed round the pole, thus sweeping the river, is a fixed engine within 24 & 25 Vict. c. 109, s. 11, and 28 & 29 Vict. c. 121, s. 39. *Olding* v. *Wild*, 14 L. T. 402.

A claim to fish in that way, by immemorial usage, is bad. *Ib.*

—— **Fixed Nets.**]—The mere using of a net, fixed to the soil in tidal waters within the limits of a salmon fishery district, but which net is not peculiarly an instrument for catching salmon, and is not fixed for that purpose, is not an offence under 24 & 25 Vict. c. 109, s. 11. *Watts* v. *Lucas*, 40 L. J., M. C. 73; L. R. 6 Q. B. 226; 24 L. T. 128; 19 W. R. 470.

—— **Stop-net.**]—A fisherman fixed his boat athwart the current of the river by lashing it at each end to a pole driven in the bed of the river, and the net, which was thirty feet wide at the mouth, and tapered to a point, was stretched by two poles twenty-two feet long, which were tied together at the upper end, and kept extended (to the width of the net at the mouth) by a pole lashed across at about seven feet from the upper end. The net was lowered overboard until the two poles rested at about eight feet from the upper end on the side of the boat. The net and poles were thus nearly on the balance, and the fisherman pressed slightly on the upper end, and so kept the net steady at about an angle of twelve degrees; he also held a string attached to the bottom of the net, and when he felt a fish he pressed down the upper end of the poles with both hands, using the edge of the boat as a fulcrum, and so raised the net out of the water and caught the fish:—Held, that the stop-net was a fixed engine within the definitions contained in 24 & 25 Vict. c. 109, s. 11, and 28 & 29 Vict. c. 121, s. 39. *Gore* v. *English Fisheries Commissioners*, 40 L. J., Q. B. 252; L. R. 6 Q. B. 561; 24 L. T. 702; 19 W. R. 1083.

—— **Right to Take or Destroy.**]—Under 24 & 25 Vict. c. 109, s. 11, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of that section, extends to all persons, and is not limited to conservators or overseers appointed under s. 33. *Williams* v. *Blackwall*, 2 H. & C. 33; 32 L. J., Ex. 174; 9 Jur. (N.S.) 579; 8 L. T. 252; 11 W. R. 621.

—— **Forfeiture of Net.**]—By 24 & 25 Vict. c. 109, s. 21, no person shall fish for, catch, or kill by any means other than a rod and line any salmon between 12 o'clock at noon on Saturday and 6 o'clock on Monday morning; and any person acting in contravention of this section shall forfeit all fish taken by him, and any net or movable instrument used by him in taking the same. Two men fished for salmon with a net during the prohibited hours, but they did not catch any fish:—Held, that the net having been used for the purpose of taking salmon, it had become forfeited. *Rutter* v. *Harris*, 45 L. J., M. C. 103; 1 Ex. D. 97; 33 L. T. 825.

The water-bailiff of the river Thames has no right to take the nets of a person fishing in his own fishery. *Bubrook* v. *Goodere*, 3 Burr. 1768.

—— **Position changed.**]—A lord of a manor claimed to be entitled to use reasonable fixed

engines in a river in reasonable places within the manor. In support of the claim he produced certain old documents showing that there had been a fishery from the earliest times in that part of the river. He also gave evidence to show that for many years previously to 1844 fixed engines had been used in various hollows formed in the sands of the river. That at that time a wall was built to improve the navigation under an act of parliament, by which the rights of all lords of manors were expressly saved, and that through the building of the wall the bed of the river was changed, and convenient hollows for placing the engines were formed close to the wall. That previously to 1844 the engines were never placed nearer than 200 yards to the place where the wall now stands, but it did not appear whether there were then any hollows worth fishing within that distance. That since that time the fixed engines had been placed in hollows close to the wall, and had never been placed on the sites where they had been used previously to 1844. In a case stated by the commissioners for the opinion of the court whether they were bound as matter of law to find that the claimant was entitled to use the fixed engines as claimed :—Held, that it was a mixed question of fact and law whether the using the engines in places since 1844 different from those in which they had been used previously amounted to an enhancement of the engines, and that the commissioners were not, therefore, bound as matter of law to find that the claimant was so entitled. *Rawstorne* v. *Backhouse*, 37 L. J., C. P. 26 ; L. R. 3 C. P. 67 ; 17 L. T. 441 ; 16 W. R. 249.

Permanent Structure Erected before the Passing of the Act.]—Section 15 of the Salmon Fishery Act, 1873, enacts that no person between the 1st day of January and the 24th day of June shall place in any inland water any device whatsoever to catch or obstruct any fish descending the stream. A permanent structure for the purpose of catching eels had been erected at a weir upon a river before the passing of the above-mentioned act. The nature of such structure was as follows :—There were flood-gates or shuttles in the weir, and a grating of iron bars, through which the eels could not pass, was fixed below such flood-gates. When the flood-gates were raised the rush of water through them carried the eels on to and over the end of the grating into a trough, which communicated with a well from which they could not escape. The appellant, on a day between the 1st of January and the 24th of June, 1882, raised the flood-gates and so brought the trap into action, with the result that eels were caught in the trap :—Held, that by so doing the appellant had been guilty of an offence within the above-mentioned section. *Briggs* v. *Swanwick*, 52 L. J., M. C. 63 ; 10 Q. B. D. 510 ; 31 W. R. 565 ; 47 J. P. 564.

Mode of Fishing lawfully Exercised at Time of Passing of Act.]—In answer to an information under 24 & 25 Vict. c. 109, s. 11, for catching salmon with fixed engines in tidal waters, where all the queen's subjects have a right to fish in the ordinary way, the defendant gave evidence that his father and his family and others of the public had for more than forty years been accustomed to fish for salmon in the locus in quo with stake nets :—Held, that this was not evidence of any ancient right or mode of fishing, lawfully exercised at the time of the passing of the 24 & 25 Vict. c. 109, within the exception in s. 11. *Bevins* v. *Bird*, 12 L. T. 306.

The owner of a several fishery in a navigable and tidal river claimed a right to use putchers and stop-nets (which it was admitted were fixed engines within 28 & 29 Vict. c. 121, s. 39), for the purpose of catching salmon. The putchers and stop-nets had been in use for forty-five years up to 1862 ; there was no evidence of previous user, nor was there any evidence to the contrary. The commissioners having found the putchers and stop-nets illegal :—Held, that the user for forty-five years did not raise a conclusive presumption of law that the putchers and stop-nets had been used from time immemorial and were not of recent origin. *Holford* v. *George*, 37 L. J., Q. B. 185 ; L. R. 3 Q. B. 639 ; 18 L. T. 817 ; 16 W. R. 1204.

Held, also, that the 2 Hen. 6, c. 15, prohibits not only the use of nets which are permanently fixed day and night, but also those which are fixed for intervals of time only, if they obstruct the navigation of a river and the passage of fish. *Ib.*

Inquiry as to Right to Fish with Bag-nets.]—A primâ facie title to fish with bag-nets, under 26 & 27 Vict. c. 114, s. 4, must be shown to the inspectors of fisheries before they can be required to hold an inquiry as to the applicant's right to fish with bag-nets ; and unless such a title shall have been so shown, the court will not grant a mandamus to compel the inspectors to hold such an inquiry. *Reg.* v. *Irish Fisheries Inspectors*, Ir. R. 10 C. L. 213.

Production of Certificate.]—On the hearing of a summons against a person, not the owner of a several fishery, in the whole of the river fished in, for wrongfully using a fixed net in a part of the river less than three-quarters of a mile wide, the justices are not concluded by the production of a certificate from the inspectors of fisheries, stating merely that the net was duly erected in pursuance of the 5 & 6 Vict. c. 106. *Alexander* v. *Shiel*, Ir. R. 6 C. L. 510.

Distance from River—How Measured.]—In a local fishery act, to place nets within a river was an offence, and the river was described to extend four miles along the sea-coast from a certain pier. In another part of the statute, a distance was described as being in a straight line from another point ; but the words "straight line" were not used as regards the four-mile limit. W. committed an offence, and if the straight line were adopted he was within the four miles ; but if the sea-coast line were adopted he would not be within that limit :—Held, that in measuring along the sea-coast the measurement ought to follow the line of coast, and that the measurement in a straight line would be incorrect. *Tweed Commissioners* v. *Wood*, 46 J. P. 760.

Ancient Weir—2 Hen. 6, c. 15.]—Semble, a weir which does not destroy fish fry or impede navigation, and which has existed from time immemorial, is not certainly illegal under 2 Hen. 6, c. 15. *Robson* v. *Robinson*, 3 Dougl. 307.

Mouth of River—What is.]—Upon an issue, whether persons had wrongfully fished for salmon by means of stake-nets placed in situations prohibited by statute, where the question was, what

was to be considered river and what sea, a direction that the thing to be looked to is the fact of the absence or the prevalence of the fresh water, though strongly impregnated with salt, is erroneous. The mouth of a river comprehends the whole space between the lowest ebb and the highest flood-mark. *Horne* v. *Mackenzie*, 6 Cl. & F. 628.

Size of Net.]—S., a fisherman, was using a net of small mesh in a salmon fishery district, without a licence. He shot the net several times in places where salmon are usually caught, and the net was calculated to catch salmon, but he was fishing for sea fish, and when he caught salmon he threw them out of the net, retaining only the sea-fish :—Held, that the justices were right in convicting S., for as the net was calculated to catch salmon, and was so used, it was immaterial whether salmon were caught or intended to be caught or not. *Short* v. *Bastard*, 46 J. P. 580.

The 1 Eliz. c. 17, s. 3 (repealed as to salmon, by 24 & 25 Vict. c. 109, s. 39) prohibits fishing, except with a net "whereof every mesh, or mask, shall be two inches and a half broad:"—Held, that the breadth of two inches and a half is to be measured by the length of thread between the adjacent knots. *Thomas* v. *Evans*, El. Bl. & El. 171 ; 27 L. J., M. C. 172 ; 4 Jur. (N.S.) 710 ; 6 W. R. 497.

Knowledge of Offence.]—Information charging A. with having in his possession the young of salmon, to wit, samlets, contrary to 24 & 25 Vict. c. 109, s. 15 ; the justices dismissed the information, on the ground that A., though he had taken samlets, and had them in his possession, did not know that they were samlets :—Held, that the information was rightly dismissed. *Hopton* v. *Thirlwall*, 9 L. T. 327 ; 12 W. R. 72.

Salmon—Unlawful Taking.]—Section 22 of the Salmon Fishery Act, 1873, by which the taking of salmon by means other than a licensed instrument is prohibited, refers only to taking living fish. *Gazard* v. *Cooke*, 55 J. P. 102.

Fishing "for trout" — Using rod without licence—No intention to catch trout.]—By s. 35 of the Salmon Fishery Act, 1865, any person fishing with a rod and line "for salmon (or trout)" without a proper licence shall be liable to a penalty. The respondent was fishing for bait with a rod and line without a licence, with no intention of catching prohibited fish :—Held, that he was not guilty of an offence under s. 35. *Marshall* v. *Richardson*, 58 L. J., M. C. 45 ; 60 L. T. 605 ; 16 Cox, C. C. 614 ; 53 J. P. 596.

By-Law — Validity of.] — By sub-s. 11 of s. 39 of the Salmon Fishery Act, 1873, it was provided that a board of conservators might make by-laws for the better protection, preservation, and improvement of the salmon fisheries within their district, to regulate during the annual and weekly close seasons the use within any river of nets for fish other than salmon, when such use at such times was prejudicial to the salmon fisheries. A board of conservators made a by-law that it should not be lawful for any person to use any net whatever inside the bar in any public water of their fishery district, except a trawl net, between the 1st Dec. and the 30th of April, both inclusive. Upon an information under the above by-law against fishermen for using a drift net inside the bar in a public water of the said fishery district on the 13th April, the magistrates found as a fact that trawl nets could not be advantageously used by fishermen in that part of the river, and that certain other kinds of nets could be used without prejudice to the salmon :—Held, that the said by-law was ultra vires and invalid, and that the conservators had no power under sub-s. 11 of s. 39 of the Salmon Fishery Act, 1873, to make a by-law which was not a mere regulation, but an absolute prohibition, for a definite time, of the use of nets which were not prejudicial to the salmon fishery. *Pidler* v. *Berry*, 59 L. T. 230 ; 53 J. P. 6.

Fixed Engine—Evidence of Ownership.]—The defendants, who were charged with using a fixed engine for catching salmon contrary to the Salmon Fishery Acts, were seen in salmon waters to tie one end of their trammel net to the bank and the other end to the boat, and there leave it for fifteen minutes. The justices held it was a fixed net, but dismissed the information for want of evidence as to ownership :—Held, that possession was good primâ facie evidence of ownership, and that the justices should have convicted. *Vance* v. *Frost*, 58 J. P. 398.

Setting of Nets—Costs to Informer—Destruction of Nets.]—Held, that under 1 Geo. 1, st. 2, c. 18, s. 14, a man may be convicted for setting a net with intent to prevent salmon going up a river to spawn, although the net be not fixed permanently with stakes or otherwise to the ground ; and that though the offence be committed partly in one ownership, and partly in another, the conviction is good which states the offence to have been committed in one ownership only ; and that costs might be awarded to the informer ; and that the conviction was not bad for not ordering the net to be destroyed. *Reg.* v. *Pomfret*, 4 W. R. 206.

By-law prohibiting all Nets — Question of Fact—Invalidity.]—A by-law, made by a board of conservators, prohibited all nets used for fish within certain limits. The justices found as a fact that some nets there used were not prejudicial to salmon, and held that the by-law was in excess of the powers given by s. 39 of the Salmon Fishery Act, 1873 :—Held, that the justices were right, and that they were the proper judges of the fact whether nets prejudiced the salmon fisheries. *Wood* v. *Venton*, 54 J. P. 662 —D.

Production of Warrant by Water Bailiff.]—A water-bailiff, before searching J.'s boat, told him that he had his warrant of appointment in his hand, and offered it to be read, but as it was dark, J. said he could not read it :—Held, that the justices were wrong in refusing to convict J. for resisting the water-bailiff on the ground that the instrument of his appointment had not been produced pursuant to s. 36 of the Salmon Fishery Act, 1873. *Cowler* v. *Jones*, 54 J. P. 660.

Powers of Water Bailiff — Obligation to produce Appointment.] — A water-bailiff appointed under the Salmon Fishery Acts, 1865, 1873 (28 & 29 Vict. c. 121, and 36 & 37 Vict. c. 71), is bound before attempting to exercise his power of searching boats, &c., used in fishing

to produce the instrument of his appointment. *Barnacott* or *Parnacott* v. *Passmore*, 56 L. J., M. C. 99; 19 Q. B. D. 75; 35 W. R. 812; 51 J. P. 821.

Width of Cruives—Salmon Fisheries (Scotland). Act, 1862.]—See *Fife* (*Duke*) v. *George*, 24 Ct. of Sess. Cas. (4th ser.) 549.

Authority to Prosecute—Fresh-water Fishery.]—The appellant was summoned for fishing without a licence, in a fishery district subject to a board of conservators, upon the information and complaint of the respondent, a duly appointed water-bailiff in the employment of the board. It was not proved that the respondent was authorised by the board to institute the proceedings:—Held, upon a case stated by justices, that the penalty for the offence could only be recovered by the board of conservators, and, therefore, the respondent was not entitled to institute the proceedings, and the appellant was not liable to be convicted. *Anderson* v. *Hamlin*, 59 L. J., M. C. 151; 25 Q. B. D. 221; 63 L. T. 168; 17 Cox, C. C. 129; 54 J. P. 757.

Water Bailiff.]—Section 13 of the Fisheries Act, 1891, enables a water bailiff to lay the information and recover penalties without the express authority of the board of conservators by whom he is employed. That section overrules the decision in *Anderson* v. *Hamlin*, supra. *Pollock* v. *Moses*, 63 L. J., M. C. 116; 10 R. 169; 70 L. T. 378; 17 Cox, C. C. 737; 58 J. P. 527.

Limits defined by Certificate of Secretary of State—"Tributary."]—Where in the certificate of the secretary of state given under the Salmon Fishery Acts, 1861 to 1873, a fishery district is defined as comprising a river "and all its tributaries," the word "tributary" includes all streams flowing directly or indirectly into that river. *Evans* v. *Owen*, 64 L. J., M. C. 59; [1895] 1 Q. B. 237; 15 R. 228; 72 L. T. 54; 43 W. R. 237.

Fishing with Stake-nets—Scottish Law.]—Fishing with stake-nets on the sea-coast near a river mouth is not prohibited by Scottish statute or common law. Grantees from the crown of a fishery with net and coble cannot at the suit of owners of a river fishery be restrained from fishing with stake nets. *Kintore* v. *Forbes*, 4 Bli. (N.S.) 485.

d. Weirs and Obstructions.

Application of 24 & 25 Vict. c. 109.]—The 24 & 25 Vict. c. 109, s. 12, which annexes the condition of having a free gap to the continuance of existing weirs, though general in its terms, is applicable only to such weirs as come within s. 27, i.e. weirs not extending beyond the middle of the stream. *Rolle* v. *Whyte*, 8 B. & S. 116; 37 L. J., Q. B. 105; L. R. 3 Q. B. 286; 17 L. T. 560; 16 W. R. 593.

What Obstruction Illegal.]—A proprietor of salmon fishings in an estuary opposite his estate restored the foreshore by an embankment sixteen inches higher than the original, which had been swept away by the tide, and this he did for the legitimate purpose of confining the river to its proper channel, and to protect his shore, and not as a device to obstruct or catch fish. The effect of thus raising the embankment was, not to prevent or to substantially impede the passage of salmon, although it did to some extent delay them and alter the course which they would take in ascending the estuary, and so facilitated their capture by the proprietor:—Held, that the raising the embankment was not an illegal obstruction within the meaning of the Salmon Fishery Acts. *Sutherland* (*Duke*) v. *Ross*, 3 App. Cas. 736.

A fishing mill-dam is a fishery within 24 & 25 Vict. c. 109, s. 20. *Hodgson* v. *Little*, 14 C. B. (N.S.) 111; 32 L. J., M. C. 220; 10 Jur. (N.S.) 46; 8 L. T. 358; 11 W. R. 782; 9 Cox, C. C. 327.

A proprietor or an occupier of a fishing mill-dam on a salmon river is bound by 24 & 25 Vict. c. 109, during the close season, to remove all obstructions to the free passage of fish up the stream, even though he has ceased to use the dam for the purpose of fishing. *Ib.*

It is no answer to a complaint against an occupier of a fishing mill-dam, under 24 & 25 Vict. c. 109, s. 20, for not lifting or removing the hatches or sliding doors of his fishery during the close season, that the doing so would to some degree injuriously affect, but not ruinously, his milling power. *Hodgson* v. *Little*, 16 C. B. (N.S.) 198; 33 L. J., M. C. 229; 10 Jur. (N.S.) 953; 11 L. T. 135; 12 W. R. 1103.

—— Fishing near.]—The 24 & 25 Vict. c. 109, s. 12, absolutely prohibits the catching or attempting to catch, except by rod and line, any salmon within fifty yards below any dam, unless it has attached to it a fish-pass, notwithstanding any ancient right by charter, grant, or immemorial usage of fishing in a salmon-cage. *Moulton* v. *Wilby*, 2 H. & C. 25; 32 L. J., M. C. 164; 9 Jur. (N.S.) 472; 8 L. T. 284; 11 W. R. 670; 9 Cox, C. C. 318.

Removing Obstruction.]—Where a dam had been used as a fishing mill-dam up to a date subsequent to the passing of the Salmon Fishery Act, 1861, but the use of it for fishing purposes was then abandoned and all appliances for fishing removed:—Held, that the dam had ceased to be a "fishing mill-dam" within the statute, and had become an ordinary mill-dam, and that consequently s. 20 of the Salmon Fishery Act, 1861, did not apply, and the occupier of the dam was not bound to remove obstructions to the free passage of fish as required by the section. *Rossiter* v. *Pike*, 48 L. J., M. C. 81; 4 Q. B. D. 24; 39 L. T. 496; 27 W. R. 339.

When Dam Unused.]—B. was charged before justices, under s. 22 of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), with omitting to maintain a clear opening of not less than four feet wide through the crib, box, or curve of a fishery occupied by him, during the weekly close time. His mill-dam had been a fishing mill-dam before 1859, and there were now the remains of a box with fenders over openings of the required size. But part of the old box was broken away; there were no internal appliances, and the box had ceased to be used, or capable of being used, for catching fish. A certificate of the fishery commissioners in 1871, however, referred to this dam as a fishing mill-dam, but there was no evidence of any alteration since the passing of the act, by which increased obstruction to fish was created:—Held, that this dam had ceased

to be a fishing mill-dam before the said act; that s. 22 did not apply, and that the justices were right in dismissing the charge. *Pike* v. *Rossiter*, 37 L. T. 635.

In what Rivers.]—Although the provision in Magna Charta prohibiting the putting down of weirs in rivers is general, that generality is restrained by 25 Edw. 3, 45 Edw. 3, 1 Hen 4, c. 12, 4 Hen. 4, c. 12, and 12 Edw. 4, c. 7, and therefore there may be fishing-weirs in non-navigable rivers, of which the easement has been acquired since 12 Edw. 4, c. 7. *Rolle* v. *Whyte*, supra; and see *Robson* v. *Robinson*, col. 111.

The provisions of Magna Charta and of the other early statutes (including 17 Ric. 2, c. 9, and 12 Edw. 4, c. 7), which prohibit weirs, apply only to navigable rivers. *Leconfield* (*Lord*) v. *Lonsdale* (*Earl*), 39 L. J., C. P. 305; L. R. 5 C. P. 657; 23 L. T. 155; 18 W. R. 1165.

A fishing mill-dam was erected between 1741 and 1751, in a river above the flow of the tide, and where the river was not navigable. For sixty years before 1861, and as far back as living memory could go, it had been used in substantially the same way as it was used in 1861:—Held, that the fishing mill-dam was not a public nuisance. *Ib.*

Evidence of Right.]—Held, also, that, as a grant may be proved either by production of the grant itself, or by evidence of enjoyment consistent only with the existence of such a grant, and from which it may be presumed, the commissioners were bound, on the evidence, to find that the right to the fishing mill-dam existed by grant from all the proprietors whose interests could be affected by the fishing mill-dam, and consequently that the fishing mill-dam was "lawfully in use" at the time of the passing of the Salmon Fishery Act, 1861, by virtue of a grant, within s. 12. *Ib.*

Acquisition of Right.]—A right to fishing-weirs in private waters on non-navigable rivers may be acquired by grant from other riparian owners, or by enjoyment, or by any other means by which such rights may be constituted. *Rolle* v. *Whyte*, supra.

Semble, that the claim to such a fishing mill-dam is within the Prescription Act (2 & 3 W. II. 4, c. 71). *Leconfield* (*Lord*) v. *Lonsdale* (*Earl*), supra.

A qualified easement, as to use the weir for fishing purposes, when the whole body of water is not wanted for the use of the mill, may be acquired by user for the time required to confer easements in respect of water. *Rolle* v. *Whyte*, supra.

—— **Alteration.**]—A fishing-weir having existed for so long a time, could not be said to be illegal in consequence of the alteration being made by cutting through the island, and by erecting the lower fenders and needles. *Ib.*

Jurisdiction of Commissioners—Mill-dam.]—The owners of a dam in the Ribble, where it was not navigable, in connection with a mill, were the owners or lessees of the land on both sides of the river between the dam and the point where the water after passing through the mill was returned to the channel. The dam was built since 1 Geo. 1, st. 2, c. 18, and had been raised to its present height since 1829; at one end of it a balk had been put to enable the fish to get over it; and they could by means of an artificial pass get through it when it was lifted. But when it was shut salmon could not jump over the dam. When the balk was shut the whole of the water of the river passed down the mill race, and the river below the dam for about two-thirds of a mile was nearly dry; during the night the balk was usually left open. During flood the balk was kept open night and day. There was no appliance for catching fish placed behind or as part of the mill-dam. In their efforts to get up to the dam the salmon were found lying in small pools below the dam, and the proprietors caught them, but not for sale. The commissioners found that the dam had been used by the owner for catching fish, and that it hindered the fish from passing up the river; and made an order by which it was rendered incapable of catching fish:—Held, first, that though the dam was erected in contravention of the 1 Geo. 1, st. 2, c. 18, s. 14, a right to it by prescription might be acquired. *Garnett* v. *Backhouse*, 8 B. & S. 490; 37 L. J., Q. B. 1; L. R. 3 Q. B. 30; 17 L. T. 170; 16 W. R. 201.

Held, secondly, that it was not a fishing mill-dam within 24 & 25 Vict. c. 109, s. 4, and therefore the fishery commissioners had no jurisdiction under 28 & 29 Vict. c. 121, s. 42, to order it to be rendered incapable of catching fish. *Ib.*

Conversion to a Stone Weir.]—Under ancient deeds recognising a right in the owner of an estate to have a weir across a river for taking fish, if it appears that such weir was heretofore made of brushwood through which fish might escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape is debarred, though the fish might still leap over in flood tide. *Weld* v. *Hornby*, 7 East, 195; 3 Smith, 244; 8 R. R. 608.

Prosecution for Constructing new Weir.]—The survey contemplated by 5 & 6 Vict. c. 106, s. 63, is not a condition precedent to the maintenance of a prosecution for constructing a new weir across a salmon river in violation of the provisions of that section; but, as no penalty is attached, it is the subject of an indictment and not of a summary proceeding before a magistrate. *Kavanagh* v. *Glorney*, Ir. R. 10 C. L. 210.

Damage to Upper Fishery by Weir below.]—See *Hamilton* v. *Donegal* (*Marquis*), 3 Ridgw. 311, supra, col. 101.

5. Licences.

To use Putts.]—A person who had no licence under 28 & 29 Vict. c. 121, s. 33, put down in a salmon fishery seventy putts, with circles in them, that is, wire gratings which could be removed at pleasure, and which, when in the putt, prevented salmon from entering, and alleged he laid down the putts for the purpose of catching shrimps and flat fish:—Held, that he was liable to a penalty, as it was made unlawful for any person to use putts in a salmon fishery for any purpose without a licence. *Lyne* v. *Leonard*, 9 B. & S. 65; L. R. 3 Q. B. 156; 18 L. T. 55; 16 W. R. 562.

To use Nets—Stranger helping.]—Under 28

& 29 Vict. c. 121, a licence may be granted to a person for the use of a net for catching salmon, and a penalty is imposed upon any person for using a net without such licence. And where A. and B. had each a licence for the use of a net, and on a certain day they and two others were together using two coracle-nets, each of which required the assistance of two persons, and A. and B. were using one net, and the two other persons, who had no licence, were using another; the justices (upon an information against these two) found that no fraud was intended, and as one of the licences would have conferred the right to the assistance of one of the two persons, and the two licences therefore would have protected all four, they dismissed the information:—Held, that they were right. *Lewis* v. *Arthur*, 24 L. T. 66.

Trout Licence—Rod and Line—Night Line.]—In a fishery district the scale of licences included, for trout rod and line, 1*s.*; for the use of night lines, 5*s.* L. took out a rod and line licence, and also, without further licence, used a night line. On being charged for fishing without a licence for night line, the justices held the rod and line licence to include use of a night line:—Held, the justices were wrong. *Williams* v. *Long*, 57 J. P. 217.

To use Night Lines, when Necessary.]—The appellant set night lines in a river situated in a fishery district, subject to the control of a board of conservators, with the intention of catching eels. No trout were caught, but the lines were reasonably calculated to catch trout:—Held, that the appellant was bound to take out a licence to use the lines. *Hill* v. *George*, 44 J. P. 424.

Colchester Oyster Dredgers.]—See *Mills* v. *Colchester Corporation*, supra, col. 88.

Licence to Fish with "a rod and line"—Licensee Fishing with Three Rods and Lines at the same time.]—A licence to fish with "a rod and line" is not a general licence, enabling the holder to fish with more than one rod and line at the same time. *Combridge* v. *Harrison*, 64 L. J., M. C. 175; 15 R. 327; 72 L. T. 592; 59 J. P. 198.

6. Fence Season.

Eels.]—The Thames Conservancy Act, 1864 (27 & 28 Vict. c. 113), s. 65, empowers the conservators to make by-laws for "determining the times during which the taking of any particular or specified kinds of fish shall not be practised." One of the by-laws was as follows:—"The following respective periods shall be deemed to be the fence season in the upper river, that is to say,—(*a*) For salmon, salmon-trout, and trout, the period between the 10th September in each year and the 31st March following, both inclusive,—(*b*) For pike, jack, perch, roach, rudd, barbel, bream, chub, carp, tench, grayling, gudgeon, pope, dace, crayfish, bleak, minnow, and every kind of fish known as river fish (except salmon, salmon-trout, and trout), the period between the 14th February in each year and the 31st May following, both inclusive":—Held, that "eels" were included in the general words, "every kind of fish known as river fish." *Woodhouse* v. *Etheridge*, L. R. 6 C. P. 570; 24 L. T. 709.

Exposing Eels for Sale—Close Season—Eels caught out of England.]—The 4th sub-s. of the 11 section of the Freshwater Fisheries Act, 1878, which forbids the sale or exposure for sale of freshwater fish during the close season, applies to fish caught beyond the limits of that part of the United Kingdom to which the act applies. *Price* v. *Bradley*, or *Bradley* v. *Price*, 55 L. J., M. C. 53; 16 Q. B. D. 148; 53 L. T. 816; 34 W. R. 165; 50 J. P. 150—D. *See now* 49 Vict. c. 2.

Oysters—Sale—Taken in French and relaid in English Waters.]—Oysters imported alive from foreign oyster-beds and relaid for purposes of storage in English waters, although remaining in the English waters for several months, are oysters "taken within the waters of a foreign state" within the proviso to s. 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877, and a person who has lifted them from the English waters and sold them during the close season cannot be convicted of an offence under that section. *Robertson* v. *Johnson*, 62 L. J., M. C. 1; [1893] 1 Q. B. 129; 5 R. 108; 67 L. T. 560; 41 W. R. 223; 17 Cox, C. C. 580; 57 J. P. 39—D.

7. Whale Fishery.

To whom Fish belongs.]—Unless he who first strikes a fish continues his dominion until he has reduced it into possession, any other person who kills it acquires the entire property. *Fennings* v. *Grenville* (*Lord*), 1 Taunt. 241; 9 R. R. 760. And see *Littledale* v. *Scaith*, 1 Taunt. 243, n.

By the custom of the whale fishery among the Gallipagos islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it. *Ib.*

By the usage of the whale fishery, a fish is to be considered as a fast fish, which is attached by any means (such as the entanglement of the line round it) to the boat of the first striker, though the harpoon does not continue in the body of the fish, and this is a more reasonable usage than that mentioned in a note in the case of *Fennings* v. *Grenville* (*Lord*), in 1 Taunt. 243. *Hogarth* v. *Jackson*, 2 Car. & P. 595.

If, while the fish is fast to the harpoon of the first striker, another unsolicited so disturbs the fish that she breaks from the first harpoon, and then he strikes her himself with a harpoon, and secures her, the fish belongs to the first striker. *Skinner* v. *Chapman*, M. & M. 59, n.

By the general custom of the Greenland whale fisheries, a whale does not become appropriated by merely being harpooned: it is necessary that the line should remain attached to the boat. The whale is then a fast fish. If the line gets detached the whale becomes a loose fish, and is consequently the lawful prey of any one who captures and secures it. *Aberdeen Arctic Co.* v. *Sutter*, 4 Macq. H. L. 355; 6 L. T. 229; 10 W. R. 516.

Premiums under 28 Geo. 3, c. 20.]—The time for ships engaged in the southern whale-fishery to be out on their voyage, in order to gain the premiums under 28 Geo. 3, c. 20, was fourteen lunar months from the time of their clearing out, without regard to the time of their actual sailing. *Lacon* v. *Hooper*, 6 Term Rep. 224; 1 Esp. 246.

R. G. M.

FIXTURES.

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1. WHAT ARE.

a. Generally.

Affixed to Freehold.]—By the word "fixtures" the court understood such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which might be removed without material injury to the freehold, and the removal of which by a tenant would not give a ground of action to the landlord. *Barclay, Ex parte* and *In re*, 5 De G. M. & G. 403 ; 25 L. J., Bk. 1 ; 1 Jur. (N.S.) 1145 ; 4 W. R. 80.

Where the owner of the inheritance annexed thereto fixtures (which would in the ordinary case of landlord and tenant be removable by the latter during his term) for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold. *Walmsley* v. *Milne*, 7 C. B. (N.S.) 115 ; 29 L. J., C. P. 97 ; 6 Jur. (N.S.) 125 ; 1 L. T. 62 ; 8 W. R. 138.

A., the owner of land in 1853, mortgaged it in fee to B., and afterwards erected buildings thereon, to which, for the more convenient use of the premises in his business of an innkeeper, brewer, and bath-proprietor, he affixed a steam-engine and a boiler, a hay-cutter, a malt-mill, or a corn-crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on to the floor of part of the premises by means of a frame screwed thereto, the upper one being fixed in usual way, and the steam-engine and other articles (except the boiler) were fastened by means of bolts and nuts to the walls or floors, for the purpose of steadying them, but were all capable of being removed without injury either to themselves or to the premises. The engine was used to supply water to the baths, and to put the other machines in motion, and the whole were subservient to the business carried on by A. He continued in possession until 1858, when he became bankrupt :—Held, that his assignees were not entitled to claim these fixtures, but that they passed to the assignee of the mortgagee as part of the freehold. *Ib.*

A. being the landlord of premises occupied by B., seized, as a distress for rent, spinning machines which were fixed by screws, some into the wooden floor and some into lead, which had been poured in a melted state into holes in the stone for the purpose of receiving the screws :—Held, that the machines never became part of the freehold, and were distrainable. *Hellawell* v. *Eastwood*, 6 Ex. 295 ; 20 L. J., Ex. 154.

Mortgage by two, described in the deed as copper roller manufacturers, reciting a conveyance to them of land, and mills or factories, in a manufacturing town, as tenants in common in fee, and that they were carrying on business at the mills or factories as copper roller manufacturers, and in such capacity had lately affixed to or placed upon the land mills, or factories, a steam-engine and boilers, together with a large quantity of mill-gear and millwright work, and granting the land, mills, or factories, and hereditaments comprised in the recited conveyance, to the use of the plaintiffs in fee, subject to a proviso for redemption :—Held, as between them and the mortgagors' assignees in bankruptcy, first, that, assuming it possible to distinguish between the case of machinery placed upon land for the purpose of trade or manufacture, as collateral to and independent of the use and enjoyment of the land, and that of machinery placed upon land for the purpose of better and more profitably enjoying the land, the recitals showed that this was a case of the latter description ; and although the proposed use and enjoyment of the land was manufacture or trade, all articles fixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, partook of the nature of the soil, and would have descended to the heir, along with and as part of the soil itself. *Mather* v. *Fraser*, 2 Kay & J. 536 ; 25 L. J., Ch. 361 ; 2 Jur. (N.S.) 900 ; 4 W. R. 387.

Held, secondly, that the mere grant of the land, following upon the preceding recitals, was sufficient to pass all articles so fixed, and that a subsequent enumeration of certain of such articles did not rebut the inference that all articles so fixed passed by the mere grant of the land, as forming part of the freehold. *Ib.*

Held, thirdly, that, the fixtures passing by the grant of the land, the Bills of Sale Act, 1854, could have no application. *Ib.* See *Waterfall* v. *Penistone*, 3 Jur. (N.S.) 15.

Held, fourthly, articles standing merely by their own weight are not fixtures. *Ib.*

But where part of a machine is a fixture, and another and essential part of it is movable, the latter also will be held a fixture. *Ib.*

Examination of the authorities upon this subject, and a dictum in *Hellawell* v. *Eastwood* (6 Exch. 313) observed upon. The principle upon which the rule of law, that fixtures pass with the soil, is relaxed in favour of trade, has no application where the parties who affix the machinery are themselves owners in fee of the soil. *Ib.*

B. bought from A. the lease of a house, and in the lease was contained a covenant to convey all the fixtures on the premises generally. Under this clause A. claimed a right to remove certain gasaliers which were affixed to the gas-pipes by means of screws, and could easily be removed without causing any injury to the freehold, on the ground that they came within the rule of tenants' fixtures :—Held, that the gaseliers passed under the general description of fixtures in the lease, and became the property of B., as although they were removable without injury to the free-

hold, yet they were necessary to the practical enjoyment of the gas-pipes to which they were affixed, which without the gasaliers would be useless. *Sewell* v. *Angerstein*, 18 L. T. 300.

Weighing-machines which rest in brick cavities constructed in the ground for that purpose, but which are not attached to the brickwork, and can be lifted out of the cavity at pleasure, are not fixtures. *Astbury, Ex parte*, and *Lloyd's Banking Co., Ex parte, Richards, In re*, 38 L. J., Bk. 9; L. R. 4 Ch. 630; 20 L. T. 997; 17 W. R. 997.

Straightening-plates, formed of flat plates of iron and let into the iron flooring of a room so as to be on a level with the surrounding floor and united to it, are fixtures. *Ib.*

Degree of Annexation.]—The question whether a particular article is a movable chattel or a fixture depends on the degree of annexation to the freehold, and the object of annexation. *Cosby* v. *Shaw*, 19 L. R., Ir. 307.

A.'s Chattel Fixed on B.'s Land.]—It is a question of evidence, depending on circumstances and the intention of the parties, whether A.'s chattel, fixed on B.'s soil, becomes part of the soil or remains the chattel of A. *Lancaster* v. *Eve*, 5 C. B. (N.S.) 717; 28 L. J., C. P. 235; 5 Jur. (N.S.) 683; 7 W. R. 260.

Piles fixed in the bed of the Thames, in front of a wharf for the purpose of mooring vessels making to the wharf, and long enjoyed for such purpose without interruption by the crown or the conservators of the river, will be taken to have been put down in the exercise of an easement, and to remain as chattels in the owners of the wharf, so as to give them a right of action against anyone injuring the piles. *Ib.*

Where a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. *Wood* v. *Hewitt*, 8 Q. B. 913; 15 L. J., Q. B. 247; 10 Jur. 390. S. P., *Mant* v. *Collins*, referred to in the last case.

Whether, in a particular case, it has become so or not, may be a question on the evidence; and a jury may infer, from use or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again. *Ib.*

—— **Hire-Purchase Agreement—Mortgagee in Possession.**]—Where the owner of a chattel lets the chattel to the owner of land for the purpose of being fixed on the land and used thereon, reserving to himself the right to unfix and take possession of it in certain events, and it is in fact annexed to the land, it will become a fixture—that is, part of the soil—subject to the right of the owner to retake possession of it in the events specified; but such right, if it is not an easement created by deed, nor is conferred by a covenant running with the land, cannot be enforced against a purchaser of the land without notice of it. Consequently, a mortgagee in fee of land on which is affixed a chattel belonging to a third person placed there under a hiring agreement not under seal, of which the mortgagee has no notice, can take possession of the fixture under his mortgage with the land, and hold it as against the original owner. *Wood* v. *Hewett* (8 Q. B. 913; 15 L. J., Q. B. 247) and *Lancaster* v. *Eve*, 5 C. B. (N.S.) 717; 28 L. J., C. P. 235) discussed. *Hobson* v. *Gorringe*, 66 L. J., Ch. 114; [1897] 1 Ch. 182; 75 L. T. 610; 45 W. R. 356—C. A.

b. Trade.

Machinery.]—Certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant:—Held, that these were the goods and chattels of the outgoing tenant, for which he might maintain trover. *Davis* v. *Jones*, 2 B. & Ald. 165; 20 R. R. 396.

The machinery of a mill is part of the freehold, and cannot be legally removed by the tenant. *Farrant* v. *Thompson*, 2 D. & R. 1; 5 B. & Ald. 826; 24 R. R. 571.

Various engines and other fixtures used in mining and smelting were standing on the premises at the date of the demise, of which the engines were purchased by the incoming from the outgoing tenant, and were not mentioned in the general words of the demise, nor in the clause of re-entry; but the lessee covenanted to keep the "said engines" (the word "engines" never having occurred before) in good and tenantable repair, and the same in such state to yield up at the end or other sooner determination of the term; and the lessor covenanted that the lessee might remove (at the end of the term or sooner, except, as in the cases and events before mentioned, in any of which—a taking in execution being one—it was made lawful for the lessor to re-enter) all such engines, &c., as had theretofore been erected, and all such as should by himself be erected for carrying on the smelting business:—Held, that upon a forfeiture of the demise by a taking in execution, the lessee had lost his right to recover any of the fixtures, and that they all belonged to the lessor, such being the intention of the parties as collected from the covenants. *Rex* v. *Topping*, M'Clel. & Y. 544; 29 R. R. 839.

The plaintiff demised salt-springs to the defendant, who was to erect salt-works on the premises, and pay a rent in proportion to the number of works erected; the defendant covenanted to leave the works in good repair at the end of the term:—Held, that iron salt-pans placed by the defendant on a frame of brick, and used in the boiling of salt, were parcel of such works, and that the defendant was not entitled to remove them. *Mansfield (Earl)* v. *Blackburne*, 8 Scott, 720; 6 Bing. (N.C.) 427; 10 L. J., C. P. 178.

A mortgage of a silk-mill with the steam-engines, boilers, steam-pipes, main-shafting, millgearing, millwrights' work, and all other machinery whatsoever being, or which should thereafter be, on the land described in the mortgage, as against a second mortgage, is not confined to machinery necessary for giving power to the mill, as being ejusdem generis with the specified particulars, but extends to silk-spinning machines resting by their weight only on the ground, but attached by movable bolts to iron rods fixed to mill-beams overhead. *Haley* v. *Hammersley*, 3 De G. F. & J. 587; 30 L. J., Ch. 771; 7 Jur. (N.S.) 765; 4 L. T. 269; 9 W. R. 562.

What is annexed to the freehold is to be considered as part of it. But between landlord and tenant, the latter may remove what he erects for

trade, but such removal must be during the term. Where engines, coppers, &c., are the principal, and the house only the accessory, they may be removed, though the house is thereby injured. A colliery is not only an enjoyment of the estate, but in part carrying on a trade. *Dudley* v. *Warde*, Ambl. 113.

A lessee of a mill and steam-engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building, and the new parts of the engine, subject to an action to be brought by the lessors to try the right. *Sunderland* v. *Newton*, 3 Sim. 450; 30 R. R. 186.

An engine affixed by means of screws and bolts to a concrete bed in freehold land, for the purpose of driving a saw-mill on the land, will, in the absence of special circumstances, cease to be a chattel, and become part of the freehold. *Hobson* v. *Gorringe*, 66 L. J., Ch. 114; [1897] 1 Ch. 182; 75 L. T. 610; 45 W. R. 356—C. A.

Rights of Mortgagees.]—Trade fixtures affixed to mortgaged freehold premises after the mortgage, by the mortgagor and his partner, occupying the premises for the purpose of their trade, pass to the mortgagee. *Cullwick* v. *Swindell*, 36 L. J., Ch. 173; L. R. 3 Eq. 249; 15 W. R. 216.

Trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee. *Climie* v. *Wood*, 37 L. J., Ex. 158; L. R. 3 Ex. 257; 18 L. T. 609. Affirmed, 38 L. J., Ex. 223; L. R. 4 Ex. 328; 20 L. T. 1012—Ex. Ch.

Fixtures belonging to a lessee and removable by him at pleasure (as between himself and the lessor) form part of the security under an equitable mortgage by deposit of the lease. *Richards, In re*, 38 L. J., Bk. 9; L. R. 4 Ch. 630; 20 L. T. 997; 17 W. R. 997.

—— **First Mortgage of Lands and Buildings—Second Mortgage of same, with Ores, Stock-in-Trade, and Chattels.**]—The S. Company carried on the business of manufacturing zinc and spelter, sulphuric acid, and zinc oxide on leasehold premises. They had erected a number of cupola and other furnaces for the purposes of their manufacture, which, as between them and their landlords, were admitted to be trade fixtures. In 1880 the company conveyed the land and buildings comprised in its lease to trustees for debenture-holders upon trust to permit the company to carry on business until default in payment of the debentures or winding-up, and then to sell. In 1883 the company executed a second mortgage to trustees for a second set of debenture-holders, which comprised, besides the land and buildings, all stock-in-trade, stock of ores, and loose plant and material. It appeared that in the course of smelting metals for the company's business small quantities of gold and silver were given off in the form of vapour, and became imbedded in the bricks lining the furnaces. The company having been ordered to be wound up, the trustees of the first mortgage deed entered and sold. The second mortgagees took out a summons that they might be allowed to enter and remove the gold, silver, and other metal embedded in the said bricks, claiming that it was included in their mortgage, and not in the first. It was admitted that the metals could not be extracted without pulling down the furnaces and pounding up some of the bricks:—Held, that the doctrine of trade-fixtures has no application as between mortgagee and mortgagor; that, whatever might have been the case between landlord and tenant, the mortgagee was entitled to everything which his mortgagor, intentionally or not, or for trade purposes or otherwise, had fixed to the mortgaged premises, and the summons must be dismissed with costs. *Tottenham* v. *Swansea Zinc Ore Co.*, 52 L. T. 738.

—— **Lease by Mortgagor—Rights of Tenant.**]—A mortgagor in possession of premises let them to a tenant who brought on to them certain trade fixtures. The mortgagee subsequently entered and sold the premises under the power of sale contained in the mortgage:—Held, that the fixtures did not pass under the mortgage, but remained the property of the tenant. *Sanders* v. *Davis*, 54 L. J., Q. B. 576; 15 Q. B. D. 218; 33 W. R. 655.

Looms Fixed to Floor with Nails.]—Tenants of a leasehold mill executed a mortgage of the mill and fixed machinery therein comprised in their lease, together with all looms and other machinery, fixed or movable, which then or thereafter during the continuance of the security should be in or about the mill. There were a number of looms fixed to the floor of the mill by nails driven through two of the feet of each loom into wooden plugs in the soil beneath. These looms were removable, for the convenience of working them, to other parts of the mill; but the primary intention was, that they should remain fixed during the term of the mortgagors. The mortgagors having become bankrupt:—Held, that as between the mortgagees and the mortgagors' assignees, the looms were fixtures. *Boyd* v. *Shorrock*, 37 L. J., Ch. 144; L. R. 5 Eq. 72; 17 L. T. 197; 16 W. R. 102.

Power looms nailed to the flooring are fixtures. *Dawson, In re*, 16 W. R. 424.

Brick Buildings.—Upon a question arising between landlord and tenant as to trade fixtures, buildings built of brick, with brick foundations let into the soil, although erected for the sole purpose of trade, cannot be removed by the tenant, although machinery, engines, vats, and utensils, with their accessories, may be removed. *Whitehead* v. *Bennett*, 27 L. J., Ch. 474; 6 W. R. 351.

Though a building may be raised on a brick foundation, and have a brick chimney, if the erection of such foundation is of wood, and the building is used for the purpose of trade or manufacture, the tenant may remove it at the end of his term. *Penton* v. *Robart*, 4 Esp. 33; 2 East, 88; 6 R. R. 376.

Erections—What Included in.]—A lease was made to an oil-refiner of some land "and also the erections and buildings then already erected and built or to be erected and built" thereon, and the lessee covenanted to lay

out 2,500*l.* in such buildings, which were to be of a permanent character, and to keep them in repair, and deliver them up at the end of the term, together with all the doors, wainscots, &c., "pumps, pipes, cisterns, and other things which now are or at any time during the term shall be fixed or fastened to the freehold of the premises, or belong thereto:"—Held, that the general words included the trade fixtures of the oil-refinery, and they were consequently irremovable by the lessee. *Bidder* v. *Trinidad Petroleum Co.*, 17 W. R. 153.

An agreement was made with a company to grant them a lease of land as soon as they had spent 3,000*l.* "in the erection of permanent and substantial buildings and works such as are usually erected for the distillation of oil," and there was a covenant to cover in the erections and buildings when necessary:—Held, that "erections" was a wider term than buildings, and might include trade fixtures. *Ib.*

Hydraulic Press.]—An hydraulic press was fixed by means of bricks and mortar to the floor of a factory. The press was not essential to the carrying on of the works at the factory, but merely a convenience:—Held, that such a press remained a chattel, and did not become a part of the freehold. *Parsons* v. *Hind*, 14 W. R. 860.

Windmill.]—A pauper rented a windmill and a brick-built cottage and garden at the rent of 30*l.* per annum for six years, and during that time held and occupied the same, and actually paid that rent. The mill was of wood, and had a foundation of brick; but the woodwork was not inserted in the brick foundation, but rested upon it by its own weight alone; no part of the machinery of the mill touched the ground or any part of the foundation:—Held, that the windmill not being affixed to the freehold, nor anything connected with it, was not parcel of the freehold. *Rex* v. *Otley*, 1 B. & Ad. 161; 9 L. J. (O.S.) M. C. 11.

A., being seised in fee of a close on which a windmill was erected, mortgaged the close to B. for 1,000 years, and in the same deed there was a conveyance, by bargain and sale, of the mill to him in fee; the mill was built of wood, removable at pleasure, and fixed to brickwork which was let into the ground:—Held, that the mill could not be taken in execution under a fi. fa. sued out against A. by one of his creditors, although he had continued in possession, and carried on his trade therein. *Steward* v. *Lombe*, 4 Moore, 281; 1 Br. & B. 506; 21 R. R. 700.

Lime Kilns.]—Lime kilns, though erected for the purposes of trade, during the continuance of a lease by indenture, containing a general covenant to repair, cannot be removed by the tenant without a breach of such covenant. *Thresher* v. *East London Waterworks Co.*, 4 D. & R. 62; 2 B. & C. 608; 2 L. J. (O.S.) K. B. 100.

Of Tavern Keeper.]—A lessee for a long term of years of an unfinished house covenanted with the lessor to surrender at the end of the term the premises, "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-bolts, slabs, and other fixtures, and articles in the nature of fixtures, which shall at any time, during the term, be fixed or fastened to the demised premises, or be thereto belonging." At the time of the lease the house was intended to be used as a tavern, and was subsequently completed and fitted up by the lessee with things necessary for carrying on the business of a tavern keeper, including articles to a considerable value known as trade fixtures, and others known as tenant's fixtures. These were all fixed to the premises in the usual way, and, in the absence of any covenant to the contrary, would have been removable by the lessee:—Held, that the lessee was not restrained. *Wilde* v. *Waters*, 16 C. B. 637; 24 L. J., C. P. 193; 1 Jur. (N.S.) 1021; 3 W. R. 570.

Taking by Railway Company.]—A railway company gave notice to take part of a manufactory, and was required by the owner to take the whole. A valuer, on behalf of the company, went to the manufactory, and, without entering it, valued it at a specified sum, and that amount was paid into court in the usual way. The company was then proceeding to take possession, and to issue its warrant to summon a jury when the owner of the manufactory insisted that the valuation had not included certain fixtures upon the premises, such as a steam-engine, shaping and turning lathes, and that the company was bound to take such fixtures. The company contended that the fixtures being trade fixtures, and removable by the owner, he could not compel the company to take them:—Held, that although the fixtures were trade fixtures, which the lessee might remove during the term, the company was bound to take them; and that whatever a railway company is bound to take under 8 & 9 Vict. c. 18, s. 92, they must, in proceeding under s. 85, cause to be valued, and pay the value into court. *Gibson* v. *Hammersmith Ry.*, 32 L. J., Ch. 337; 9 Jur. (N.S.) 221; 8 L. T. 43; 11 W. R. 299.

Tramways and Steam Crane.]—By a deed of mortgage of a quarry, the quarry was granted together with fixtures of every description:—Held, that a tramway and steam crane thereon were fixtures. *Moore and Robinson's Banking Co., Ex parte, Armytage, In re*, 49 L. J., Bk. 60; 14 Ch. D. 379; 42 L. T. 443; 28 W. R. 924.

Plant used for Rolling Machine.]—Weighing machines which rest in brick cavities constructed in the ground for that purpose, but which are not attached to the brickwork, and can be lifted out of the cavity at pleasure, are not fixtures. *Astbury, Ex parte*, and *Lloyd's Banking Co., Ex parte, Richards, In re*, 38 L. J., Bk. 9; L. R. 4 Ch. 630; 20 L. T. 997; 17 W. R. 997.

Straightening plates, formed of flat plates of iron and let into the iron flooring of a room so as to be on a level with the surrounding floor and united to it, are fixtures. *Ib.*

c. Agricultural.

A tenant in agriculture, who erected at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the pur-

poses of agriculture and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former; that is, whether the superincumbent building is erected as a mere accessory to a personal chattel, as an engine; but where it is accessory to the realty, it can in no case be removed. *Elwes* v. *Maw*, 3 East, 38; 6 R. R. 523. And see *Williams* v. *Williams*, 12 East, 209; 11 R. R. 357.

A tenant is entitled, at the expiration of his term, to remove a wooden barn which he has erected upon a foundation of brick and stone; the foundation being let into the ground, but the barn resting upon it by weight alone. *Wansbrough* v. *Maton*, 4 A. & E. 884; 6 N. & M. 367; 2 H. & W. 37; 5 L. J., K. B. 150.

d. Useful or Ornamental.

Greenhouses.]—The executors of a deceased rector are at liberty to remove hothouses erected by such rector which did not form part of the rectory house. Such erections are not necessary for the enjoyment of the rectory, but are only conveniencies which the deceased rector might have removed during his lifetime. *Martin* v. *Rowe*, 7 El. & Bl. 237; 26 L. J., Q. B. 129; 3 Jur. (N.S.) 465; 5 W. R. 263.

Greenhouses built in a garden, and constructed of wooden frames fixed with mortar to foundation walls of brickwork, are fixtures, and not removable by the occupier who built them. *Jenkins* v. *Gething*, 2 Johns. & H. 520.

A boiler built in the masonry of the greenhouse, also, is irremovable; but the pipes of a heating apparatus, which were connected with the boiler by screws, are removable. *Ib.*

A conservatory erected on a brick foundation, affixed to and communicating with rooms in a dwelling-house by windows and doors, cannot be removed by a tenant for years, who erected it during his tenancy, although he had a reversion in fee after the death of his lessor. *Buckland* v. *Butterfield*, 4 Moore, 440; 2 Br. & B. 54; 22 R. R. 649.

Chimneypiece.] — An out-going tenant may remove an ornamental chimneypiece put up by himself during his tenancy, but not a chimney piece which is not ornamental. An outgoing tenant has no right to remove pillars of brick and mortar built on a dairy floor to hold pans, although such pillars are not let into the ground. *Leach* v. *Thomas*, 7 Car. & P. 328.

A tenant during the term has a right to remove a chimneypiece of an ornamental character put up himself, but he has no such right with respect to a plain chimneypiece merely because it is of marble. *Bishop* v. *Elliott*, 11 Ex. 113; 24 L. J., Ex. 229; 1 Jur. (N.S.) 662; 3 W. R. 454—Ex. Ch.

A tenant during the term may take chimneypieces or wainscot put up by himself; afterwards he is a trespasser. *Quincy, Ex parte*, 1 Atk. 477. See also *Dudley* v. *Warde*, Ambl. 113.

Chimneyglasses.] — Hangings, chimneyglasses, or pier glasses are matters of ornament and furniture, and not fixtures made to go with the house. *Beck* v. *Rebow*, 1 P. W. 94.

—— And Bookcases.]—A testator by his will devised his house with the grates, stoves, coppers, &c., and the "fixtures and fixed furniture" to his executors upon trust to permit E. to have the use thereof for life, and he also bequeathed his furniture, plate, &c., to E. absolutely:—Held, that chimneyglasses fixed to the wall and a bookcase screwed or fastened to the wall, were fixed furniture; but that a bookcase merely placed in a wall was not so. *Birch* v. *Dawson*, 6 Car. & P. 658.

Beds.]—Beds fastened to the ceiling, or even nailed, are not fixtures. *Quincy, Ex parte*, 1 Atk. 477.

Carpet.]—Whether a carpet tacked to the floor is fixed furniture, quære. *Birch* v. *Dawson*, 6 Car. & P. 658.

Tapestry.]—See *D'Eyncourt* v. *Gregory*, 36 L. J., Ch. 107; L. R. 3 Eq. 382; 15 W. R. 186; *Norton* v. *Dashwood*, 65 L. J., Ch. 737; [1896] 2 Ch. 497; 75 L. T. 205; 44 W. R. 680, post, col. 130.

Brass Plate on Door.]—A. hired of B. rooms in his house, at a yearly rent, with the privilege of putting a brass plate, with his name engraved thereon, upon the front door, there to remain so long as he should continue to occupy the apartments. The rent being in arrear, B. removed the brass plate from the door, and refused to allow A. to have access to the apartments. In an action, charging that B. broke and entered the apartments of A., and expelled him therefrom, and removed the plate, and seized and converted his goods, B. pleaded that A. was not possessed of the brass plate:—Held, that the facts warranted the jury in finding that B. was guilty of breaking and entering the apartments; that the removal of the plate was properly treated as a substantive trespass, having been pleaded to as such; and that, in the absence of evidence to show that it was affixed to the freehold, it must be assumed to be a chattel only. *Lane* v. *Dixon*, 3 C. B. 776; 16 L. J., C. P. 129; 11 Jur. 89.

Window Sashes.]—Window sashes, which are neither hung nor beaded into the frames, but merely fastened by laths nailed across the frames to prevent their falling out, are not fixed to the freehold. *Rex* v. *Hedges*, 1 Leach, C. C. 201; 2 East, P. C. 590, n.

Bells.]—Where a yearly tenant of a house had, at his own expense, during his term hung bells, but quitted the premises without removing them:—Held, that by remaining fixed to the freehold after the expiration of the term, they became the property of the landlord, and that the tenant could not maintain trover for them after the landlord had severed them from the freehold. *Lyde* v. *Russell*, 1 B. & Ad. 394; 9 L. J. (O.S.) K. B. 26.

Ranges and Ovens.]—A sheriff cannot take in execution fixtures consisting of ranges, ovens, and set-pots affixed to a freehold house which was built by the person against whom the execution issued. *Wynne* v. *Ingleby*, 1 D. & R. 247; 5 B. & A. 625; 24 R. R. 503.

Pump.]—A pump erected by a tenant, and so fixed as to be removable without injury to the freehold, may be taken away by him at the expiration of his term, as being an article of domestic use or convenience. *Grymes* v. *Boweren*,

4 M. & P. 143 ; 6 Bing. 437 ; 8 L. J. (o.s.) C. P. 140 ; 31 R. R. 460.

Cornice.]—A plea to an action by a landlord against his tenant for removing a cornice, stated, that it was the property of the tenant, that it was fixed up by him with screws only, for the purpose of ornament ; that he carefully removed it during the term, doing no unnecessary damage ; and that he repaired all the damage done. The replication stated that it was affixed to the freehold of the house, and was not removable by law. Issue on that question :—Held, that it was not a misdirection to leave it to the jury to say whether they were of opinion that the cornice was ornamental, and was so affixed to the freehold that it could be removed without substantial injury ; and that if they thought so, and that it had been so removed, the tenant had a right to remove it. *Avery* v. *Cheslyn*, 5 N. & M. 372 ; 3 A. & E. 75 ; 1 H. & W. 283.

Box Border — Garden.]—A tenant (not a gardener by trade) cannot remove a border of box, planted by himself on the premises demised, unless by special agreement with the landlord. *Empson* v. *Soden*, 4 B. & Ad. 655 ; 1 N. & M. 720.

Dove-cot — Presses.] — Injunction granted against waste by tenant. Waste is committed by destruction of dove-cot, but not by removing presses, &c., unless fixed. *Kimpton* v. *Eve*, 2 Ves. & B. 349 ; 13 R. R. 116.

e. Between Heir and Executor.

Things fixed to the freehold by and at the expense of the tenant in fee, which are removable, but necessary to the enjoyment of the inheritance, go to the heir and not to the executor ; therefore, trover will not lie by the executor against the heir for salt-pans erected by the testator. *Lawton* v. *Salmon*, 1 H. Bl. 259, n. ; 2 R. R. 764.

The absolute owner of land, for the purpose of better using that land, erected upon and fixed to the freehold certain machinery :—Held, that, in the absence of any disposition by him of this machinery, it would go to the heir as part of the real estate. *Fisher* v. *Dixon*, 12 Cl. & F. 312; 9 Jur. 883.

If the corpus of such machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. *Ib.*

No distinction arises in the application of this rule from the circumstance that the land did not descend to, but was purchased by, the owner. *Ib.*

Pictures and glasses put up instead of wainscot, or where wainscot would otherwise have been put, shall go to the heir, and not to the executor. *Cave* v. *Cave*, 2 Vern. 508.

Plaintiffs, as administrators, brought trover for certain salt-pans set up in the wyche-houses in Cheshire ; the pans were fixed with brick and mortar to the floor, with a furnace under them, and were worth, with the buildings and lodging-rooms, 8*l.* per week. The ancestor who fixed the pans was seised in fee, and the inheritance was of little value without them, and a salt-brine and salt-pans form the most valuable inheritance in Cheshire :—Held, that these salt works should go to the heir. *Lawton* v. *Lawton*, 3 Atk. 16, n.

Though the strictness of the old rule with regard to fixtures and other appendants to the freehold has of late years been much relaxed, as between tenant for life or in tail and remainderman, as also between landlord and tenant, yet the rule still holds as between heir and executor. *Ib.* 13. And see *Poole's Case*, 1 Salk. 368.

f. Between Tenant for Life and Remainderman.

If a tenant for life or in tail erects a fire-engine to work a colliery, it will, on his death, be considered as part of his personal estate, and not go with the estate to the remainderman. *Dudley* (*Lord*) v. *Ward* (*Lord*), Amb. 113.

A tenant for life of mines and collieries erected machinery for the purpose of working them and rendering the minerals merchantable : —Held, that if such machinery was capable of being removed by disturbing the soil, without destroying the land, it was to be deemed trade fixtures, and as such passed on his death to his executor, and not to the owner of the land. *Ward* v. *Dudley* (*Countess*), 57 L. T. 23.

A tenant for life of an estate, on which he had built and furnished a house (an old one having fallen into decay), bequeathed all the tapestry, marbles, statues, pictures with their frames and glasses, which should be in or about the house at his death, and of which he had power to dispose, to A., the remainderman, for life, and then to B. after A.'s death :—Held, that tapestry, pictures in panels, frames filled with satin and attached to the walls, and also statues, vases, and stone garden-seats, essentially part of the architectural design, however fastened, were fixtures, and could not be removed ; but that glasses and pictures, not in panels, passed under the will to B. *D'Eyncourt* v. *Gregory*, 36 L. J., Ch. 107 ; L. R. 3 Eq. 382 ; 15 W. R. 186.

Held, also, that articles bought by the testator, but fixed by A. after his death, passed under the will. *Ib.*

Tapestry attached to the walls of a room in a mansion-house in the manner described in the case of *D'Eyncourt* v. *Gregory* (36 L. J., Ch. 107 ; L. R. 3 Eq. 382) :—Held, following that case, to pass as a fixture with the devise of the house. *Norton* v. *Dashwood*, 65 L. J., Ch. 737 ; [1896] 2 Ch. 497 ; 75 L. T. 205 ; 44 W. R. 680.

The strictness of the old rule with regard to fixtures and other appendants to the freehold, has of late years been much relaxed, as between tenant for life or in tail and remainderman, as also between landlord and tenant. *Lawton* v. *Lawton*, 3 Atk. 13. And see *Poole's Case*, 1 Salk. 368. *Quincy*, *Ex parte*, 1 Atk. 477.

A collection of stuffed birds, fixed for the purpose of display upon twigs or pieces of imitation rock-work, which are in their turn fastened to movable wooden trays fitting into solid metal cases fixed to the walls of a museum in a settled family mansion, cannot be considered as fixtures forming part of the architectural design and structure of the mansion-house so as to devolve with the settled estate, but are movable personal chattels. *D'Eyncourt* v. *Gregory* (36 L. J., Ch. 107 ; L. R. 3 Eq. 382), distinguished. *Hill* (*Viscount*) v. *Bullock*, 66 L. J., Ch. 705 ; [1897] 2 Ch. 482 ; 77 L. T. 240 ; 46 W. R. 84—C. A.

2. When Removable.

Generally.]—Whether removable by law or not is a mixed question of law and fact. *Avery* v. *Cheslyn*, supra.

Within what Time.]—In the absence of a special contract tenant's fixtures cannot be removed after the termination of the lease, and this rule applies whether the lease determines by effluxion of time or by re-entry on forfeiture. *Pugh* v. *Arton*, 38 L. J., Ch. 619; L. R. 8 Eq. 626; 20 L. T. 865; 17 W. R. 984.

Where a tenant forfeited his lease by an act of bankruptcy, and the landlord re-entered:—Held, that the landlord was absolutely entitled to all fixtures remaining upon the premises at the date of the re-entry. *Ib.*

If a tenant, in exercising his trade, puts up fixtures, he is entitled to remove them, if he does so within the term. The tenant of a house is also entitled to remove ornamental fixtures not connected with trade, they being considered built in merely for a temporary domestic purpose. *Gibson* v. *Hammersmith and City Ry.*, 2 Drew. & Sm. 603; 1 N. R. 305; 32 L. J., Ch. 337; 9 Jur. (N.S.) 221; 8 L. T. 43; 11 W. R. 299. See *Lyde* v. *Russell*, 1 B. & Ad. 394; 9 L. J. (O.S.) K. B. 26.

The purchaser of lands having brought an ejectment against the tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution till a given period: the tenant cannot in the interval remove buildings, &c., from the premises which he had himself erected during his term, and before the action was brought. *Fitzherbert* v. *Shaw*, 1 H. Bl. 258.

The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. *Weeton* v. *Woodcock*, 7 M. & W. 14; 10 L. J., Ex. 183.

An outgoing tenant has no right to enter, for the purpose of severing and removing fixtures after the expiration of his term, and a new tenant has been let into possession. *Leader* v. *Homewood*, 5 C. B. (N.S.) 546; 27 L. J., C. P. 316; 4 Jur. (N.S.) 1062.

The right of a tenant to tenant's fixtures is a qualified right, and is dependent on the tenant removing them during the term, or during some period after its termination in which he may be considered as still in possession under the landlord. *Lavies, In re, Stephens, Ex parte*, 47 L. J., Bk. 22; 7 Ch. D. 127; 37 L. T. 613; 26 W. R. 136—C. A.

What is annexed to the freehold is to be considered as part of it; but between landlord and tenant, the latter may remove what he erects for trade, but such removal must be during the term. So, tenant may remove chimney-pieces, &c.; and where engines, coppers, &c., are the principal, and the house only the accessory, they may be removed, though the house is thereby injured. *Dudley* v. *Warde*, Ambl. 113.

When Tenant not Prevented by Delay.]—A lessee of business premises having become insolvent, the trustee in liquidation put up the fixtures for sale by auction, under conditions which required them to be cleared by the purchaser in two days from the sale. The plaintiff bought the fixtures; but with the knowledge of the trustee, allowed them to remain on the premises whilst he was treating with the landlord for a new lease. This negotiation fell through, and the trustee surrendered the premises to the landlord, who relet them, the fixtures still remaining affixed. About a fortnight afterwards the plaintiff, learning of the surrender, applied to the landlord for the fixtures. In an interpleader issue between the plaintiff and a person claiming title through the new tenant:—Held, that the plaintiff had not lost his right by delay or laches, and that he was entitled to the fixtures. *Saint* v. *Pilley*, 44 L. J., Ex. 33; L. R. 10 Ex. 137; 33 L. T. 93; 23 W. R. 753.

Landlord's Rights on Wrongful Removal.]—*See* post, col. 153.

Reasonable Time after Surrender.]—The lessee of premises erected a greenhouse thereon, which, though a fixture by agreement with the lessor, he was entitled to remove. He subsequently assigned the greenhouse by a bill of sale, and the assignee immediately entered under the powers of the bill of sale. The greenhouse was put up to auction a month after the entry, but not sold. Ten days after the auction the keys of the premises were given up to the lessor by the auctioneer, who had been in possession for the assignee, and the lessor took possession: on the same day the assignee had notice of the surrender. The lessee made no attempt or claim to recover the premises after the entry under the bill of sale. Between three and four weeks after possession had been given up to the lessor the assignee sold the greenhouse to the plaintiff, who claimed to be entitled to enter and remove it:—Held, that the facts showed a surrender by operation of law, and that the greenhouse, not having been removed by the assignee within a reasonable time after notice of the surrender, had become the property of the lessor, and could not be removed. *Moss* v. *James*, 38 L. T. 595—C. A. Affirming, 47 L. J., Q. B. 160.

Agreements as to.]—The defendant let to the bankrupt certain premises, upon which he covenanted to erect fixtures for shipbuilding, and to leave them at the end of the term; provided that this covenant was not to include any fixtures other than shipbuilding fixtures which he might erect during the term; provided also, that, in case the lessee became bankrupt the plaintiffs (his assignees) might re-enter and take possession of the shipbuilding fixtures. The lessee became bankrupt:—Held, that the assignees were, under these provisions, entitled to the possession of the premises for a reasonable time in order to remove the fixtures other than shipbuilding fixtures. *Stansfield* v. *Portsmouth Corporation*, 4 C. B. (N.S.) 120; 27 L. J., C. P. 124; 4 Jur. (N.S.) 440; 6 W. R. 296.

A tenant from year to year disclaimed his landlord's title; upon which the landlord demanded possession, and served him with a declaration in ejectment on the 8th February. On the 19th February the parties signed the following agreement:—"In consideration of Mr. B. (the tenant) not appearing to this action, I undertake not to issue a writ of possession until after the 25th March next":—Held, that the meaning of this agreement was, that the premises should be given up on the 25th in the same condition as they were in on the 19th, and that therefore the tenant (whatever his rights might otherwise be) was precluded by it from removing in the interval his fixtures, which he had put up during his term. *Heap* v.

Barton, 12 C. B. 274; 21 L. J., C. P. 153; 16 Jur. 891.

Implied Covenant to allow.]—An underlease of a nursery ground contained an express covenant by the underlessee to deliver up all landlord's fixtures thereon at the end of the time:—Held, that a representation and covenant by the grantors of the underlease that the underlessee should be at liberty, without hindrance from any one, to remove trade fixtures during the term, and that the grantors had not entered into covenants inconsistent with such right, could not be implied. *Porter* v. *Drew*, 49 L. J., C. P. 482; 5 C. P. D. 143; 42 L. T. 151; 28 W. R. 672; 44 J. P. 267.

Rights of Assignee in Bankruptcy.] — The rent of a cotton mill was made payable in advance, and the tenant covenanted with the landlord to keep in the mill machinery of a certain value, as a security for the rent. The lessee became bankrupt, no rent being due. The official assignee immediately entered and claimed to be entitled to remove the machinery before the next instalment of rent became due, which claim the landlord resisted, on the ground that the covenant gave him a lien on the machinery:—Held, that the provision as to reputed ownership applied, and that the assignee was entitled to remove the machinery. *Shuttleworth* v. *Hernaman*, 1 De G. & J. 132. See also *Gould* or *Goold*, *Ex parte*, *Walker*, *In re*, post, col. 138.

When a trustee in bankruptcy disclaims a lease, then, as under the Bankruptcy Act, 1869, s. 23, the disclaimer relates back to the adjudication, the trustee has no interest in the lease, and no right to the tenant's fixtures, which pass to the landlord. *Lavies*, *In re*, *Stephens*, *Ex parte*, 47 L. J., Bk. 22; 7 Ch. D. 127; 37 L. T. 613; 26 W. R. 136—C. A.

Sale under Execution.]—A landlord filed a bill, to which there was a demurrer, alleging that, under an execution against his tenant, the sheriff was about to sell all the property on the demised premises, and that it appeared by the handbills that it was intended to sell the fixtures on the premises. Demurrer overruled. *Richardson* v. *Ardley*, 38 L. J., Ch. 508.

Machinery.]—A lease contained covenants by the lessee to erect certain machinery in the buildings demised, and to keep the buildings and machinery in repair during the term; and a covenant to deliver up the buildings at the end of the term, not mentioning the machinery:—Held, nevertheless, that the machinery was made a landlord's fixture, as, practically, the tenant could never remove it. *Daglish*, *Ex parte*, *Wilde*, *In re*, 42 L. J., Bk. 102; L. R. 8 Ch. 1072; 29 L. T. 168; 21 W. R. 893.

Partly-erected Cattle Shed—Shed Built of Timber taken from the Land.]—A tenant, by permission of his landlord, cut down some trees for the purpose of building a cattle house upon the land. When the building was completed, with the exception of the roof, the landlord sold his reversion, and the tenant gave the new landlord notice to quit, and took down the unfinished building and removed the materials:—Held, that the new landlord was entitled to the building although it was not completed, since the materials of which it was constructed consisted of timber taken from the land by permission of the owner for the purpose of its erection. *Smith* v. *Render*, 27 L. J., Ex. 83; 5 W. R. 875.

—— **Shed Built of Tenant's Materials.**] — Quære, whether where a tenant uses his own materials in the construction of a building, he may, before it is completed, pull it down again, doing no injury to the soil. *Ib.*

By Law of Cape Colony.]—See *London and South African Exploration Co.* v. *De Beers Consolidated Mines*, 64 L. J., P. C. 123; [1895] A. C. 451; 72 L. T. 609; 11 R. 511—P. C.

3. Contracts respecting.

a. Between Landlord and Tenant.

Removal of Fixtures.]—*See* ante, col. 132.

Construction of Covenants—To yield up Fixtures.]—A covenant to yield up at the expiration of the term all erections and improvements erected, made, or set up, during the term, is broken by the removal of the sashes and framework of a greenhouse erected during the term, the framework of which was laid upon walls, built for the purpose of receiving it, and imbedded in mortar thereon. *West* v. *Blakeway*, 3 Scott (N.R.) 199, 218; 2 Man. & G. 729; 9 D. P. C. 846; 10 L. J., C. P. 173; 5 Jur. 630.

A lease contained a covenant to repair and yield up in repair the furnaces, fire-engine, ironworks, dwelling-house, and all other erections, buildings, improvements, and alterations to be erected, built, or set up, except the ironwork castings, railways, winseys, gins, machines, and the movable implements and materials used in or about the furnaces, fire-engine, ironworks, stone pits, and premises; and there was a power given to the lessors to purchase those articles, on giving notice before the expiration of the lease:—Held, that the lessees had a right to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building, or support of building, although made of iron; and that, in such removal, the lessees might disturb such brickwork as was necessary, and were not bound to restore it to a perfect state, as if the article it was intended to support or cover was still there; but that the lessees were liable for any unnecessary disturbance of brickwork. *Foley* v. *Addenbrooke*, 13 M. & W. 174; 14 L. J., Ex. 169.

By a covenant in a lease for a term of years the lessee was bound peaceably to surrender and deliver up to the lessor the premises, together with "all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, and other fixtures, and articles in the nature of fixtures, which should at any time during the term be fixed or fastened to the premises, or be thereto belonging." At the date of the lease the house was intended to be used as a tavern, and the lessees subsequently completed and fitted up the house with things necessary for carrying on the business of a tavern-keeper, and for that purpose caused to be put in and fixed to the premises, in the usual way, fixtures of the description known as trade and tenants' fixtures:—Held, that the words of the covenant referred only to what are commonly called landlords' fixtures, and the lessee was therefore not restrained from selling either the trade or tenants' fixtures. *Bishop* v. *Elliott*, 11 Ex. 113; 24 L. J., Ex. 229; 1 Jur. (N.S.) 662; 3 W. R. 454—Ex. Ch.

The assignee of a house held under a lease for twenty-one years erected during the term a plate-glass shop-front or window, fixed with wooden wedges, without screws, nails, or glue, and which could be removed without doing any injury to the premises:—Held, that the removal by the assignee of this plate-glass shop-front or window was a breach of a covenant contained in the lease, to yield up at the end of the term all windows which then were, or at any time thereafter should be, thereunto affixed or belonging, together with all sheds and other erections, buildings, and improvements which should be erected, built, or made upon the premises; because the plate-glass front was either a window or an improvement within the meaning of the covenant, and therefore irremovable at the end of the term, although erected for the purposes of trade. *Burt* v. *Haslett*, 18 C. B. 893; 25 L. J., C. P. 295; 2 Jur. (N.S.) 974; 4 W. R. 679—Ex. Ch.

A lessee of a mine covenanted by his lease, at the end of the term, if the lessor should require it, to leave him all the engines, machinery, things, and materials which should have been used in and about the working of the mine, upon receiving twelve months' notice from the lessor, and being paid for the same according to valuation. In a subsequent part of the lease it was provided that it should be lawful for the lessee at any time or times during the term, or within twelve months after its expiration, to remove all the machinery, engines, things, and materials which should be erected or brought by him upon the premises, unless the lessor should be minded to purchase the same, which he should have liberty to do upon giving the notice thereinbefore mentioned, and upon paying the price estimated. The lease also contained a covenant by the lessee not to do any act which might occasion or tend to produce the drowning of the mine. Fourteen years before the expiration of the term the lessee became insolvent, and assigned everything he had brought upon the premises to trustees, who gave notice to the lessor of their intention to remove the same unless he should be minded to purchase. To a bill by the lessor, averring that such removal would occasion or tend to produce the drowning of the mine, and praying for an injunction to restrain the same until the end of the term, and until he had the opportunity of exercising his option to purchase, a demurrer was allowed, the court being of opinion, that, according to the true construction of the lease, the lessee was to be at liberty to remove all the property in question, unless the lessor gave notice of his intention to purchase, and paid for the same. *Rolleston* v. *New*, 4 Kay & J. 640.

A lease contained a covenant to yield up certain scheduled articles, together with all doors, wainscots, shelves, presses, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, mantel-pieces, chimney-jambs, foot-spaces, slabs, covings, window-shutters, partitions, sinks, watercloset, cisterns, pumps and rails, water-tanks, "and other additions, improvements, fixtures, and things," which were and should be anyways fixed or fastened upon the premises:—Semble, that the general words could not be restricted (there being no assignable genus to which the enumerated articles belonged). *Wilson* v. *Whateley*, 1 John. & H. 436; 7 Jur. (N.S.) 908; 3 L. T. 617; 9 W. R. 331.

Held that the lessee could not make a marketable title even to articles in the nature of tenant's fixtures. *Ib.*

In 1804, owners of the fee-simple of certain premises agreed, by indented articles, to demise them for lives renewable for ever, and the intended lessees agreed to pull down a mill on the premises, and build a new one, and covenanted to keep the mills and works in constant working order, repair, and condition. On the 30th July, 1823, a lease was executed in pursuance of this agreement, and the lessee thereby covenanted to preserve and keep the premises, and all buildings and improvements then or thereafter to be made thereon, in good order and repair: to keep the mills, works, and machinery therein in working order, repair, and condition: to yield up the premises, and all buildings and improvements, in like good order, repair, and condition, and to keep the mills and works thereto belonging, or in anywise appertaining, in constant working order and repair. The lease was renewed in 1829, the renewal containing similar covenants by the tenant. On the 8th November, 1834, an underlease, at a profit rent, was made of the mills and premises for 999 years, which disclosed the existence of a head lease. In 1862 S. & Co. became assignees of the sub-lease, and, having entered into possession, took out the old mill-stone, and erected a quantity of new machinery in the mill, of an improved description. In 1865 a fee-farm grant was made by the plaintiff, as owner of the reversion, to the owners of the superior lease, with covenants by the grantees similar to the lessee's covenants in the original lease and renewal, and also to keep the mills and works in constant working order, repair, and condition. In 1874 an agreement was executed between the head landlord and S. & Co. reciting the original lease, its renewal, the underlease, and the derivative title to it, and giving S. & Co. liberty to erect an engine-house and shed, in pursuance of which the defendants erected a steam-engine and boiler, and buildings for the same. In 1886 S. & Co. sold, and proceeded to remove, the new machinery placed by them in the mill:—Held, that S. & Co. were precluded by the terms of the contract of tenancy having regard to the covenants in the several instruments constituting their title, and of which they had notice, from removing tenants' fixtures, including the new and improved machinery, and its accessories. *Cosby* v. *Shaw*, 19 L. R. Ir. 307.

—— **Estoppel.**]—A tenant covenanted in a lease to deliver up, at the expiration of his term, certain fixtures on the premises. The term expired on the 1st of April. On the 10th the landlord demanded possession. On the 13th the tenant received notice from a mortgagee that he was entitled to possession, and that he demanded payment of the rent; and on the same day the tenant bought the mortgagee's interest. The landlord having afterwards brought an action for breach of the covenant in not delivering up the fixtures:—Held, first, that the tenant was not estopped from denying the landlord's title to the fixtures. *Watson* v. *Lane*, 11 Ex. 769; 25 L. J., Ex. 101; 2 Jur. (N.S.) 119; 4 W. R. 293.

—— **Damages for Breach of.**]—Held, secondly, that the landlord could not recover the value of the fixtures, but only the actual damages sustained by him in consequence of their detention from the 10th to the 13th of April. *Ib.*

—— **To Protect Landlord against Execution Creditor.**]—Tenants' fixtures are not chattels until severed; and it is competent to a landlord to make an agreement with his tenant which shall, without an abandonment by the tenant of his property in such fixtures during the term, in the event of an execution against the tenant, enable the landlord to re-enter and retain such fixtures against the execution creditor. *Dumergue* v. *Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88; 10 Jur. (N.S.) 155; 9 L. T. 775; 12 W. R. 205—Ex. Ch.

D. demised to F. a music-hall. F. covenanted, at the determination of the lease, to deliver up the music-hall, together with all locks, doors, and other fixtures, and that no fixtures should be removed during the term, except for the purpose of repair; and if the lease should determine by efflux of time, it should be lawful for F. to remove the fixtures within twenty-one days; but that if F. should become bankrupt, or if any distress or execution should be levied or executed by seizure on the premises, then it should be lawful for D. to re-enter, and to seize and retain for her own use all fixtures whatsoever, whether tenants' or trade fixtures, or otherwise. During the term, the sheriff entered on the premises, and seized the fixtures in execution under a fi. fa.:—Held, that, by the terms of the lease, the tenant had no right to remove the fixtures during the tenancy, and therefore the fixtures were not seizable by the sheriff. *Ib.*

—— **Covenant in Second Lease to Repair—Fixtures Erected under First Lease.**]—Where a tenant erected fixtures for the purposes of his trade on the demised premises, and afterwards took a new lease to commence at the expiration of the former one, and the latter lease contained a general covenant to repair, such lessee is bound to repair such fixtures, unless it can be satisfactorily shown that they were not intended to pass under the general words of the second lease. *Thresher* v. *East London Waterworks Co.*, 4 D. & R. 62; 2 B. & C. 608; 2 L. J. (O.S.) K. B. 100.

—— **As to Ways and Roads in Mine.**]—Coal and iron works were demised, together with lands, and mines under other lands not included in the demise, with liberty to the lessees to make and use roads and ways over any of the lands, and to do all such other acts upon the lands as should be necessary for the purposes of the works; and the lessees covenanted to uphold and keep in good repair the furnaces and other works, houses and other buildings then standing, and which during the term should be erected and built on the demised land and all other the demised premises, and at the expiration of the term to deliver up the property, and all ways and roads in, upon, or under the same lands, in such good order that the works might be continued by the lessor:—Held, that this covenant did not extend to trams fastened to sleepers not affixed to the freehold, which the tenant had placed upon roads for the purpose of using them as tramways, and that the landlord, therefore, was not entitled to an injunction to restrain the tenant from disposing of them during the term. *Beaufort (Duke)* v. *Bates*, 3 De G. F. & J. 381; 31 L. J., Ch. 481; 8 Jur. (N.S.) 270; 6 L. T. 82; 10 W. R. 200.

—— **As to Removals—Exceptions.**]—Lessors demised land, on which the lessees covenanted to erect saltworks, and at the end of their term to leave at the disposal of the lessors all the fixed materials, of what nature or kind soever, that should be in or about the works, or in anyways relating thereto, "save and except all the salt-pans and other movable articles made use of at all or any of the works." Afterwards the representatives of the original lessees surrendered their term in the premises, and took a fresh lease covenanting as to the salt-pans and other articles made use of in the works, that they should at the end of the term be at liberty to take and carry them away, making good such damages to the freehold as might be consequential upon their removal, but with an option to the lessors of purchasing the salt-pans and movable articles. On the 13th of December, 1861, they underlet the premises, in violation of the terms of the lease, whereupon, on the 23rd of June, 1862, the lessors demanded repossession, and on the 7th of July, 1862, brought ejectment. Between the 18th of January and the 17th of March, 1863, on which latter day they confessed judgment, the lessees removed, and sold a quantity of the fixtures:—Held, that there was nothing in the covenant to restrain them from removing trade fixtures, and that they were entitled to a reasonable time for removing them, dating from the day on which the lessors demanded repossession. *Sumner* v. *Bromilow*, 34 L. J., Q. B. 130; 11 Jur. (N.S.) 481.

—— **Removal before Termination of Lease—Bankruptcy.**]—A lease of a mill and warehouse for twenty-one years contained a covenant by the lessors (inter alia) (4) that certain articles mentioned in a schedule should be the property of the lessees, and should be removable by them, they making good all damage done by such removal. The articles mentioned in the schedule were iron columns, beams, floors, brick piers and things ejusdem generis. There was a proviso (2) that the lessees might by notice determine the term at the end of seven or fourteen years, (1) that on the tenant's bankruptcy the term should cease, and (3) that on the determination or cesser of the term, all the machinery and also all the buildings erected by the lessees should be their property, and should be removed by them previously to the determination or cesser of the term, unless it should then be mutually agreed that the lessors should purchase them, the lessees in cases of removal to make good all damages which might be caused by such removal. The tenants failed and the lease determined:—Held, that the official receiver was nevertheless entitled to the articles mentioned in clause (4) of this covenant and clause (3) of the proviso, as being the property of the lessees. *Gould* or *Goold*, *Ex parte*, *Walker*, *In re*, 13 Q. B. D. 454; 51 L. T. 368; 1 Morrell, 168.

—— **To yield up Buildings.**]—A covenant by a tenant to yield up in repair at the expiration of his lease all buildings which should be erected during the term upon the demised premises, includes buildings erected and used by the tenant for the purpose of trade and manufacture, if such buildings are let into the soil, or otherwise fixed to the freehold, but not where they merely rest upon blocks or pattens. *Naylor* v. *Collinge*, 1 Taunt. 19. See also *Cosby* v. *Shaw*, 23 L. R. Ir. 181.

The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced

before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises, and to deliver up the same at the end of the term, together with all things affixed thereto. *Doe* d. *Burrell* v. *Davis*, 15 Jur. 155.

—— **Meaning of "Improvements."**]—A tenant occupied a mill, under a lease containing a covenant, on the part of the tenant, to deliver up the premises at the end of the term in good repair, "together with all locks, bolts, bars, and all other fixtures, fastenings, and improvements that should at any time during the term be erected, set up, or fixed upon the premises" :—Held, that mill-stones, set up by the tenant, came within the term "improvements" in the covenant, and consequently could not be removed by him at the end of the term. *Murter* v *Bradley*, 2 M. & Scott, 25; 9 Bing. 24; 1 L. J., C. P. 147.

Although the custom of the country authorised him to remove them. *Ib.*

A covenant to keep in repair the premises and all erections, buildings, and improvements erected on the same during the term, and yield up the same at the end of the term, is broken by the removal of a verandah, erected during the term, the lower part of which was affixed to the ground by means of posts. *Penry* v. *Brown*, 2 Stark. 403.

A lease contained a covenant to yield up certain scheduled articles, together with all doors, wainscots, shelves, presses, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, mantel-pieces, chimney-jambs, foot-paces, slabs, covings, window-shutters, partitions, sinks, water-closets, cisterns, pumps and rails, water-tanks, "and other additions, improvements, fixtures and things," which were and should be anyways fixed or fastened upon the premises :—Semble, that the general words could not be restricted, there being no assignable genus to which the enumerated articles belonged. *Wilson* v. *Whateley*, 1 Johns. & H. 436; 7 Jur. (N.S.) 908; 3 L. T. 617; 9 W. R. 331.

Held, that the lessee could not make a marketable title even to articles in the nature of tenant's fixtures. *Ib.*

Re-entry under Covenant.] — In 1824, A. leased to B. for twenty-one years a colliery (with the right of putting up steam-engines for working it), subject to a proviso for re-entry, on non-payment of rent or insolvency. B. erected on the colliery several steam-engines, affixed in the ordinary way to the soil; and afterwards, in 1827, assigned the colliery, with the engines, implements, &c., in use upon it, to trustees to permit B. to enjoy them until default in payment of an annuity granted by him; and on such default to take possession and sell them, and pay the arrears. In June, 1829, A. recovered possession of the premises in ejectment, brought in pursuance of the proviso for re-entry. In November, 1829, the engines and other articles on the colliery were seized under a fi. fa., at the suit of an execution creditor of B. :—Held, that the steam-engines passed to the landlord on the re-entry, and that the trustees could not recover them in trover against the sheriff. *Minshall* v. *Lloyd*, 2 M. & W. 450; M. & H. 125; 6 L. J., Ex. 115; 1 Jur. 336.

Forming Part of Personal Estate.]—In January, 1797, several persons carried on business in partnership as calico printers; and in the same month, premises on which their works were principally carried on were conveyed to one of the partners in fee. The conveyance mentioned the premises to consist, besides land, of dwelling-houses, machine-house, and other buildings and erections, and stated them to be then in the possession of the partner to whom they were conveyed, and another partner. Various buildings and machines were afterwards, from time to time, erected on the premises by the firm, for the purpose of extending the works. The whole was firmly fixed to the freehold, and stood on that part of the land which was conveyed to one of the partners in 1797, but the part in question could be removed without material injury to the buildings. In the different stock-takings of the firm, the land and buildings were always valued and classed separately from the machinery and fixtures. In the part of the country where the premises were situated, machinery of this description was constantly bought and sold distinctly from the freehold. The freehold in the premises having been subsequently conveyed to two of the partners, they, in 1828, mortgaged them to the plaintiff's wife, under the description of all the messuages, dwelling-houses, lands, and buildings therein mentioned; "and also all that and those the steam-engine, mill-gearing, heavy gear to millwright work, fixed machinery, and other matters and things then standing and being in and upon the demised buildings, works, and premises, which in any manner constituted fixtures and appendages to the freehold of the same, or any part thereof." All the machinery, fixtures, &c., appeared to have been in the reputed ownership of the partners who carried on the works until 1831, when they became bankrupt. The mortgagee had inspected statements of the affairs of the partners, which treated the machinery as not included in the mortgage, and had made no objections to such statements. In April, 1831, the assignees sold all the machinery and fixtures, with the exception of two steam-engines, two water-wheels, an iron flooring, and other small articles, and the greater part of them was removed by the purchasers. The articles claimed by the mortgagee were all firmly fixed to the freehold, in such a manner, however, that they might easily be removed without material injury to themselves or to the buildings :—Held, that the machinery did not belong to the inheritance, but was part of the personal estate of the bankrupts; and that it passed to the assignees, and that the machinery was not intended to pass, and did not pass, to the mortgagee under the mortgage deed. *Trappes* v. *Harter*, 2 C. & M. 153; 3 Tyr. 604; 3 L. J., Ex. 24.

Agreement to leave Fixtures on Premises after Determination of Term.]—A tenant of a house for a term of years, being possessed of shelves, stoves, ranges, ovens, boilers, and other articles of household use, his own property, but annexed to the freehold, requested the landlord to purchase them at the expiration of the term, or let them remain for purchase by the incoming tenant, but to be taken away if the tenant should refuse them. The landlord wrote an answer, declining to purchase, but adding, "I have no objection to your leaving them on the premises, and making the best terms you can with the incoming tenant." The articles remained un-

severed from the freehold till the entry of the new tenant, who came in under a demise from the same landlord, but who declined to take them. The old tenant then (after the new tenant had been two months in possession) demanded liberty to enter and remove the fixtures, but the tenant refused permission; and thereupon brought an action for the hindrance, and trover against the tenant:—Held, that if the landlord's letter amounted to a licence to take away the articles, yet not being under seal, it was no valid grant of such privilege as against a new tenant in possession, and not party to the licence. *Ruffey* v. *Henderson*, 17 Q. B. 575; 21 L. J., Q. B. 49; 16 Jur. 84.

Held, also, that trover did not lie for the articles unsevered from the freehold. *Ib.*

As between landlord and tenant an agreement by the landlord that the tenant shall be at liberty to leave tenant's fixtures on the premises after the expiration of the tenancy, and to sever and remove them after they have thus become part of the freehold, may, in the event of the landlord's subsequent refusal to permit severance and removal, give the tenant a right of action for the value of the fixtures. But such an agreement gives the tenant no such right of action against the landlord's mortgagees who have in the meantime entered into possession under a prior mortgage. *Thomas* v. *Jennings*, 66 L. J., Q. B. 5; 75 L. T. 274; 45 W. R. 93.

Tenant's fixtures not removed during the continuance of the tenancy become on its expiration part of the freehold even though they are on the premises by the parol consent of the lessor; and though such consent might give the tenant a right of action for the value of the fixtures against the lessor if he subsequently refused to permit their removal, it will give no such right as against the lessor's mortgagees who were no parties to it, should they refuse. *Ib.*

Implied Agreement.]—The acceptance of a demise of a house containing fixtures does not raise an implied contract to pay for such fixtures. *Goff* v. *Harris*, 5 Man. & G. 573; 12 L. J., C. P. 273.

Declaration—As to Fixtures Scheduled.]—A declaration stated that the plaintiff agreed to let, and the defendant to take for one year, a dwelling-house, together with the furniture, fixtures, and effects mentioned in the inventory thereof, "which was to be examined or signed by both parties." And the defendant agreed, at the end of the term, to deliver up the dwelling-house, furniture, fixtures, and effects, as per inventory, in as good condition as the same were then in, or pay for the damage. The declaration averred that the defendant entered and enjoyed the house, furniture, fixtures, and effects, and alleged as a breach, that, at the end of the term, he delivered up the furniture, fixtures, and effects, as per inventory, in a broken condition, and refused to pay for the damage:—Held, that the declaration was good, although it contained no averment that the inventory was examined or signed by either party. *Dumpier* v. *Pole*, 4 Ex. 678.

Costs of Agreement.]—A lessee of a house and fixtures, agreeing to pay the expense of preparing the agreement, is liable to pay the costs of preparing the agreement, and of copies of an inventory of the fixtures referred to by it. *Thomas, In re*, 8 Beav. 145.

Included in "Erections."]—An agreement was made with a company to grant them a lease of land as soon as they had spent 3,000*l.* "in the erection of permanent and substantial buildings and works such as are usually erected for the distillation of oil," and there was a covenant to cover in the "erections" and buildings when necessary:—Held, that "erections" was a wider term than buildings, and might include trade fixtures. *Bidder* v. *Trinidad Co.*, 17 W. R. 153.

b. Sale and Assignment.

Meaning of Fixtures.]—The word "fixtures" means the right of severance of chattels attached to the soil, but not part of the freehold. A transfer of fixtures is therefore, at least, the transfer of the right of severance; and, whether a memorandum of the sale of fixtures transfers any interest in the chattels themselves or not, is a conveyance within the words of the Stamp Act, which include the transfer of any right; and as fixtures are not goods, wares, and merchandise, it is not within the exemption. *Horsfall* v. *Key*, 2 Ex. 778; 17 L. J., Ex. 266.

Parol Agreement as to Reversionary Interest.]—A reversionary interest in trade fixtures will pass to a purchaser under a parol agreement. *Petrie* v. *Dawson*, 2 Car. & K. 138.

Wrongful Sale of.]—By agreement, reciting (as the fact was) that the plaintiff had discounted a bill for S., and that S., in consideration thereof, had deposited with the plaintiff as a collateral security for repayment, the lease of his house, and had also assigned to him the fixtures as per inventory, S. undertook, if the bill should be dishonoured, to execute a mortgage to the plaintiff of the lease (such mortgage to contain the usual power of immediate sale), together with the fixtures as per inventory, such lease and fixtures to be sold by auction, or otherwise, and, after repayment of debt and expenses to the plaintiff, the balance to be paid over to S. But if the plaintiff should wish to sell the fixtures by auction, or otherwise, S. undertook to allow him to do so on the premises, without his being liable to an action of trespass. S. also undertook to pay all arrears of rent and taxes within three months; and, in default of such payment, authorised the plaintiff to sell the lease and fixtures on the premises, by auction or otherwise, without previous mortgage, and to pay the proceeds as before stated. S. signed a receipt for 80*l.*, as paid for purchase of the fixtures. S. became bankrupt, having continued in possession of the house and fixtures until that event, and the bill having then three weeks to run. The assignees took possession of the fixtures and sold them:—Held, that the plaintiff was entitled to recover the value from them, the agreement having vested in him an immediate interest in the fixtures. *Thompson* v. *Pettitt*, 10 Q. B. 101; 16 L. J., Q. B. 162; 11 Jur. 748.

—— **Damages for.**]—The fixtures were sold by auction for 36*l.*, a fair price on such sale; but if they had been valued as between outgoing and incoming tenant they would have been worth 80*l.*:—Held, that the plaintiff was entitled to damages according to the latter estimate. *Ib.*

Removal of, after Sale.]—The plaintiff purchased a farm from the devisees in trust of the

father of the defendant, and the premises were conveyed by a deed, to which the defendant was a party, as one of the devisees. The plaintiff demised the premises to M. immediately after the conveyance, and the defendant, who was in the occupation of the farm at the time of the conveyance, under a lease from the devisees, removed some rick staddles, a threshing-machine, and a granary from the premises after the demise to M. The deed conveyed the land and all fixtures. The articles in question had been put on the land by the defendant's father:—Held, first, that, everything attached to the land having passed by the deed, the defendant had no right to remove the articles as fixtures removable by an outgoing agricultural tenant. *Wiltshire* v. *Cottrell*, 1 El. & Bl. 674; 22 L. J., Q. B. 177; 17 Jur. 758.

Held, secondly, that the removal of the rick staddles, which were stone pillars mortared to a foundation of brick and mortar let into the earth, with stone caps mortared on the pillars, and of the threshing-machine, which was fixed by bolts and screws to posts, which were let into the ground, was an injury to the plaintiff's reversionary estate, for which the defendant was liable in an action. *Ib.*

Held, thirdly, that a granary laid on a wooden foundation, supported by staddles, and which could be lifted from them by sufficient power without disturbing them, was a chattel, though it might pass under the word "fixtures" in a deed of conveyance, if there were other words in the deed denoting an intention of passing chattels, and it appeared, from the circumstances of the case, to be comprehended under that word; but that the removal of it would not support a count for an injury to the reversionary estate of the plaintiff, nor a count in trover. *Ib.*

What pass under Sale of Mill.]—Upon the sale of a mill or of a factory, looms used in the mill are not within the words "steam-engines, boilers, shafting, piping, mill-gearing, gasometer, gas-pipes, drums, wheels, and all and singular other the machinery, fixtures, and effects fixed up, in, attached or belonging to the mill or factory or premises." *Hutchinson* v. *Kay*, 23 Beav. 413; 26 L. J., Ch. 457; 3 Jur. (N.S.) 652; 5 W. R. 341.

Looms standing upon a loom-foot, from which they may be removed at pleasure, will not pass by the general terms of machinery, though they are worked by steam-power which is attached to the mill and mortgaged with it. *Ib.*

Of Iron Foundry.]—Where by a deed were granted "all that iron-foundry, together with the said dwelling-houses and appurtenances thereto belonging, and the dwelling-houses and buildings erected thereon, and all and singular other the hereditaments, &c., together with all grates, boilers, bells, and other fixtures in and about the said dwelling-houses, and the brew-houses thereto belonging"; it was held that the fixtures of the iron-foundry did not pass. *Hare* v. *Horton*, 5 B. & Ad. 715; 2 N. & M. 428; 3 L. J., K. B. 41.

Of Brewhouse.]—By the sale of a brewhouse the utensils will not pass. *Quincy, Ex parte*, 1 Atk. 478.

Agreement to Assign—Refusal of Defendant to Sign.]—A declaration, after reciting that the defendant was possessed, for the residue of a term of years, of a messuage and premises, and also of fixtures annexed to the premises, averred that the plaintiff agreed to purchase of the defendant the residue of the term of the messuage and premises, with the appurtenances and the fixtures; and the defendant agreed to give up possession of the messuage, with the appurtenances and the fixtures, on a certain day. The declaration averred, that the plaintiff tendered to the defendant for execution an instrument, which contained a recital that the plaintiff had lately contracted with the defendant for the sale to him of the residue of the term granted to him by P., in the messuage or tenements and hereditaments, with their appurtenances, and also all and singular the fixtures belonging to the messuage or tenements and hereditaments, for a certain sum, the receipt of which was acknowledged:—Held, that as the agreement between the parties was for the assignment of the fixtures only, which belonged to the defendant, the recital in the instrument tendered was too large, and therefore that it was not such an one as the defendant was bound to execute, and the judgment was arrested. *Manning* v. *Bailey*, 2 Ex. 45.

c. Mortgage.

i. *Of Freeholds.*

Fixtures included.] — Trade fixtures pass by a mortgage of the freehold or of a freeholder's interest in the property to which they are attached, whether such mortgage is effected by a regularly-executed deed, or by deposit with memorandum, and such mortgage will be effectual, though not registered, as against any subsequent unregistered bill of sale. Trade fixtures added subsequently to the mortgage are subject to this rule as much as those attached before the mortgage. *Meux* v. *Jacob*, 44 L. J., Ch. 481; L. R. 7 H. L. 481; 32 L. T. 171; 23 W. R. 526.

A portable engine and boiler brought on to colliery premises to be used in sinking a new shaft, and for the purpose of steadying the machinery, bolted to a wooden framework, and then the frame embedded in a layer of wet mortar laid upon a brick foundation, pass to the mortgagee of the realty as affixed to the freehold, and cannot be seized by the judgment creditors of the mortgagor. *Cross* v. *Barnes*, 46 L. J., Q. B. 479; 36 L. T. 693.

When an article is affixed to the soil by the owner of the fee, though only by means of bolts and screws, it is to be considered as part of the land; at all events where the object of setting up the article is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied. *Holland* v. *Hodgson*, 41 L. J., C. P. 146; L. R. 7 C. P. 328; 26 L. T. 709: 20 W. R. 990—Ex. Ch.

The owner in fee of a worsted mill at which he carried on the business of a worsted spinner and stuff manufacturer, mortgaged it. By a deed of arrangement under the Bankruptcy Act, 1861, subsequently executed, the mortgagor assigned all his property to trustees for the benefit of his creditors. Under this latter deed the trustees seized looms which were in the mill that was mortgaged. These looms were attached to the stone floors of the rooms of the mill by means of nails driven through holes in the feet of the looms, in some cases into beams which had been built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for

the purpose. It was necessary that the looms should be so attached for the purpose of steadying them and keeping them in a true direction, perpendicular to the line of the shafting, by means of which the steam power was applied to them. It was impossible to remove the looms without drawing the nails; but this could be done easily and without any serious damage to the flooring. The mortgagees brought trover for the looms:—Held, that the looms passed by the mortgage of the mill as part of the realty, and the action was therefore maintainable. *Ib.*

Things firmly annexed to the freehold by a mortgagor in possession after the date of the mortgage, for the purpose of improving the inheritance, pass to the mortgagee, and do not pass to the assignees of the mortgagor upon his bankruptcy; and that rule applies as well to trade as to other fixtures, the mortgagor not being in possession as tenant to the mortgagee. *Walmsley* v. *Milne*, 7 C. B. (N.S.) 115; 29 L. J., C. P. 97; 6 Jur. (N.S.) 125; 1 L. T. 62; 8 W. R. 138.

A trader mortgages the trade premises in fee, and then enters into partnership, and the firm carry on business on the same premises, and erect trade fixtures:—Held, on their bankruptcy, that the mortgagee was entitled to the trade fixtures. *Cotton, Ex parte, Nutter, In re*, 2 Mont. D. & D. 725; 6 Jur. 1045.

The owner of a mill mortgaged it in fee together with all the engines, plant, and machinery described in the schedule to the mortgage deed. The schedule included certain driving belts which were necessary for connecting the power machinery with certain machines which were so affixed as to be part of the realty:—Held, that the belts, being essential parts of the fixed machines, formed part of the realty, and as such passed under the mortgage. *Sheffield and South Yorkshire Permanent Building Society* v. *Harrison*, 54 L. J., Q. B. 15; 15 Q. B. D. 358; 51 L. T. 649; 33 W. R. 144.

By a mortgage of a mill, the stones, tackling and instruments necessary for working the mill pass to the mortgagee. *Place* v. *Fagg*, 4 M. & Ry. 277; 7 L. J. (O.S.) K. B. 195.

A bankrupt being the owner, as well as occupier, of a freehold cotton-mill, gave the petitioners an equitable mortgage on it, "together with the steam-engines, and also all and singular other the movable and fixed machinery, and steam-pipes then in, upon, about, and belonging to the said steam-mill and premises, or occupied or used therewith"; and the bankrupt continued in possession of the mill and fixtures up to the period of his bankruptcy:—Held, that all parts of the machinery and fixtures which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within s. 72 of the Bankrupt Act, and that the assignees had no right to them, as against the equitable mortgagee. *Wilson, Ex parte*, 4 Deac. & C. 143; 2 Mont. & Ayr. 61; 4 L. J., Bk. 24.

Where the memorandum of deposit accompanying an equitable mortgage stated, that the bankrupt had deposited "the deeds and documents under which he held the steam-mills, cottages, land, buildings, and premises at L.":—Held, upon construction of the contract, the point of "order and disposition" not having been taken, that the equitable mortgagee had a lien on the fixtures, whether erected before or after the time of the deposit, and including tenant's fixtures. *Price, Ex parte, Stead, In re*, 2 Mont. D. & D. 518; 11 L. J., Bk. 27; 6 Jur. 327.

A., who was a partner with B., deposited with their bankers the deeds of a freehold cotton-mill belonging to A., as a security for advances to be made by the bankers for the use of the firm of A. & B.; and in the memorandum of deposit it was stated, that the buildings were insured for 2,000*l.*, and "the machinery, &c., for 2,000*l.* more." A steam-engine and other machinery having been, previous to the deposit, erected by A. & B. for the purposes of their trade, A. & B. continued in possession of the premises, with all the machinery, up to the period of their bankruptcy:—Held, that the bankers had a lien on the steam-engine and machinery as well as on the buildings. *Lloyd, Ex parte, Ogden* or *Walmsley, In re*, 3 Deac. & C. 765; 1 Mont. & Ayr. 494; 3 L. J., Bk. 108. And see *Hobson* v. *Gorringe*, 66 L. J., Ch. 114; [1897] 1 Ch. 182; 75 L. T. 610; 45 W. R. 356—C. A. Ante, cols. 122, 123.

With Appurtenances.] — Where real property "with its appurtenances" (without other evidence of intention) was mortgaged by the owner of the fee, articles of furniture, as rolling maps, affixed before and after the mortgage to the freehold, although they might have been removable as between a landlord and tenant, and although he continued in possession up to the time of his bankruptcy, passed by the mortgage, and were taken out of the order and disposition of the bankrupt owner. Whatever is affixed to freehold by the owner of the inheritance is to be considered as a fixture till severed by him; and whether so affixed before or after a mortgage, passes absolutely to the mortgagee. *Belcher, Ex parte*, 4 Deac. & C. 703; 2 Mont. & Ayr. 160; 4 L. J., Bk. 29.

A mortgage of a brewhouse, with the appurtenances, will not carry the utensils, but the things only belonging to the outhouses. *Quincy, Ex parte*, 1 Atk. 477. *See also cases*, ante, cols. 123, 124.

As against Bill of Sale Holder.] — The owner in fee in possession of land and premises deposited the title-deeds with a banking company as an equitable mortgage, to secure the balance of his account with them for the time being. He then erected a mill, and set up, not only steam power applicable to all mills, but machinery applicable only to the purposes of a particular manufacture which he carried on there. He afterwards granted a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds:—Held, as between the mortgagees and the assignee, that all of the machinery which was annexed to the floor, ceilings, or sides of the building, in a quasi-permanent manner, by means of bolts and screws, passed to the mortgagees; and that it made no difference that the object of annexation was merely to steady the machines when in use, and that they could be removed without any injury to them or the freehold, nor that the machines were in the nature of trade fixtures, which would, as between landlord and tenant, belong to the tenant. *Longbottom* v. *Berry*, 10 B. & S. 852; 39 L. J., Q. B. 37; L. R. 5 Q. B. 123; 22 L. T. 385.

ii. *Of Leaseholds.*

A mortgage of a lease made by the lessee will carry the fixtures of that property which is in

lease, and the power to remove which fixtures was in the tenant. *Meux* v. *Jacobs*, 44 L. J., Ch. 481; L. R. 7 H. L. 481; 32 L. T. 171; 23 W. R. 526.

Trade fixtures removable as between landlord and tenant pass to equitable mortgagee by deposit of lease, though not specified therein nor in the memorandum of deposit. Quære, as to fixtures subsequently erected. *Broadwood, Ex parte, M'Neil, In re*, 1 Mont. D. & D. 631.

Fixtures belonging to a lessee and removable by him at pleasure (as between himself and the lessor) form part of the security under an equitable mortgage by deposit of the lease. *Richards, In re, Lloyds Banking Co., Ex parte*, and *Astbury, Ex parte*, 38 L. J., Bk. 9; L. R. 4 Ch. 630; 20 L. T. 997; 17 W. R. 997.

Leases are deposited by way of equitable mortgage, accompanied by a memorandum of deposit. Tenant's fixtures are included in the security, although they are not mentioned in the memorandum. *Cowell, Ex parte*, 17 L. J., Bk. 16; 12 Jur. 411.

Where a lessee for years mortgaged his lease, and all his estate and interest in the premises, and afterwards became bankrupt:—Held, that the mortgagee might declare as reversioner against the assignee of the tenant for the removal of the fixtures from the premises, whereby they were dilapidated and injured; and that he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before the execution of the mortgage, although there was a covenant in the original lease to the mortgagor to yield up to the lessor, at the determination of the term, "all fixtures and things to the premises belonging or to belong." *Hitchman* v. *Walton*, 4 M. & W. 409; 1 H. & H. 374; 8 L. J., Ex. 31.

The lessee of a house containing fixtures executed an assignment of the premises by way of mortgage, not mentioning the fixtures. He afterwards assigned the premises and all his estate and effects to trustees. The trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused, on demand, to deliver the fixtures up. The trustees brought trover:—Held, that they could not recover for the fixtures. *Longstaff* v. *Meagoe*, 2 A. & E. 167; 2 N. & M. 211; 4 L. J., K. B. 28.

A lessee annexed tenant's fixtures, and then deposited the lease, by way of mortgage, with a memorandum not noticing the fixtures:—Held, on his becoming bankrupt, that the security extended to the fixtures. *Tagart, Ex parte*, De Gex, 531.

A lessee erected trade fixtures, firmly attached to the freehold, but removable as between himself and the landlord. He then mortgaged the premises, without referring to the new erections, for an amount greater than the premises would be worth without the fixtures. He became bankrupt:—Held, that the mortgagee was entitled to the fixtures. *Bentley, Ex parte*, 2 Mont. D. & D. 591; 6 Jur. 719.

A publican deposited a lease of a public-house and other leases with his brewers, with a memorandum stating that they were to be equitable mortgagees of the leases and premises, and fixtures and appurtenances. The publican became bankrupt, and the brewers petitioned for a realisation of their security. The leases, and trade and other fixtures and fittings-up of the public-house were ordered to be sold, and were sold. The commissioner decided that the proceeds of the trade fixtures belonged to the general creditors, on the ground that these fixtures were in the order and disposition of the bankrupt within the meaning of s. 125 of the 12 & 13 Vict. c. 106; but upon appeal:—Held, that the mortgagees were entitled to the entire produce of the sale, as the trade fixtures were included in their security, and were not in the order and disposition of the bankrupt. *Gawan* v. *Barclay, Barclay, Ex parte*, 5 De G. M. & G. 403; 25 L. J., Bk. 1; 1 Jur. (N.S.) 1145.

Under an equitable mortgage by the simple deposit of a lease, unaccompanied by any memorandum, the tenant's fixtures will be included. *Williams* v. *Evans*, 23 Beav. 239.

A. and B. agreed that B., on payment of 1,000*l.* premium, and putting up fittings to the value of 500*l.*, should have a lease from A. of certain premises, and that he should advance 1,000*l.* to be secured by the premises so fitted up. B. entered, put up the fittings, and continued in possession; but nothing more was done, except that B., preferring to have only the agreement, and desiring to deposit it as a security to others, A. allowed him to deposit his part of the agreement (which was in duplicate) as a security, subject to his claim for 1,000*l.* B. became bankrupt, and his assignees, under an order of the court of bankruptcy, severed and sold the fittings:—Held, that A. was equitable mortgagee of the premises and fittings, and that the assignees had no right to remove the fittings. *Tebb* v. *Hodge*, 39 L. J., C. P. 56; L. R. 5 C. P. 73; 21 L. T. 499—Ex. Ch.

The defendants supplied and fixed for E., a nurseryman, on his premises, which were mortgaged to the plaintiff, a trade fixture, which, according to a hire-and-purchase agreement between E., E.'s landlord, and the defendants, prior to the mortgage, was to remain the property of the defendants till the instalments of purchase-money were paid. The plaintiff took the mortgage without notice of the agreement. E. having made default in payment of the instalments, the defendants removed the fixture before the plaintiff entered into possession:—Held, that the defendants were entitled to remove the fixture. *Sanders* v. *Davis* (15 Q. B. D. 218) and *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* ([1892] 1 Q. B. 415) followed. *Gough* v. *Wood*, 63 L. J., Q. B. 564; [1894] 1 Q. B. 713; 9 R. 509; 70 L. T. 297; 42 W. R. 469—C. A.

A mortgagor in possession has no right as against his mortgagee to remove fixtures otherwise than in the ordinary course of his trade and as a legitimate act of that trade. *Gough* v. *Wood* ([1894] 1 Q. B. 713) explained. *Huddersfield Banking Co.* v. *Lister*, 64 L. J., Ch. 523; [1895] 2 Ch. 273; 12 R. 331; 72 L. T. 703; 43 W. R. 567—C. A.

See also cases ante, cols. 123, 124.

iii. *Of Fixtures.*

When a rolling-machine (which itself was admittedly a fixture) was fitted with a number of different sets of loose rollers, one of which only could be actually attached to the machine and used at one time, but the duplicates were kept for the purpose of effecting different kinds of work:—Held, in a con-

test between mortgagees and the assignees in bankruptcy of the mortgagor, that all the rollers that had been fitted to the machine thereby became part of it, and passed to the mortgagees by virtue of an equitable mortgage by deposit of the lease of the mill. *Richards, In re, Lloyds Banking Co., Ex parte*, and *Astbury, Ex parte*, 38 L. J., Bk. 9; L. R. 4 Ch. 630; 20 L. T. 997; 17 W. R. 997.

Held, also, that other rollers which had been purchased with the view of using them in the machine, but had not been fitted to the machine, were not part of the machine, and did not pass to the mortgagee. *Ib.*

A lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh term to a third party:—Held, that the mortgagee had a right to enter and sever the fixtures, it not being competent to the tenant to defeat his grant by a subsequent voluntary act of surrender. *London Loan and Discount Co.* v. *Drake*, 6 C. B. (N.S.) 798; 28 L. J., C. P. 297; 5 Jur. (N.S.) 1407; 7 W. R. 611.

Under a mortgage of an iron rolling-mill, with certain specified machinery, and all engines, machinery, fixtures, and things which might thereafter be fixed or fastened in or upon the premises, whether in addition to or substitution for the fixtures, machinery, articles, and things:—Held, that entirely new machinery, as well as additions to existing machinery, passed to the mortgagee. *Metropolitan Counties Insurance Society* v. *Brown*, 26 Beav. 454; 28 L. J., Ch. 581; 5 Jur. (N.S.) 378; 7 W. R. 303.

Under an assignment of the machinery fastened in or upon a mill:—Held, that an anvil, though not fastened or fixed to it, passed as essential to a fixed steam hammer. *Ib.*

A mortgage of a silk mill with the steam-engines, boilers, steam pipes, main shafting, millgearing, millwright's work, and all other machinery whatsoever being, or which should thereafter be, on the land described in the mortgage:—Held, as against a second mortgagee, not to be confined to machinery necessary for giving power to the mil, as being ejusdem generis with the specified particulars, but to extend to silk-spinning machines resting by their weight only on the ground, but attached by movable bolts to iron rods fixed to mill-beams over head. *Haley* v. *Hammersley*, 3 De G., F. & J. 587; 30 L. J., Ch. 771; 7 Jur. (N.S.) 765; 4 L. T. 269; 9 W. R. 562—L. C.

A tenant in fee of a cotton-mill, in which there were a steam-engine, boilers, &c., mortgaged the mill, engine, boilers, &c., to B., but remained in possession until his bankruptcy. The entablature plate of the engine, which, however, formed no part of the working apparatus, was fixed to the frechold of the mill; every other part of the engine was secured by bolts and screws, and might be removed without injury to the building:—Held, that the steam-engine was not in the order and disposition of A. at his bankruptcy. *Hubbard* v. *Bagshaw*, 4 Sim. 326; 9 L. J. (O.S.) Ch. 190.

The mortgagee of tenant's fixtures in a leasehold house, the house not being included in the security, petitioned that the fixtures might be sold, and the produce applied in discharge of the mortgage money, or pro tanto, and that he might be permitted to prove against the bankrupt's estate for the difference; but the petition was dismissed, with costs, the petitioner declining to accept the offer of the court to file a bill. *Sykes, Ex parte*, 18 L. J., Bk. 16; 13 Jur. 486.

iv. *Other Matters.*

Meaning of Fixtures.]—A house fitted up for and intended to be used as a club was mortgaged with all fixtures therein:—Held, that in determining what articles were included as "fixtures," regard must be had to the intentions of the parties, the one in mortgaging and the other in taking a security for the sum advanced; and that such things as were substantially part of the house so that they could not be removed without depriving the house of what was intended to be used with it must be regarded as fixtures. *Smith* v. *Maclure*, 32 W. R. 459.

By a mortgage by sub-demise a corn-mill and other leasehold premises, together with certain fixtures specifically mentioned, and constituting the motive power of the mill, were conveyed to the mortgagees, to secure a sum due to them by the mortgagors. The deed contained the following general words:—"Together with all buildings, fixtures, rights, lights, easements," &c.:—Held, that the word "fixtures" in the general sense was not restricted to fixtures ejusdem generis with those specifically mentioned, but was intended to extend and enlarge that class, and that therefore the trade fixtures in the mill passed by the sub-demise to the mortgagees. The observations of Blackburn, J., in *Hawtry* v. *Butlin* (L. R. 8 Q. B. 293) explained. *Southport Banking Co.* v. *Thompson*, 57 L. J., Ch. 114; 37 Ch. D. 64; 58 L. T. 143; 36 W. R. 113.

Fixtures are not goods and chattels within 6 Geo. 4, c. 16, s. 72. *Smith* v. *Grazebrooke*, 4 Scott (N.R.) 565. S. P., *Heathcote, Ex parte, Oybourne, In re*, 2 Mont. D. & D. 711; 6 Jur. 1001.

Registration under Bills of Sale Acts, when necessary.]—An agreement to mortgage paper-mills and machinery does not extend to any property which requires registration under the Bills of Sale Acts, and trade machinery is therefore not included in the security. *London and Lancashire Paper Mills Co., In re*, 58 L. T. 798.

When there is a mortgage of leasehold property and fixtures with a power of sale, the Bills of Sale Act, 1854, applies, not only where the power of sale authorises the mortgagee to sell the fixtures separately from the leasehold property, but also where there is a separate assignment of the fixtures. *Brown, Ex parte, Reed, In re*, 9 Ch. D. 389; 39 L. T. 338; 27 W. R. 219—C. A.

In suits for redemption and foreclosure, F., a third mortgagee (who was also first mortgagee), attempted to impeach the security of B., the second mortgagee, on the ground of fraud, but at the hearing his bill was dismissed with costs in this respect, and an ordinary decree for foreclosure and redemption was made. On taking the accounts, F. attempted to raise the question whether B.'s security, which comprised leasehold premises and also trade fixtures, machinery, and loose chattels, was not invalid as to the trade fixtures, machinery, and loose chattels, because it had not been registered under the Bills of Sale Act. F., who had registered his later security, contended that he was not bound to account as mortgagee in possession of the trade fixtures,

machinery, and chattels, on the ground that his registration had been the means of preventing any claim on the part of the assignees in bankruptcy of the mortgagor:—Held, that this contention ought to have been raised at the hearing, and that it was too late to raise it afterwards, and consequently that the respective mortgages must be taken to comprise what was expressed to be included in them. *Beghie* v. *Fenwick*, L. R. 6 Ch. 869; 25 L. T. 441; 20 W. R. 67.

4. Recovery of Fixtures or their Value.

Sufficiency of Claim.]—In a declaration for taking the plaintiff's goods, chattels, and effects:—Held, that the value of fixtures might be recovered under these words. *Pitt* v. *Shaw*, 4 B. & Ald. 206.

The price of fixtures in a house cannot be recovered under a declaration for goods sold and delivered. *Lee* v. *Risdon*, 7 Taunt. 188; 2 Marsh. 495; 17 R. R. 484. S. P., *Nutt* v. *Butler*, 5 Esp. 176.

A. having occupied a house as tenant to B., in which there were fixtures which A. had purchased on entering the house, and which he had a right to remove during his tenancy, agreed at B.'s request, a few days before the expiration of his tenancy, to forbear to remove his fixtures, B. agreeing to take them at a valuation of two brokers. A., at the expiration of his tenancy, delivered up possession of the house to B., leaving the fixtures on the premises. On the following day the fixtures were valued by two brokers at 40*l.* 10*s.*, and the valuation was signed by them accordingly. A. having brought an action for the price and value of fixtures, bargained, sold, and delivered:—Held, that the action was maintainable, and that this was not a sale of an interest in land. *Hallen* v. *Runder*, 1 C., M. & R. 266; 3 Tyr. 959; 3 L. J., Ex. 260.

If a landlord, under a distress for rent in arrear, severs fixtures from the freehold and disposes of them, he is liable in trover, and the articles may be described in the declaration as goods and chattels; and the plaintiff does not thereby waive his right of maintaining that the distress is illegal, because fixtures cannot be distrained for rent in arrear. *Dalton* v. *Whittem*, 3 G. & D. 260; 3 Q. B. 961; 12 L. J., Q. B. 55; 6 Jur. 1063.

Under a count in trover, to recover damages for wrongfully removing fixtures under a distress, the plaintiff is entitled to recover the value of fixtures removed from the premises, and sold as chattels merely. *Clarke* v. *Holdford*, 2 Car. & K. 540.

When Left in House.]—Where a freehold mansion-house was sold by public auction, without any stipulation on the part of the owner that the fixtures were to be taken and paid for separately, and the vendee, who had paid the purchase-money, entered into possession under a conveyance:—Held, that the fixtures still remaining in the house passed to the vendee by the conveyance of the freehold, and were not the subject of trover. *Colgrave* v. *Dios Santos*, 3 D. & R. 255; 2 B. & C. 76; 1 L. J. (o.s.) K. B. 239.

Held, also, that a demand of and refusal to deliver the fixtures would not entitle the vendor to such articles left in possession of the vendee as appeared to be movable goods and chattels. *Ib.*

Trover will not lie for fixtures which a tenant has left annexed to the freehold, after he has quitted possession with the leave of his landlord, for the purpose of enabling him to make terms as to their purchase by the incoming tenant. *Ruffey* v. *Henderson*, 17 Q. B. 575; 21 L. J., Q. B. 49; 16 Jur. 84.

A ladder, a crane, and a bench were left by an outgoing tenant upon the demised premises at the expiration of his term; the ladder and crane were fastened with nails or screws to the floor and to the joists above, in the usual way, and the bench was fixed to the wall:—Held, that, in the absence of anything to show that they were put up for the purposes of ornament or trade, trover would not lie for them. *Wilde* v. *Waters*, 16 C. B. 637; 24 L. J., C. P. 193; 1 Jur. (N.S.) 1021; 3 W. R. 570.

Attached to the Freehold.]—An auctioneer put into possession of fixtures attached to the freehold, for the purpose of selling them, the purchaser being bound to detach and remove them, has not such a possession as will support trespass de bonis asportatis for their wrongful removal. *Davis* v. *Danks*, 3 Ex. 435; 18 L. J., Ex. 213.

A lessee cannot, even during his term, maintain trover for fixtures attached to the freehold. *Mackintosh* v. *Trotter*, 3 M. & W. 184.

The word "fixtures" does not necessarily mean things fixed to the realty; and therefore, in an action of trover for goods, chattels, and fixtures, where damages were assessed generally on the whole declaration:—Held, that it must be intended after verdict, that the jury had not awarded damages in respect of fixtures attached to the freehold. *Sheen* v. *Rickie*, 5 M. & W. 175; 7 D. P. C. 335; 3 Jur. 607.

Sale of Fixtures—Vendor's Title to House.]—The defendant agreed verbally with the plaintiff to take a house, and purchase the fixtures at a valuation to be made by two brokers. An inventory of the furniture and fixtures was accordingly made, described generally as "an inventory of the fixtures," &c., with the gross amount placed at the foot. In an action for goods sold and delivered, and on an account stated:—Held, that the defendant having taken possession of, and enjoyed the furniture and fixtures, and paid part of the sum determined by the brokers to be due for the same, he was liable on the account stated for the remainder, and could not afterwards object to the plaintiff's defective title to the house. *Salmon* v. *Watson*, 4 Moore, 73.

Non-assignment of Lease.]—By an agreement between the plaintiffs and defendant, the defendant was to accept of the assignment of the lease of a farm from the plaintiffs, and to take the fixtures and crops at a valuation; he was afterwards let into possession of the fixtures, and the crops were valued to him; but the lease was never assigned:—Held, that indebitatus assumpsit would not lie for the price of the fixtures and crops, and that the plaintiff's only remedy was by a special action on the agreement. *Neale* v. *Viney*, 1 Camp. 471.

Goods and Chattels of Tenant.]—Certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant:—Held, that these were the goods and chattels of the outgoing tenant, for which he

might maintain trover. *Davis* v. *Jones*, 2 B. & Ald. 165 ; 20 R. R. 396.

Owner estopped from denying Vendor's Title.]—Where the owner of the goodwill and fixtures of a public-house allowed A. to represent himself as such to the landlords, and the latter thereupon let the public-house to A., and A. sold the lease and fixtures to the defendant, who was informed by the landlords that A. was their tenant :—Held, that the owner had estopped himself from recovering the fixtures from the defendant, who had purchased bonâ fide. *Gregg* v. *Wells*, 2 P. & D. 296 ; 10 A. & E. 90 ; 8 L. J., Q. B. 193.

Wrongful Removal by Tenant.] — Where the owner of a mill demised it to a tenant for a term, and the latter clandestinely, and without permission of his landlord, dismantled the mill of the machinery, which, on its being removed, was seized by the sheriff under a fi. fa., and sold under his authority to a bonâ fide purchaser :—Held, that the landlord might maintain trover against such purchaser, though the tenant's term was unexpired. *Farrant* v. *Thompson*, 2 D. & R. 1 ; 5 B. & Ald. 826 ; 24 R. R. 571.

The tenant of a public-house held over after the expiration of his lease because the incoming tenant, who was to rebuild the premises, had failed to pay him a sum agreed for fixtures. His landlords brought ejectment, and he removed the fixtures. The landlords sued him for wrongful removal and conversion :—Held, that no inference of a subsisting tenancy could be drawn, and that the tenant was a trespasser at the time he removed the fixtures, but that the landlords were entitled only to the auction or breaking-up value of the fixtures. *Penton* v. *Robart* (2 East, 88), and *Weeton* v. *Woodcock* (7 Mee. & W. 14) commented on. *Barff* v. *Probyn*, 64 L. J., Q. B. 557 ; 73 L. T. 118.

J. R.

FOOD.

See LOCAL GOVERNMENT.

FORCIBLE ENTRY.

See CRIMINAL LAW.

FORECLOSURE.

See MORTGAGE.

FOREIGN ATTACHMENT.

See MAYOR'S COURT.

FOREIGN ENLISTMENT ACT.

See WAR.

FOREIGN JUDGMENT.

See INTERNATIONAL LAW.

FOREIGN LAW AND FOREIGNER.

See INTERNATIONAL LAW.

FORESHORE.

See SEA AND SEASHORE.

FOREST.

1. *Epping Forest*, 154.
2. *Royal Forests.*—*See* CROWN.
3. *Forest of Dean.*—*See* MINES AND MINERALS.
4. *Rights of Common.*—*See* COMMON.

1. EPPING FOREST.

Bill, Parties to.]—The plaintiffs filed a bill on behalf of themselves and all other the owners and occupiers of lands and tenements lying within a royal forest, against the lords of manors within the forest, praying for a declaration that they were entitled to a right of common of pasture upon all the waste grounds within the forest, and that the lords might be restrained from inclosing or permitting to remain inclosed any part of the waste lands of the forest subject to such commonable rights :—Held, that the bill was not demurrable on the ground of multifariousness, but that the relief prayed in respect of the inclosures already made could not be granted in a suit wherein the persons interested in the inclosures were not represented, or were made plaintiffs by misjoinder. *Sewers Commissioners* v. *Glasse*, 41 L. J., Ch. 409 ; L. R. 7 Ch. 456 ; 26 L. T. 647 ; 20 W. R. 515.

The names of all the persons interested in the inclosures not being known to the plaintiffs, the bill ought to have been on behalf of themselves, and all other the owners and occupiers of lands, &c., within the forest except the persons interested in the inclosures. *Ib.*

Jurisdiction of Chancery.]—A bill was filed in equity on behalf of all the owners and occupiers of land within a forest, other than the waste lands of the forest, except such of them as were defendants, or were alleged to be sufficiently represented by the defendants or some of them, to establish a right of common over all the wastes of the forest. The defendants to the bill were the lords of the several manors within the forest, who had, as the bill alleged, improperly inclosed portions of the wastes of the forest ; two persons who claimed to be owners and were occupiers of portions of the wastes so inclosed ; and the attorney-general :—Held, that the right claimed was one to which there was no objection in law ; and the suit was rightly constituted as to parties, and was the most proper method of

enforcing the general right claimed; and that the Court of Chancery had jurisdiction in the matter. *Ib.*

Rights of Pasturage.]— In a suit by the owners and occupiers of lands in Epping Forest against the lords of the several manors within the forest, claiming to be entitled, in right of, and as appurtenant to their several lands and tenements to common of pasture for cattle, levant and couchant, on their respective tenements over all the waste lands of the forest, and praying an injunction to restrain the inclosure of any part of the waste:—Held, on the evidence in the case, that such right had been established; that the defendants had failed to show that the right of common was only common of vicinage; that the other grounds of defence wholly failed; and that any further inclosure of the waste must be restrained. *Sewers Commissioners* v. *Glasse*, 44 L. J., Ch. 129; L. R. 19 Eq. 134; 31 L. T. 495; 23 W. R. 102.

Orders of Commissioners.]—By the Epping Forest Amendment Act, 1872 (35 & 36 Vict. c. 95), the Epping Forest Commissioners were authorised to make orders prohibiting, until the expiration of the session of parliament next after they should have made their final report under the Epping Forest Act, 1871, any inclosures of any land within the forest, not inclosed before the passing of the Epping Forest Act, 1871 (34 & 35 Vict. c. 93); and for the prevention of any waste, injury or destruction of vert, herbage, trees, shrubs or other growing things in or upon any land within the forest, subject in their judgment to any forestal or common rights. The commissioners made an order that, until the expiration of the session of parliament next after they should have made their final report under the Epping Forest Act, 1871, "all persons whosoever be and they are hereby prohibited from committing any waste, injury or destruction of or to the vert, herbage, trees and shrubs, or other growing things in or upon the waste lands of Epping Forest within the Manor of Theydon Bois, in the county of Essex (including the inclosures of waste lands within the manor made within twenty years next preceding and since the 21st of August, 1871), and all which lands are distinguished on the plan hereto annexed by the colour green." The defendant, who was in occupation, as tenant, of a piece of land which was part of that coloured green on the plan, and had been inclosed before the passing of the act of 1871, but within the twenty years previously, committed waste by digging marl and clay, and was indicted for a misdemeanour in doing so contrary to the order of the commissioners:—Held, that the order was rightly made, and that a breach of it was an indictable offence punishable as a misdemeanour at common law. *Reg.* v. *Walker*, 44 L. J., M. C. 169; L. R. 10 Q. B. 355; 33 L. T. 167; 13 Cox, C. C. 94.

Effect of Declaration of Right.]—The statement of claim set out a decree in a suit by the same plaintiffs declaring that the plaintiffs and other owners and occupiers of lands in Epping Forest were entitled to a right of common upon all the waste lands of the forest, and giving liberty to the plaintiff to apply for injunctions in pursuance of such declaration of right; and stated that the defendant occupied waste lands as grantee from the lord of a manor within the forest; that the lands were inclosed, and the defendant thereby interfered with the enjoyment of the right of common; that the defendant was not a party to the suit, but his grantor was a defendant thereto, and two grantees of inclosed waste were also defendants thereto, and sufficiently represented the grantees of inclosed waste lands; but that the defendant disputed the validity of the decree and denied that he was bound thereby; and the plaintiffs claimed that the action might be taken as supplemental to the suit, and that they might have the same benefit of the decree and the same relief against the defendant as they would have been entitled to if he had been a defendant to the suit:—Held, that the defendant, as one of a class represented in the suit, was bound by the declaration of general right, although it was open to him to show some special ground of exemption, or that the decree was fraudulently obtained. *Sewers Commissioners* v. *Gellatly*, 45 L. J., Ch. 788; 3 Ch. D. 610; 24 W. R. 1059.

Leave to deliver Statement of Claim, when Necessary.]—The Epping Forest Amendment Act, 1872 (which was passed during the pendency of the suit in question), provided that, for a period which at the date of the action had not expired, no new legal proceeding, except such supplemental or amended bills as might be filed by the plaintiffs for the purpose of making the suit effectual, should be instituted, brought, or taken respecting the matters in question except with the leave of the Epping Forest Commissioners:—Held, that, assuming that s. 76 of the Judicature Act, 1873, enabled the plaintiffs to institute a supplemental action in a proper case under the above act, the present statement of claim was not supplemental, and ought not to have been delivered without the leave of the commissioners. *Ib.*

Held, also, that, the statement of claim not showing that the leave had been obtained, the objection was properly taken by demurrer. *Ib.*

Semble, that if upon an amended statement of claim it should appear that the leave of the commissioners had been obtained, a demurrer to the amended statement on the ground that the leave ought to have been obtained before action brought would not lie, for the delivery of the amended statement would be a "proceeding taken" with leave as required by the act. *Ib.*

The defendant having demurred to the statement of claim on two grounds; one of substance, which failed; and the other a ground which, in the event of leave being obtained to prosecute the action, would prove merely technical; and the demurrer being allowed with liberty to amend if the leave were obtained, in that event the costs of the demurrer were reserved. *Ib.*

Leave to Prosecute, when Necessary.]—A commoner of Epping Forest, who objected to the proceedings of the corporation of London as owners of the forest, removed and destroyed their notice boards and gave them warning that he should remove their fences and other obstructions. The corporation promptly commenced an action against him and obtained an injunction to restrain him from carrying out his threats. They also summoned him under 24 & 25 Vict. c. 97, s. 52, for destroying their boards. At the hearing of the summons before two justices, the applicant objected to one of them on the

ground that he was disqualified by interest in adjudicating on the summons. This justice had made an affidavit on behalf of the corporation in the action, in which he stated that he was a commoner, and that the corporation had by their proceedings rendered the forest better fitted for the use of the commoners and the public. The applicant also objected that no leave of the Epping Forest commissioners had been obtained under 35 & 36 Vict. c. 95, s. 3, for this prosecution. The justices overruled these objections and convicted the applicant:—Held, that the justice was not disqualified from adjudicating on this summons; that no leave of the commissioners was required for a criminal prosecution; and that the conviction was right. *Reg.* v. *Alcock, Chilton, Ex parte*, 37 L. T. 829.

FORFEITURE.

Of Leases.]—*See* LANDLORD AND TENANT.

On Breach of Condition.]—*See* CONDITION.

Of Shares.]—*See* COMPANY.

Of Property of Felons.]—*See* CRIMINAL LAW (FELONY).

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See CRIMINAL LAW.

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FRAUD, MISREPRESENTATION, AND UNDUE INFLUENCE.

[BY A. LAWRENCE.]

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I. WHAT AMOUNTS TO.

1. GENERAL PRINCIPLES.

Generally.]—Suppression of the truth, or misrepresentation of a material fact, will vitiate any contract or gift, the validity of which depends upon the truth and accuracy of the representation on which it was made. *Prideaux* v. *Lonsdale*, 4 Giff. 159 ; 32 L. J., Ch. 317 ; 9 Jur. (N.S.) 488; 8 L. T. 109 ; 1 N. R. 565 : 11 W. R. 531.

Suppressio veri or suggestio falsi is each of them a good reason to set aside any deed or conveyance. *Broderick* v. *Broderick*, 1 P. Wms. 240.

Misrepresentations may be either by a suppression of the truth or an assertion of what is false. *Pulsford* v. *Richards*, 17 Beav. 87 ; 22 L. J., Ch. 559 ; 17 Jur. 865 ; 1 W. R. 295.

Circumstances which constitute a case of fraudulent misrepresentation. *Smith* v. *Kay*, 7 H. L. Cas. 750 ; 30 L. J., Ch. 45.

Misrepresentation of a fact, misleading others to deal for value upon the face of it, binding on the person making it. *Carr, Ex parte*, 3 V. & B. 111 ; 13 R. R. 158.

Consideration of the effect in equity of misrepresentation made by parties entering into contracts. *Clapham* v. *Shillito*, 7 Beav. 146.

Distinction between actual and presumed fraud ; in the latter left to law. *Bennet* v. *Musgrove*, 2 Ves. 51.

General Principles, what.]—The principles by which, in the administration of justice, the limits of responsibility for the consequences of a false representation are to be ascertained, are these : first, every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified : secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified ; provided it appear that such false representation was made with the direct intent that it should be acted on by such third person in the manner that occasions the injury or loss ; and thirdly, but to bring it within the second principle, the injury must be the immediate and not the remote consequence of the representation thus made. *Barry* v. *Croskey*, 2 J. & H. 21.

—— **Application of Principles to Contracts with Companies.**]—The same rules as to false or deceptive representations which are applicable to contracts between individuals are also applicable to contracts between an individual and a company. No misstatement or concealment of any material facts or circumstances ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company. *Venezuela Central Ry.* v. *Kisch*, 36 L. J., Ch. 849 ; L. R. 2 H. L. 99 ; 16 L. T. 500 ; 15 W. R. 821.

The public are, in such a case, entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess. *Ib.*

——**Fair Arrangement between Parties fraudulently concocted by Third.**]—If an arrangement between two parties is on general principles fair as between them, it is not invalid merely because it may have been concocted by a third party fraudulently to benefit himself ; and so far as regards the third party, to judge of his motives, and construe his acts, the whole may be looked on as one transaction. As regards the other two, however, who, though affected by one part of the transaction, may be total strangers to the other part, it is not necessary to consider every part of

the transaction affected by objections which only apply to portions of it. *Bellamy* v. *Sabine*, 2 Ph. 425; 17 L. J., Ch. 105.

Fraud, What is.]—Fraud is what is done in secret, and where there is a concealment from the party in a matter which concerns him in interest. *Tyrrell* v. *Hope*, 2 Atk. 560.

Fraud, in a legal sense, means an act unwarranted by law, to the prejudice of a third person. *Harman* v. *Fisher*, Lofft, 472; Cowp. 117.

"Legal Fraud."] — The expression "legal fraud" considered and explained. *Peek* v. *Derry*, 57 L. J., Ch. 347; 37 Ch. D. 541; 59 L. T. 78; 36 W. R. 899—C. A.

There is no such thing as "legal" fraud in the absence of moral fraud. *Jolliffe* v. *Baker*, 52 L. J., Q. B. 609; 11 Q. B. D. 255; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

Covin.]—Party in possession under the title of A., taking a conveyance, though for valuable consideration, from one who claims a title adverse to that of A., is guilty of covin, which would avoid the transaction at law. *Underwood* v. *Courtown* (*Lord*), 2 Sch. & Lef. 64.

Fraud in Law.]—The making of a representation which a party knows to be untrue, and which is intended, or is calculated, from the mode in which it is made, to induce another to act on the face of it, so that he may incur damage, is a fraud in law. *Polhill* v. *Walter*, 3 B. & Ad. 114. See *Wilson* v. *Butler*, 4 Bing. (N.C.) 748; 6 Scott, 540; 8 L. J., C. P. 143.

Therefore, where a bill was presented for acceptance at the office of the drawee when he was absent: and A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance, as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the indorsee brought an action against the drawee, and on proof of the above facts was nonsuited. The indorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorised to accept by procuration; and on the trial the jury negatived all fraud in fact:—Held, notwithstanding, that A. was liable, because he must be considered as having intended to make such representation to all who received the bill in the course of its circulation. *Ib.*

In an action for falsely and fraudulently representing a ship to be sound, the jury was directed to find for the plaintiff, if the representation was false to the defendant's knowledge, and the plaintiff sustained damage in consequence. The jury returned a verdict, "We find for the plaintiff, but acquit the defendant of any fraudulent intention." The judge thereupon directed a verdict to be entered for the plaintiff:—Held, no misdirection. *Milne* v. *Marwood*, 15 C. B. 778; 3 C. L. R. 228; 24 L. J., C. P. 36.

A false statement knowingly made, for the purpose of enabling another to enter into a contract, is a fraud in law. *Stevens* v. *Lee* or *Legh*, 2 C. L. R. 251; 2 W. R. 16.

Any false statement knowingly made with a view to induce another to alter his condition, and thereby altering it, is a fraud in law. *Murray* v. *Mann*, 2 Ex. 538; 17 L. J., Ex. 256; 12 Jur. 634.

What are Representations.]—It seems to me that every representation, false when made or falsified by the event, (A.) in order to produce any legal consequences, must operate in one of three ways:—1. It may be a term in the contract (e.g. a warranty), in which case its falsity will, according to circumstances, either render the contract voidable, or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. 2. It may operate as an estoppel, preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it. (*Pickard* v. *Sears* and other well-known cases are instances of this.) 3. It may amount to a criminal offence (e.g. false pretences). (B.) Besides these there is a class of false representations which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it—Per Stephen, J. *Alderson* v. *Maddison*, 49 L. J., Ex. 801; 5 Ex. D. 293; 43 L. T. 349; 29 W. R. 105.

A representation is a statement, or an assertion, made by one party to the other, before or at the time of a contract, of some matter or circumstance relating to it. *Behn* v. *Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; 9 Jur. (N.S.) 620; 8 L. T. 207; 11 W. R. 496—Ex. Ch.

Although a representation is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. *Ib.*

Whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the court, and not the jury, must determine. *Ib.*

When that question is raised by pleading, the court may, in aid of the construction, take into consideration the surrounding circumstances; such as the circumstances under which, and the purposes for which, a charterparty was entered into; aliter, if the question is raised by demurrer or on an application for judgment non obstante veredicto. *Ib.*

If the former, the question arises whether that part of the contract is a condition precedent or only an independent agreement, a breach of

which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. *Ib.*

With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine is that, generally speaking, if the descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word; viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages. *Ib.*

Although a mere false statement of the consideration does not in itself necessarily vitiate a deed, yet there may be cases where a false statement of itself may destroy the whole transaction. *Bowen* v. *Kirwan*, Ll. & G. t. Sugd. 47.

—— **On Assignment of Term of a House.**]—In an action for the fraudulent misrepresentation of the value of a term of years of a house, on the assignment of it from the defendant to the plaintiff, the jury found a special verdict that the defendant directed her attorney to instruct the plaintiff, who was an auctioneer, to prepare particulars for the sale of the premises by auction. The attorney represented the premises to be let at a rent of 100*l.* per annum. They were let at that rent, but the defendant paid the rates and taxes, and not the tenant, but that was not known by the attorney. On this instruction the plaintiff, with the assent of the attorney, described the premises as let at 100*l.* per annum, clear of taxes and rates. The plaintiff purchased the premises himself, and for a larger sum than he would have given, if he had known that the landlord paid the rates and taxes:—Held, that upon this finding it did not appear that the defendant had been guilty of any actual fraudulent representation or concealment or had authorised any; that, if her agent had been guilty of any fraudulent representation and concealment, she would herself have been liable, but that no such misfeasance appeared from the verdict, and therefore that the defendant was entitled to judgment. *Wilson* v. *Fuller*, 3 Q. B. 68, 1009; 3 G. & D. 570—Ex. Ch.

—— **Sale of Goods.**]—The defendant sent for sale to a public market pigs which he knew to be infected with a contagious disease; they were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant, and also some of those with which they were put, died of the contagious disease. The plaintiff having sued to recover damages for the loss which he had sustained:—Held, that, although the defendant might have been guilty of an offence against the Contagious Diseases (Animals) Act, 1869, he was not liable to the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease. *Ward* v. *Hobbs*, 47 L. J., Q. B. 90; 3 Q. B. D. 150; 37 L. T. 654; 26 W. R. 151—C. A. Affirmed, 48 L. J., Q. B. 281; 4 App. Cas. 13; 40 L. T. 73; 27 W. R. 114—H. L. (E.)

—— **Fact, not Opinion.**]—Misrepresentation entitling to relief must be a misrepresentation of fact, and not merely a conclusion of opinion. *New Brunswick and Canada Ry. and Land Co.* v. *Conybeare*, 9 H. L. Cas. 711; 31 L. J., Ch. 297; 8 Jur. (N.S.) 575; 6 L. T. 109; 10 W. R. 305.

—— **Simplex Commendatio.**]—The plaintiffs advertised for sale by auction an hotel, stated in the particulars to be held by a "most desirable tenant." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (400*l.*), rates and taxes. The defendants, relying on the statements in the particulars, authorised the secretary to attend the sale and to bid up to 5,000*l.* The property was bought in at the sale, and the secretary purchased it by private contract for 4,700*l.* It appeared subsequently that the quarter's rent previously to the sale had not been paid; the previous quarter had been paid by instalments; and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs brought an action for specific performance, relying (in answer to the defence and counterclaim for rescission on the ground of misrepresentation) on the fact that the defendants had made their own inquiries:—Held, that the statement that the property was held by a "most desirable tenant" was not a mere expression of opinion, but contained an implied assertion that the vendors knew of no facts leading to the conclusion that he was not; that the circumstances relating to the payment of rent showed that he was not, and that there was a misrepresentation. *Smith* v. *Land and House Property Corporation*, 28 Ch. D. 7; 51 L. T. 718; 49 J. P. 182—C. A.

Estoppel.]—If a man misrepresents a fact, to that fact he is bound, if any other person, misled by such misrepresentation, acts upon it, and thereby suffers damage. *Beattie* v. *Ebury* (*Lord*), L. R. 7 H. L. 102; 30 L. T. 581; 22 W. R. 897.

I have always understood it to have been decided that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises de futuro, which, if binding at all, must be binding as contracts—Per Selborne, L. C. *Maddison* v. *Alderson*, 52 L. J., Q. B. 737; 8 App. Cas. 473; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

Where one wilfully induces another to believe in the existence of a certain state of things, and induces him to act on that belief, the former is concluded from averring against the latter a

different state of things as existing at that time. Wilful representation means, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and it is acted upon accordingly. *Freeman* v. *Cooke*, 2 Ex. 633.

The defendant, an auctioneer, being owner of a sum of 500*l.* stock standing in the names of directors, which had been made an indemnity to provide against costs in a pending chancery suit, put the fund up for sale, under a particular, which stated the above fact, and, further, that there was a considerable sum applicable for payment of costs, and that such costs would be paid thereout; also, that the fund of 500*l.* might be looked upon as a secure and sound investment. The plaintiff purchased the fund for 230*l.*, and found afterwards that it was all required to answer the indemnity. The plaintiff alleged that the defendant knew at the time that the fund was liable to be wholly swallowed up in costs. The court being of opinion that the defendant had knowledge of this fact:—Held, that he could not be heard to say it was not present to his mind when he put the property up for sale, and decreed rescission of the contract. As against a co-defendant, a solicitor, who had taken no part in the misrepresentation, the action was dismissed. *Mathias* v. *Yetts*, 46 L. T. 497—C. A.

Negligence.]—Negligence may be evidence of, but it is not the same thing as, mala fides. *Jones* v. *Smith*, 1 Hare, 43; 11 L. J., Ch. 83; 6 Jur. 8. Affirmed, 1 Ph. 245; 12 L. J., Ch. 381; 7 Jur. 431.

Married Woman bound by Fraud.]—A feme covert is as much bound by fraud in a court of equity as if she were a feme sole. *Jones* v. *Kearney*, 1 Dr. & War. 134; 1 Con. & L. 34; 4 Ir. Eq. R. 74.

Fraud between Vendor and Purchaser.]—There being no fiduciary relation between a vendor and a purchaser, the purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or a gesture intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be a sufficient ground for a court of equity to refuse a decree of specific performance, and so, à fortiori, would any contrivance on the part of the purchaser, better informed than the vendor as to value, to hurry the vendor into an agreement without giving him an opportunity of being fully informed on that subject, or taking advice as to the terms of the bargain. *Walters* v. *Morgan*, 3 De G. F. & J. 718; 4 L. T. 758.

Lease—Evidence.]—A lease impeached for alleged fraud and undervalue:—Held, under the circumstances, valid. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

Concealment and misrepresentation relied on in such a case must be proved fraudulent, and the contract shown to be based upon it, and the very fraud alleged in the bill proved. *Ib.*

Materiality—Dans locum contractui.]—Suggestio falsi or suppressio veri to operate as a ground for the postponement of an equity must occur in the transaction which dat locum contractui. *Rolt* v. *White*, 3 De G. J. & S. 360.

Representations inducing a person to enter into a particular contract, though not made at the moment the contract is actually entered into, constitute, if fraudulently made, dolus dans locum contractui. *Smith* v. *Kay*, 7 H. L. Cas. 750; 30 L. J., Ch. 45.

To be the ground for avoiding the contract, a misrepresentation must be one dans locum contractui, or such that it is reasonable to infer, that in its absence the party deceived would not have entered into the contract. *Pulsford* v. *Richards*, 17 Beav. 87; 22 L. J., Ch. 559; 17 Jur. 865; 1 W. R. 295.

—— **Prospectus of Company.**]—Persons who take shares on the formation of a company, and the directors who form it, are contracting parties, and the prospectus issued is a representation quæ dat locum contractui. *Ib.*

Upon the formation of a company the directors and the persons who take shares are contracting parties, and the prospectus and advertisements issued by the directors are the representations quæ dant locum contractui. If these be false, and cannot be made good by the persons making them, the contract may be avoided. It has, however, to be considered whether it is reasonable to believe that if the real truth had been stated, the shares would not have been taken. *Jennings* v. *Broughton*, 17 Beav. 234; 22 L. J., Ch. 585: 17 Jur. 905; 1 W. R. 441.

2. MISREPRESENTATION OF MATTERS OF LAW.

Generally.]—The doctrine, that a person, who by a false representation induces another to do an act which results in a loss, is liable to make good his representation, does not apply where the misrepresentation is one of law only. *Beattie* v. *Ebury* (*Lord*), 41 L. J., Ch. 804; L. R. 7 Ch. 777; 27 L. T. 398; 20 W. R. 994.

Rescission of Contract.]—When an alleged misrepresentation is not of fact, but upon a doubtful question of law, it can scarcely be a sufficient ground for rescinding a contract. *Conybeare* v. *New Brunswick and Canada Ry. and Land Co.*, 6 Jur. (N.S.) 164.

Misrepresentation by Third Persons.]—A plaintiff alleged that, being desirous of advancing money on debentures, he applied to a secretary of a railway company, who wrote, offering him a bond of the company for 1,500*l.*, and stating that the company was not yet in a position to issue permanent debentures, but that they expected to be able to do so in four or five months' time. With the letter was sent a prospectus, from which it appeared that the company was incorporated by act of parliament, and that three persons named were directors. The plaintiff advanced the money, and received in return a Lloyd's bond, signed by the secretary, whereby the company purported to acknowledge the debt, and to covenant to pay the same at 6*l.* per cent. The company having ceased to pay interest, and being in difficulties, the plaintiff filed a bill against two of the three directors, and the representatives of the third, praying that they might be decreed to pay the amount advanced by the

plaintiff with interest :—Held, that the principle of relief on the ground of misrepresentation by third persons did not extend to an incorrect statement of a matter of law ; and a demurrer by the representatives of the third director was allowed. *Rashdall* v. *Ford*, 35 L. J., Ch. 769 ; L. R. 2 Eq. 750 ; 14 L. T. 790 ; 14 W. R. 950.

3. Matters of Fact.

a. Knowledge and Intention of Defendant.

Mistake.]—A person making a false representation through mistake, but where he might have had notice of the truth, it shall bind him. *Pearson* v. *Morgan*, 2 Bro. C. C. 388.

—— **Unintentional Misrepresentation.**] — If one party be acting under a misrepresentation, and the other is accessory to it, although unintentionally, the transaction cannot stand. *Hartopp* v. *Hartopp*, 21 Beav. 259 ; 25 L. J., Ch. 471 ; 2 Jur. (N.S.) 794.

Mere Untruth.]—The mere assertion of that which is not true shall not vitiate dealings. The party to be visited by fraud must have made the false assertion wilfully and knowingly. *Pike* v. *Vigers*, 2 Dr. & Wal. 252. And see *S. C.*, nom. *Vigers* v. *Pike*, 8 Cl. & F. 562.

When there was much evidence of fraud, misrepresentation, and of deficient value :—Held, that such evidence is not to be regarded, unless it goes also to fix the vendor with a knowledge or belief of such insufficient value, in which case it is evidence of fraud. *Ib.*

Defendant having Means of Knowledge.]—A representation false in fact may be fraudulent so as to sustain an action, if made by one having the means of knowledge of its falsehood, provided the jury is satisfied that, having regard to the particular means of knowledge and the nature of the representation, a man paying that attention which any man owes his neighbour in making a representation ought to have known by the use of these means the fact of its falsehood—Per Palles, C. B. *Doyle* v. *Hort*, 4 L. R. Ir. 661.

Circumstances Altered—Defendant's Duty to Disclose.]—If a person make a representation calculated to induce another to assume a particular liability, and the circumstances are afterwards, before liability assumed, so altered to the knowledge of the person making the representation that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made it the alteration of those circumstances ; and a court of equity will not hold the person to whom the representation has been made to be bound by any contract entered into on the faith thereof, unless such a communication has been made. *Traill* v. *Baring*, 33 L. J., Ch. 521 ; 10 Jur. (N.S.) 377 ; 3 N. R. 681 ; 10 L. T. 215 ; 12 W. R. 678—L.JJ.

Enforcing Contract obtained by Misrepresentation.]—If A., in contracting with B., falsely represents himself to be the agent of C., and thereby obtains better terms, the court will, notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation. *Fellowes* v. *Gwydyr* (*Lord*), 1 Sim. 63 ; 5 L. J. (O.S.) Ch. 43. Affirmed, 1 Russ. & M. 83.

Marriage Settlement, based on unintentional Misrepresentation of Wife's Brother.]—On a treaty of marriage, the husband applied to the wife's brother to know her fortune, and how it was secured. The brother represented it fairly, as he then conceived it, and as being charged on a real estate under the father's will, and added that the husband need not examine the will, nor the father's family deeds, for the fact was as he represented. A recital to the same fact was also made in the settlement, to which the brother was a party. It afterwards turned out that the father had no power to charge the estate by his will, but this fact was unknown to all the family at the time of the marriage :—Held, that the representation of the brother would not bind him to make it good. *Merewether* v. *Shaw*, 2 Cox, 124.

Fraud as between Vendor and Purchaser—Reticence.]—When the owner of mines adduces to the intended purchaser thereof evidences of their value :—Held, that the fact of his not having brought forward evidence of what he was aware, showing the mines to be of less value than he represented them, did not constitute such fraud or misrepresentation as to vitiate the contract. *Pike* v. *Vigers*, 2 Dr. & Wal. 260, 261.

—— **Sale of Vendor's own Shares, represented to be a Third Person's.**]—A., in consequence of an advertisement in a newspaper for the sale of shares in mines, which were offered at lower prices than the current list of sales of the same shares in the same publication, purchased of B., a shareholder, the shares so advertised, which he (A.) believed from the advertisement to be the property of a third person. They turned out to be the property of B., the broker :—Held, that such a sale was voidable on the ground of misrepresentation. *Maturin* v. *Tredinnick*, 9 L. T. 82.

—— **Bonâ fide Misrepresentation—Selling Copyhold as Freehold.**]—A vendor sold copyhold as freehold :—Held, that, assuming the vendor made the representation bonâ fide, he had committed a legal fraud, and the sale was set aside. *Hart* v. *Swaine*, 7 Ch. D. 42.

—— **Action for Compensation after Completion.**]—A vendor of real property, during the negotiations for the sale, made a representation to the purchaser, bonâ fide, and believing it to be true, that the pieces of land sold contained three acres, whereas in truth they contained a less quantity. After completion of the contract and execution of the conveyance, the purchaser sought to recover compensation from the vendor for the false representation :—Held, that, after completion, such compensation could not be recovered unless there had been fraud or the breach of some contract or warranty contained in the conveyance, and therefore the action would not lie. *Jolliffe* v. *Baker*, 52 L. J., Q. B. 609 ; 11 Q. B. D. 255 ; 48 L. T. 966 ; 32 W. R. 59 ; 47 J. P. 678.

Valuer—Action by Mortgagee for Misrepresentation.]—An intending mortgagor, at the re-

quest of the solicitors of an intending mortgagee, applied to a firm of valuers for a valuation of the property proposed to be mortgaged. A valuation at the sum of 3,000*l.* was sent in by the valuers direct to the mortgagee's solicitors, and the mortgage was subsequently carried out. Default having been made in payment by the mortgagor, and a loss having resulted to the mortgagee, he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, and breach of duty. The court being satisfied on the evidence that the defendants knew at the time the valuation was made that it was for the purpose of an advance, and that the valuation as made was in fact no valuation at all :—Held, that, under the circumstances, the defendants were liable on two grounds : (1), that they (independently of contract) owed a duty to the plaintiff which they had failed to discharge ; (2), that they had made reckless statements on which the plaintiff had acted. *George* v. *Skivington* (L. R. 5 Ex. 1), and *Heaven* v. *Pender* (11 Q. B. D. 503), followed ; *Peek* v. *Derry* (37 Ch. D. 541) discussed. *Cann* v. *Willson*, 57 L. J., Ch. 1034 ; 39 Ch. D. 39 ; 37 W. R. 23.

Matter equally open to both Parties.]—The inference of fraud (when there is no direct evidence thereof) will be rebutted by the fact of the subject matter of the alleged misrepresentations being equally open to the examination of both parties. *Pike* v. *Vigers*, 2 Dr. & Wal. 260, 261.

Means of Knowledge open to both Parties.]—An agreement will not be avoided by reason that representations, made by one party to the other, upon the subject of the agreement, are not correct, if it be manifest that the party making the representation is speaking, not from personal knowledge, but with reference to accounts which were equally open to both parties, and if the representations be justified by those accounts. *Harris* v. *Kemble*, 1 Sim. 111 ; 5 L. J. (O.S.) Ch. 131. Reversed, 2 Dow & Cl. 463 ; 5 Bligh (N.S.) 730 ; 7 L. J. (O.S.) Ch. 79.

Deed Vitiated by Reckless Statement.]—Semble, per Maule, J., that, if a person, having no knowledge on the subject, represents a fact to be true which is not so, in order to induce another to enter into a deed for the advantage of the former, and to the prejudice of the latter, such misrepresentation amounts to fraud, so as to vitiate the deed. *Evans* v. *Edmonds*, 13 C. B. 777 ; 1 C. L. R. 653 ; 22 L. J., C. P. 211 ; 17 Jur. 883 ; 1 W. R. 412.

Setting Aside Contract.]—It is not now necessary, in order to set aside a contract, to prove that the person who obtained it by material false representation knew at the time the representation was made that it was false, or even made it recklessly and without care.—Judgment of Lord Cairns, L.J., in *Reese River Silver Mining Co., In re* (L. R. 2 Ch. 604), approved. *Redgrave* v. *Hurd*, 51 L. J., Ch. 113 ; 20 Ch. D. 1 ; 45 L. T. 485 ; 30 W. R. 251—C. A.

Practice—Pleading.]—A paragraph in a statement of claim in substance stated that A., and B. his agent, by fraudulently representing that A. had power to make a lease to the plaintiff of certain premises to be used as a butcher's shop, that careful inquiry had been made as to A.'s rights in relation to the premises, and that their representation as to his power to make the lease was the result of such inquiry, induced the plaintiff to take a lease of the premises from A., and to expend money thereon ; and it alleged that these representations were false, as A. and B. respectively then had the means of knowing, and ought to have known. In an action for damages against B. and the executors of A. :—Held, on demurrer, that the paragraph disclosed a good cause of action. *Doyle* v. *Hort*, 4 L. R., Ir. 661.

A party agreed with another as follows :—"Provided you use your influence, and secure me the situation of superintendent, I agree to pay you the amount of my first quarter's salary." To an action on this agreement the defendant pleaded, that he was induced to make the agreement by fraud and covin on the part of the plaintiff, and also that the plaintiff did not use his influence and secure him the situation :—Held, that to constitute fraud and covin, the representations made by the plaintiff must be false to his knowledge at the time he made them ; and it is not enough to show that he stated warmly the power he possessed, but the jury must be quite satisfied, before they affix on a party the stigma of fraud, that he stated what was untrue to his knowledge. *Neelly* v. *Lock*, 8 Car. & P. 527.

b. Knowledge of, and Inquiry by, Plaintiff.

Generally—Onus of Proof.]—Equity will not grant relief to a plaintiff in a case where he is cognisant of the fact that the representations made were inaccurate. The onus of proving the representations to be false lies on the plaintiff. *Jennings* v. *Broughton*, 17 Beav. 234 ; 22 L. J., Ch. 585 ; 17 Jur. 905 ; 1 W. R. 441. *S. C.*, on appeal, 23 L. J., Ch. 999.

—— **Setting Aside.**]—Agreements, and solemn conveyances in consequence of them, are not to be set aside on slight grounds, where the contracting parties have not been deceived or misled by any concealment or misrepresentation on the part of the persons with whom they contracted. *Butler* v. *Butler*, 1 Bro. P. C. 383.

A deed executed by a married woman, conveying away, without consideration, an annuity to which she was entitled, she having been induced to execute it by misrepresentation, never having read it, and being misformed as to the contents of it, which were prejudicial to her :—Held, not binding upon her. *Blake* v. *Hyland*, 2 Dr. & Wal. 397.

—— **Relief.**]—If a person will enter into a hard bargain with his eyes open, equity will not relieve him, unless he can show fraud in the party contracting with him, or undue means to draw him into the agreement. *Willis* v. *Jernegan*, 2 Atk. 251.

What Sufficient Knowledge.]—To obtain the execution of a deed by saying it is a mere form, where the person executing knows it has something to do with the property affected, cannot be such misrepresentation as to avoid the deed. *Hunter* v. *Walters*, 41 L. J., Ch. 175 ; L. R. 7 Ch. 75 ; 25 L. T. 765 ; 20 W. R. 218.

Means of Knowledge.]—Although the means of ascertaining the truth of representations may be within the power of the plaintiff, yet he is

not, in order to entitle him to rescind his contract, bound to show that he has resorted to all the means of information within his power. *Rawlins* v. *Wickham*, 4 Jur. (N.S.) 990. Affirmed, 3 De G. & J. 304; 28 L. J., Ch. 188; 5 Jur. (N.S.) 278; 7 W. R. 145.

The defendant, having produced an impression on the mind of the plaintiff, contrary to the true facts, as to the plaintiff's interests in an estate, obtained a conveyance of a moiety of the estate from the plaintiff. The court set aside the conveyance, and:—Held, that it was not an objection to this relief that the plaintiff had throughout the means, equally with the defendant, of knowing what his rights were and of obtaining competent advice respecting them. *Reynell* v. *Sprye*, *Sprye* v. *Reynell*, 8 Hare, 222. Affirmed, 21 L. J., Ch. 633.

—— **No Answer to Claim.**]—Where there has been a fraudulent misrepresentation, or a wilful concealment, of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it that he might have known the truth by proper inquiry. *Venezuela Co.* v. *Kisch*, 36 L. J., Ch. 849; L. R. 2 H. L. 99; 16 L. T. 500; 15 W. R. 821.

—— **As between Vendor and Purchaser.**]—If a purchaser chooses to judge for himself, and does not avail himself of the knowledge or means of knowledge, open to him or his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being, caveat emptor, and the knowledge of his agents being as binding on him as his own knowledge. *Attwood* v. *Small*, 6 Cl. & F. 232.

Careless Inquiry, no Answer to Claim.]—It is no defence to an action for rescission of a contract on the ground of fraud, that the plaintiff inquired to a certain extent whether the representation made to him was true, but did it so carelessly and inefficiently as not to observe the fraud. *Redgrave* v. *Hurd*, 51 L. J., Ch. 113; 20 Ch. D. 1; 45 L. T. 485; 30 W. R. 251—C. A.

Plaintiff's Reliance on Representations.]—If a defendant has made a material representation to induce a person to enter into a contract, and the plaintiff has entered into the contract, it is not sufficient, in order to uphold the contract against the plaintiff in an action for rescission, that he does not prove that he entered into it relying on the representation, but the defendant must show that the plaintiff abandoned such reliance, either by having knowledge contrary to the representation, or by his explicit statement that he did not rely on such representation. In the absence of such evidence the inference remains that the plaintiff did rely on the representation. *Attwood* v. *Small* (6 Cl. & F. 232) explained. *Ib.*

In an action for deceit, if it is proved that the plaintiff did not rely upon the false statement complained of, he cannot maintain the action. *Smith* v. *Chadwick*, 51 L. J., Ch. 597; 20 Ch. D. 27; 46 L. T. 702; 30 W. R. 661—C. A.

If a statement, although untrue to the knowledge of the defendants, is so trivial that it could not in the opinion of the court have influenced the conduct of the plaintiff, it will not support an action for deceit. *Ib.*

If a statement, by which the plaintiff says he has been deceived, is ambiguous, the plaintiff is bound to state the meaning which he attached to it, and cannot leave the court to put a meaning upon it. *Ib.*

Cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other party. If the party, to whom the representations were made, himself resorted to the means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. *Clapham* v. *Shillito*, 7 Beav. 146.

—— **When to be Presumed.**]—Again, when the court is endeavouring to ascertain what reliance was placed on the representations, it must consider them with reference to the subject matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge and the other is entirely ignorant, and a contract entered into, after representation made by the party who knows or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed; but if the subject in its nature is uncertain, if all that is known about it is matter of inference from something else, and if the parties making it and receiving representations on the subject, have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence on the other. *Ib.*

Where Party is ignorant of Fraud but retains Benefit.]—Where a party retains any benefit from a contract induced by fraud, ignorance of the fraud at the time such benefit accrued will not entitle him to repudiate the contract. *Savage* v. *Canning*, Ir. R. 1 C. L. 434; 16 W. R. 133.

4. Concealment.

a. Of Facts.

Generally—Effect.]—Concealment of a material fact sufficient to avoid a release obtained by the person whose duty it was to make the disclosure. *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.

Where a lessee wilfully conceals the death of any of the cestuis que vient, and acts under such concealment for his own advantage, the lessor is not obliged to renew, but may take advantage of the forfeiture, and enter upon and hold the estate. *Pendred* v. *Griffith*, 1 Bro. P. C. 314.

Where partner, withdrawing money from partnership, by entries in books disguises trans-

action, or wholly omits or conceals it, it is a fraud, and will entitle the others to sue his separate estate; otherwise if done openly. *Smith, Ex parte*, 6 Madd. 2; 1 Glyn & J. 74; 22 R. R. 224.

In treaties for an agreement, a wilful and industrious concealment of a material fact, by one of the parties, in order to keep the other in ignorance, and to profit by that ignorance, is a gross fraud, and will, in equity, set aside the contract. *Meade* v. *Webb*, 1 Bro. P. C. 308.

What is Improper Concealment.]—By the prior of two wills, the eldest son of an heir-at-law of a testator took an estate tail in remainder. By a subsequent will this remainder was taken from him, and limited to another party. The subsequent will was admitted to probate, but the heir contested it. Ultimately a compromise was effected. It turned out that the party contesting the validity of the subsequent will was not heir, but eldest son of the heir, and that fact was concealed from the devisee. The eldest son had also entered into an agreement with the trustee of the devisee not to dispute the subsequent will, and the existence of that agreement was not mentioned to the devisee by the son of the heir, although the devisee admitted that he suspected its existence:—Held, that this was not such a case of concealment as entitled the devisee to have the compromise set aside. *Bainbridge* v. *Moss*, 3 Jur. (N.S.) 58. Affirmed, 3 Jur. (N.S.) 62, n.

A bill in equity for setting aside the agreement alleged that one of the witnesses about to be called by the son of the heir-at-law, at a new trial, had made statements on cross-examination at the first trial which the son of the heir knew to be false, and that this was concealed from him when he compromised the whole matter, just previous to the new trial:—Held, that this was not a matter which the heir's son was bound to disclose. *Ib.*

Where one party to a compromise suspected the existence of a fact which he considers of importance to his success, and asks his adversary, who refuses all information, but does not ask other parties, whom he has reason to believe are able and willing to give him the information, his ignorance of that fact at the time of a compromise is to be treated as wilful ignorance, and not as an improper concealment by the adversary. *Ib.*

Duty to Disclose Circumstances.]—Where the grantee of an annuity is induced by false representations, or improper concealment of facts, on the part of the grantor, or his agent, to become the purchaser of an annuity, although he may have relief at law, a court of equity has concurrent jurisdiction. The grantor and his agent in such transactions are not bound to disclose all the circumstances of the grantor's situation; they are, however, bound to give honest answers to questions put to them. *Adamson* v. *Evitt*, 2 Russ. & M. 66; 9 L. J. (O.S.) Ch. 1.

Imperfect Information.]—Imperfect information equivalent to concealment. *Walker* v. *Symonds*, 3 Swanst. 73; 19 R. R. 155.

Concealing Debt.]—Creditor by suppressing his debt, inducing another person to enter into a contract, not permitted to set up the debt, even against the person in whose favour and at whose instance he made the suppression. *Dalbiac* v. *Dalbiac*, 16 Ves. 125.

A person dealing with another for a composition shall not be bound by a concealment, or representation of the amount of his debt, if the plan under which the concealment or representation takes place is not carried into effect. *Oakley, Ex parte*, 1 Rose, 138.

Concealment of Bankruptcy Proceedings.]—A trader, after being served with the petition on which he was afterwards adjudicated bankrupt, purchased goods at an auction, and removed them without payment, without disclosing the fact of the bankruptcy proceedings:—Held, that this omission did not of itself amount to a misrepresentation such as to avoid the contract, and entitle the vendor to a return of the goods. *Whittaker, Ex parte, Shackleton, In re*, 44 L. J., Bk. 91; L. R. 10 Ch. 446; 32 L. T. 443; 23 W. R. 555.

Vendor and Purchaser.]—Specific performance not decreed where there is a concealment on the part of the vendor. *Shirley* v. *Stratton*, 1 Bro. C. C. 440.

A contract for the purchase of an estate, rescinded at the suit of the purchaser, on the ground of fraudulent misrepresentation, the contract having been completed with the knowledge, on the part of the defendant or her agent, of the existence of a public right of way over the property, and the plaintiff not knowing or having the means of knowing that fact. *Gibson* v. *D'Este*, 2 Y. & C. C. C. 542; 8 Jur. 94. Reversed, 1 H. L. Cas. 605.

—— **Suppression of Lien.**]—A party who, having a lien or claim on property, suppresses it, and permits another person to purchase the property upon the supposition that no such lien or claim exists, cannot afterwards be allowed to set up such lien or claim against such purchaser. *Brown* v. *Thorpe*, 11 L. J., Ch. 73.

Settlement, Concealment of.]—The defendant suppresses a settlement, but, upon proof that it came to his hands, the party entitled shall hold and enjoy the lands according to the settlement. *Eyton* v. *Eyton*, 4 Bro. P. C. 149.

Husband and Wife.]—Securities obtained from a married woman having property settled to her separate use, by a creditor of her husband, who, by suppressing the fact, procured himself to be appointed one of the trustees, his co-trustee not being a party to the transaction, set aside. *Dalbiac* v. *Dalbiac*, 16 Ves. 116.

Misreading Deed — Relief.]—One, that could read, made an agreement for twenty-one years. The lessor drew the lease for one year, and read it twenty-one. Equity would not relieve the lessee in this case, for it was within the Statute of Frauds. Sed secus, if the lessee had been unlettered. *Anon.*, Skin. 159.

Proof.]—Concealment and misrepresentation alleged as grounds for setting aside a lease must be proved fraudulent, and the contract shown to be based upon it, and the very fraud alleged proved. *Donegal (Marquis)* v. *Greg*, 13 Ir. Eq. R. 12.

Costs.]—Corporation being trustees for charity

and in possession of charity estate, and suppressing or concealing evidence relating to charity, are liable to costs of suit. *Hertford Borough* v. *Hertford Poor*, 2 Bro. P. C. 377.

Concealment of Evidence.]—When a plaintiff at law is nonsuited for want of evidence withheld by the defendant, he shall be relieved in equity, and the defendant shall pay the costs of nonsuit. *Wilmot* v. *Lennard*, 3 Swanst. 682.

Proceedings against Parties to.]—Depositions of witnesses examined by fraud suppressed, and parties thereto to be proceeded against by bill. *Walford* v. *Walford*, Cary, 56.

Practice—Pleading.]—The mere non-disclosure of a material fact is, except in the case of a policy of insurance, no answer to an action upon a contract. *Fletcher* v. *Krell*, 42 L. J., Q. B. 55; 28 L. T. 105.

b. Of Title.

Generally—Effect.]—A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not, in equity, be permitted to assert his own title against a title created by that other, although he derives no benefit from the transaction. *Nicholson* v. *Hooper*, 4 Myl. & Cr. 179. Reversing 2 Jur. 9.

Where a person, knowing his own title, does not give notice of it to purchaser, though an infant, he shall not afterwards set it up. *Savage* v. *Foster*, 9 Mod. 35.

A., being in insolvent circumstances, suffers another person to become the apparent owner of his farm (though under a secret trust for him). A. shall not have against the landlord a specific execution of an agreement made by him with the trustee, the landlord supposing the trustee to have been the rightful owner, and confiding in his solvency. *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123; 9 R. R. 23.

Injunctions granted to restrain defendant from recovering a demand from one of the plaintiffs, he having represented to the agent of the other plaintiffs, on a treaty of marriage with his daughter, that there was no such demand existing. *Neville* v. *Wilkinson*, 1 Bro. C. C. 543.

—— **Mortgagee.**]—A prior encumbrancer, being a witness to subsequent mortgages, does not disclose his own encumbrance. He shall be postponed. *Hunsden* v. *Cheyney*, 2 Vern. 150.

Where mortgagee was present while mortgagor was in treaty for his son's marriage, and fraudulently concealed his mortgage, he was held precluded from his claim. *Berrisford* v. *Milward*, 2 Atk. 49; Barnard. 101.

—— **Concealment of Statute.**]—A counsel, having a statute from A., advises B. to lend A. 1,000*l.* on a mortgage, and draws the mortgage with a covenant against all encumbrances, and conceals his own statute. The statute shall be postponed to the mortgage. *Draper* v. *Borlace*, 2 Vern. 370.

—— **Absolute Owner.**]—The mother, who was the absolute owner of a term, is present at a treaty for her son's marriage, and hears her son declare that the term was to come to him at his mother's death, and is a witness to the deed whereby the reversion of the terms is settled on the issue of his marriage after the mother's death. The mother is compellable in equity to make good this settlement, and to settle the reversion of the term accordingly after her death. *Hunsden* v. *Cheyney*, 2 Vern. 150.

—— **Concealment by Third Party.**]—A., on his marriage with B., settles lands for her jointure, which were subject to an entail. C., brother of A., was privy to the entail, engrossed the jointure deed, had the deed of entail in his custody, and concealed it. A., the husband, devises the inheritance of the premises to S., afterwards dies without issue, and S. marries the widow; C., the brother, sets up the entail, and brings the ejectment; S. and his wife bring a bill to be relieved against this deed of entail. Decreed, the wife to hold her jointure, but bill dismissed as to the husband's claim under the will, being a voluntary conveyance. *Raw* v. *Pote*, 2 Vern. 239.

—— **Agent.**]—Attorney or agent, on sale of an estate, not disclosing to the buyer an encumbrance, and leading him to suppose the title good:—Held, liable to make satisfaction in default of the vendor. *Arnot* v. *Biscoe*, 1 Ves. 95.

—— **Making Good.**]—A tenant in tail under a settlement, encouraging a stranger to purchase an annuity charged on his estate to B. by a will, which was void as against the settlement, decreed to make good the annuity. *Hobbs* v. *Norton*, 1 Vern. 136; 2 Ch. Cas. 128.

Account.]—Defendant shall account for the profits from the time the plaintiff's title accrued, and not from the filing the bill only, if the defendant has concealed the deeds and writings making out plaintiff's title. *Bennet* v. *Whitehead*, 2 P. Wms. 645.

5. Duress and Undue Influence.

a. Coercion and Oppression.

Coercion, what is.]—From the moment that a person who influences another does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have obtained, the act of the person exercising the influence becomes coercion, and ceases to be persuasion or consideration. *Ellis* v. *Barker*, 40 L. J., Ch. 603; 25 L. T. 7; 19 W. R. 963. Affirmed, 41 L. J., Ch. 64; L. R. 7 Ch. 104; 25 L. T. 688; 20 W. R. 160.

Preventing Use of Process of Court—Practice—Relief.]—On a bill to carry a former decree for payment of money into execution, further interest cannot be given. Where the plaintiff, although entitled, had not framed his bill for such further interest, liberty to amend was refused after decree and report, but a case being alleged of duress and oppression, by which the plaintiff had been prevented availing herself of the process of the court to compel payment:—Held, that that was a fact arising within the court itself and its proceedings, and, as such, might be at any stage of a cause brought under its cognisance by petition: on which further interest might be added to the sum decreed, without affecting the decree: interest not being a substantive part of the decree, but an accessory at all times in the

discretion of the court, *Mayhee* v. *Mahon*, 1 Moll. 147.

Preventing Recovery—Relief.]—Tenant in tail is prevented, by the issue in tail, from suffering a recovery in order to provide for young children, by his promise to do so for them himself: equity will compel him to do it after the father's death. *Devenish* v. *Baines*, Pre. Ch. 5.

Relief.]—A., being taken by the husband going to bed to his wife, gives him securities for payment of 500*l*. A bill to be relieved against the securities, alleging that it was a plot, dismissed. *Woodman* v. *Skute*, or *Goodman* v. *Scuse*, Pre. Ch. 266; Gilb., Eq. Rep. 9; 2 Eq. Abr. 183, pl. 2.

Securities obtained from the plaintiff for his wife as a compromise of doubtful rights, but under the threat and apprehension of arrest, and without adequate consideration or advice, set aside. *Scott* v. *Scott*, 11 Ir. Eq. R. 74.

—— **Injunction.**] — Injunction against an ejectment under a deed of appointment as obtained by a husband from his wife by undue influence, oppression, etc., and an issue directed. *Peel* v. ——, 16 Ves. 157.

—— **Cancelling.**] — An agreement executed by a party under threat of prosecuting his son for forgery ordered to be delivered up to be cancelled. *Bayley* v. *Williams*, 4 Giff. 638; 11 Jur. (N.S.) 236; 11 L. T. 110; 13 W. R. 533.

A. settled lands upon his nephew B. for life, remainder to the first and every other son of the body of B. in tail, with remainder to the daughter and daughters of B. as tenants in common, with remainder, in default of such issue of B., to the right heirs of himself, A. B. had no issue, and A. in B.'s lifetime made a codicil to his will in favour of another nephew, C., for life, with remainder to the first and every other son of the body of C. in tail. D., the son of C., took possession, but was persuaded by Z., a conveyancer, that some other parties were entitled to the premises under the limitation to the right heirs of A.; and under the pressure of Z. he executed an agreement to assign one-third to these parties, and to pay him, Z., 40*l*. for costs. Upon bill filed to set aside the agreement, it was decreed to be delivered up to be cancelled, because without consideration and executed under pressure, with costs against Z. (the conveyancer). *Brent* v. *Brent*, 10 L. J., Ch. 84; 4 Jur. 1027.

—— **Setting aside.**]—A release from a younger brother to the elder, of certain premises which had been devised to him by his father, executed in consequence of a threat to file a bill, set aside in favour of creditors. *Peat* v. *Powell*, Ambl. 387; 1 Eden, 479.

A woman, pending a treaty of marriage with A., settled all her property to her separate use with his approbation: a few days afterwards B., by stratagem, induced her to marry him the day after she first thought of it. B. had no notice of the settlement. Settlement established, and deed of revocation obtained by duress, set aside. *Strathmore* (*Countess*) v. *Bowes*, 1 Ves. J. 22; 1 R. R. 76. See 2 Bro. C. C. 345; 2 Cox, 28. Affirmed 6 Bro. P. C. 427.

A purchase deed set aside, the consideration paid being less than half the value of the land sold, the vendor being a person of reckless and improvident habits, greatly embarrassed, indebted to the purchaser, and to some extent dependent on him, and without professional advice; and there being evidence of management and contrivance on the part of the purchaser in procuring the signature of the vendor to the agreement for the sale, and of his having depreciated the title, and deterred others from purchasing, though himself aware of counsel's opinion favourable to the title, of which he did not inform the vendor. *Butler* v. *Miller*, Ir. R. 1 Eq. 195; 15 W. R. 779.

Practice—Injunction against oppressive restraint.]—Injunction to restrain husband from preventing his wife's solicitor and friends from having access to her, she being confined by dangerous illness in his house, to enable her to execute a deed of appointment under a power in her marriage settlement, refused, it not being proved that she had given instructions for such a deed. Quære, whether, under any circumstances, such an injunction would be granted. *Middleton* v. *Middleton*, 1 J. & W. 94; 20 R. R. 233.

b. Undue Advantage.

Generally.]—Principle adopted in *Baker* v. *Monk* (4 De G. J. & S. 388), following the rule laid down in *Evans* v. *Llewellin* (1 Cox, 333), is one to be extended and applied to every conceivable case where one man by fraud or chicanery gets advantage over another not standing in an equal position to negotiate with him. *Slator* v. *Nolan*, Ir. R. 11 Eq. 367.

By Person claiming Supernatural Power.]—Gift by a person of weak intellect of her whole fortune to a person who had acquired great influence over her mind, by making her and others believe that he sustained a supernatural character:—Held, invalid. *Nottidge* v. *Prince*, 2 Giff. 246; 29 L. J., Ch. 857; 6 Jur. (N.S.) 1066; 8 W. R. 742.

A., a widow, aged seventy-five, within nine days after first seeing B., who claimed to be a spiritual medium, was induced, from her belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of B., to adopt him as her son, and transfer 24,000*l*. to him: to make her will in his favour; afterwards to give him a further sum of 6,000*l*.; and also to settle upon him, subject to her life interest, the reversion of 30,000*l*. (these gifts being made without consideration, and without power of revocation):—Held, that the relation proved to have existed between them implied the exercise of dominion and influence by B. over A.'s mind; and, consequently, that as B. had failed to prove that these voluntary gifts were the pure, voluntary, well-understood acts of A.'s mind, they must be set aside. *Lyon* v. *Home*, 37 L. J., Ch. 674; L. R. 6 Eq. 655; 18 L. T. 451; 16 W. R. 824.

Setting aside—Stated Account.]—Stated accounts set aside, the items being very gross, and the settlement obtained from a person just come of age under a misrepresentation. *Brown* v. *Pring*, 1 Ves. 407.

—— **Agreement.**]—Agreements, though pre-

pared by an independent solicitor, may be set aside if one of the parties for whom the solicitor is acting is under the undue influence of the other party. *Moxon* v. *Payne*, 43 L. J., Ch. 240; L. R. 8 Ch. 881.

—— **Delivery up.**]—On bill by heir-at-law to set aside a conveyance of the estate to defendant, on suggestion of fraud, imposition, and undue influence:—Held, that he ought to be relieved, and decreed that deed should be delivered, and possession of the estate likewise given to him. *Bennett* v. *Vade*, 2 Atk. 324; 9 Mod. 312.

Account.]—The obligor, on payment of 20*l.* to the obligee, procured a bond and notes for money to be delivered up to him, upon pretence that he was poor, and nearly related to the obligee; but, that not being proved, he was ordered to account for the bond and notes. *Lucas* v. *Adams*, 9 Mod. 118.

Conveyance by Insane Person.]—A. obtains a conveyance from insane person long before commission of lunacy issues, or is executed:—Held, fraudulent and set aside, though consideration money was near the value of the estate. *Evans* v. *Blood*, 3 Bro. P. C. 632.

Lease by Intoxicated Person.]—Lease obtained by fraud and circumvention from person in a state of intoxication is void in equity. *Butler* v. *Mulvihill*, 1 Bligh, 137.

Where A., the heir of lessee, having a right to perpetual renewal, had entered into an agreement with B. respecting the independent lease of lands held under renewable lease by ancestor of A., which independent lease B. had obtained from landlord by fraud and circumvention:—Held, that heir of A. and purchasers for valuable consideration claiming under him were entitled in equity to benefit of agreement between B. and A., and that heir of landlord was entitled to benefit of agreement, so far as B. took an interest. *Ib.*

Taking advantage of Intoxication—Relief.]—A., for 90*l.* lent to B., got his bond for 800*l.* when he was drunk, on which he obtained judgment. A. sought by his bill to subject B.'s trust estate in his wife's lands: equity would not relieve A., even to the extent of the money really lent. Sed secus, if B. had gone into equity to be relieved from the judgment, for then he must have paid the money borrowed. *Rich* v. *Sydenham*, 1 Ch. Ca. 202.

c. Distress and Necessitous Circumstances.

Generally.]—Securities taken during poverty and distress set aside as unconscionable and oppressive. *Lamplugh* v. *Coæ*, Dick. 411.

Province of Court of Equity.]—It is the peculiar province of a court of equity to give relief in all cases of fraud, or of contracts in which any advantage is unduly taken by either of the parties of the distress or necessity of the other. *Kenrick* v. *Hudson*, 4 Bro. P. C. 222.

Sale at Gross Undervalue—Want of Independent Advice—Setting Aside.]—The court, being of opinion that A., a reckless and improvident man, incapable of appreciating his rights, and in destitute circumstances, had been grossly overreached by B., his brother-in-law, in a sale at a gross undervalue to B. of A.'s interest in certain property, and that, to the knowledge of B., no adequate protection or advice were afforded to A., set aside the transaction with costs. *Slator* v. *Nolan*, Ir. R. 11 Eq. 367.

Relief—Bond to Stand as Security.]—The plaintiff, a poor man, suing for a considerable estate, gives a bond for a great sum of money to the defendant, a person who assisted him with small sums, and took some pains in the affair; the defendant's wife had also intermeddled, with her husband's knowledge and approbation; and the bond was obtained by pressing the plaintiff for payment of what was expended, and taking advantage of his insolvency. The bond decreed to stand only as a security for what was advanced and interest, and the defendant left at liberty to bring his quantum meruit for pains, &c. *Proof* v. *Hines*, Cas. t. Talb. 111.

Conveyance by Labourer to Solicitor—Mortgagee—Validity.]—When a solicitor and mortgagee took a conveyance from the mortgagor, a day labourer, who had no independent legal advice:—Held, that the deed was not valid unless the circumstances were all explained to the mortgagor, and that the onus of showing that this was done lay on the solicitor. *Prees* v. *Coke*, L. R. 6 Ch. 645.

Purchase set aside after Purchaser's Death]—Where a purchaser takes advantage of the distress or ignorance of the vendor, or of any particular authority over him, a court of equity may set aside the purchase as fraudulent, even after the purchaser's death. *Gould* v. *Okeden*, 4 Bro. P. C. 198.

Setting aside Deed of Confirmation.]—Deed, confirming a grant impeached by suit and compromising the rights, the subject of a suit, obtained from a person apprised of his rights set aside, he being compelled to accede to the terms from distress and poverty occasioned by the party procuring the confirmation. *Roche* v. *O'Brien*, 1 Ball & B. 330.

Relief given to Volunteers.]—A grant from a distressed man in prison for debt to his attorney, set aside as fraudulent, in favour of children, though deriving as volunteers, yet having as fair a claim to be relieved against fraud as the heir-at-law. *Falkner* v. *O'Brien*, 2 Ball & B. 214.

Advantageous Purchase—Undervalue.]—M., being in embarrassed circumstances, in consideration of loan of 900*l.*, makes lease to D., with covenant for perpetual renewal, of lands of yearly value of 450*l.* at rent of 150*l.*, subject to private parol agreement, that M. might redeem within two years, on payment of 1,300*l.* S., knowing the circumstance, with consent of M. purchases from D. his interest, to whom S. pays the 1,300*l.* S. afterwards purchases the whole interest of this and other land of M., for additional sum of 3,706*l.*, the clear profit rent at which the lands let the year following being 603*l.* a year, and other advantages:—Held, binding on M. *Meredith* v. *Saunders*, 2 Dow, 515; 14 R. R. 201.

Exorbitant Price.]—The purchase of a piece of land, at an exorbitant price, will not be allowed

to stand when made the condition of a loan of money to a party whose necessities compelled him to borrow. A mortgage of a fund in court, in a suit of *Collet* v. *Maude*, by W. G. C., the purchaser of the land, to secure 6,000*l*., the purchase-money, to G. W. F., the vendor, set aside on the ground that the transaction was fraudulent. An assignment of a chose in action must be taken subject to all prior claims. Sub-mortgages of the fund in court, made without noticing G. W. F., were therefore set aside; for his title was either void or subject to the prior equity of W. G. C., notwithstanding he had been induced to create or countenance such sub-mortgages. The acts of W. G. C. in joining to create the sub-mortgages were not a recognition of, or an acquiescence in, the sub-mortgages, as they were done in entire ignorance of his rights, and under the idea that the original transaction with G. W. F. was unimpeachable. *Cockell* v. *Taylor*, 15 Beav. 147; 21 L. J., Ch. 545.

A purchase from an illiterate poor and old man, who was ill at the time, set aside, the price being inadequate, the vendor having no professional advice, and the transaction being completed in great haste and on terms unduly disadvantageous to him. *Clark* v. *Malpas*, 4 De G. F. & J. 401; 31 Beav. 80; 8 Jur. (N.S.) 734; 10 W. R. 676.

Setting aside Sale at Undervalue.]—Where unfair advantage was taken of the necessities of one who wished only to raise money upon mortgage, but was induced to execute an absolute conveyance at a considerable undervalue by his solicitor, who betrayed his interests to serve the purposes of the purchaser, the court set aside the transaction as an absolute sale. *Douglas* v. *Culverwell*, 5 L. T. 484. *S. C.*, 3 Giff. 251; 31 L. J., Ch. 65; 10 W. R. 189. Affirmed, 6 L. T. 272.

Inadequate Consideration.]—Deed set aside as improvidently obtained, being for an inadequate consideration from persons in low circumstances, and unapprised of their right until the time of the transaction, though no misrepresentation nor actual fraud whatever appeared to have been made use of. *Evans* v. *Llewellin*, 2 Bro. C. C. 150; 1 R. R. 49; 1 Cox, 335.

Setting aside—Lease and Release, and Fine.]—Conveyance by lease and release, and fine, set aside upon great inadequacy of consideration, combined with misrepresentation and surprise upon parties in extreme distress, ignorant of their interests, and not properly protected, though the transaction took place twelve years before the bill; and a former bill having been dismissed, the plainliff not appearing, that objection not being made either by plea or answer. The decree limited to the time of the bill filed. *Pickett* v. *Loggon*, 14 Ves. 215.

—— Lease by Mortgagor to Mortgagee.]—A lease set aside under the circumstances, being made by mortgagor to mortgagee, the latter taking advantage of the distresses of the former, and using his mortgage as an instrument to obtain an undue advantage; and the lessor executing the lease on the faith of an agreement that he was to be allowed a certain maintenance out of the property for himself and family, which lessee did not perform, and which it would not have been in his power to have secured on account of the rights of creditor. But, whether the mere relation of mortgagor and mortgagee be sufficient to avoid a lease fairly made by the former to the latter, quære. *Gubbins* v. *Creed*, 2 Sch. & Lef. 214; 9 R. R. 71.

Agreement in Execution of Private Act.]—Notwithstanding two private acts of parliament reducing younger children's portions in proportion to the other interests in the estate, the court would not enforce an agreement entered into by one of the younger children in execution of the private acts, thereby consenting to accept a stated sum in satisfaction; such agreement being inserted by the plaintiff's solicitor in a receipt from her, on paying her a small sum of money, and she being in great distress and embarrassment, at the time. *Kerneys* v. *Hansard*, G. Cooper, 125.

Undervalue.]—Deeds of assignment set aside as having been obtained at undervalue from the assignors, who were far advanced in life and in needy circumstances, by a person whose situation enabled him to throw impediments in the way of the proceedings taken by them for the recovery of their demands, and who held out threats to that effect. *Bowen* v. *Kirwan*, Ll. & G. t. Sugd. 47.

Transaction between Brothers-in-law.]—A transaction of sale, made upon a false or mistaken consideration between parties in the relation of brothers-in-law, the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father, and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached, if fairly made; but, if the consideration for the purchase was the balance of an account, which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts. *M'Neil* v. *Cahill*, 2 Bligh, 228.

Reversionary Interest.]—Sales of reversionary interests were set aside, the vendors being poor, ignorant men, selling at a considerable undervalue, and having no professional adviser other than the solicitor to the purchasers who gave to the latter a great advantage in the transactions. *Fry* v. *Lane*, 58 L. J., Ch. 113; 40 Ch. D. 312; 60 L. T. 12; 37 W. R. 135.

d. Extravagant and Unreasonable Contracts.

Generally.]—Equity will not carry unreasonable bargains into execution; and, therefore, where A. agreed to pay B. 240*l*. a year for his board, lodging, etc., the agreement was set aside as being unreasonable; and the master was directed to inquire what accommodation A. had, and what B. reasonably deserved for the same, and to make him allowance accordingly. *Stanhope* v. *Toppe*, 1 Bro. P. C. 157.

Hard Bargain.]—If a person will enter into a hard bargain with his eyes open, equity will not relieve him, unless he can show fraud in the party contracting with him, or undue means to draw him into the agreement. *Willis* v. *Jernegan*, 2 Atk. 251.

Hardship.]—On a question of executing an

agreement, hardship cannot be regarded unless it amounts to a degree of inconvenience and absurdity so great as to afford judicial proof that such could not be the meaning of the parties. *Prebble* v. *Boghurst*, 1 Swanst. 329 ; 1 Wils. Ch. 161.

Neither Fraud nor Incapacity.]—If a person on marriage makes an extravagant or unreasonable settlement, yet, if no fraud or incapacity appear, it shall not be avoided by persons claiming under a subsequent settlement. *Hobson* v. *Staneer*, 9 Mod. 80.

Neither Fraud nor Mistake.]—The defendant agreed to purchase a property at a valuation to be made by A. The court, though it considered A.'s valuation very high, "and perhaps exorbitant," decreed specific performance, there appearing neither "fraud, mistake, nor miscarriage." *Collier* v. *Mason*, 25 Beav. 200.

Price.]—An agreement to give forty years' purchase for fen land, set aside as extravagant. *Kien* v. *Stukeley*, 1 Bro. P. C. 191.

e. Inadequacy of Consideration.

Generally.]—Mere inadequacy of value is not a sufficient ground to set aside an annuity. *Speed* v. *Phillips*, 3 Anst. 732.

An annuity cannot be set aside upon mere inadequacy of price which can be applied only as evidence of fraud. The notion of a market price ascertained in the usual way upon the principle of calculation at an insurance office is not a just criterion of the value. Therefore, a bill to set aside an annuity, the circumstances not amounting to fraud, was dismissed with costs. *Low* v. *Barchard*, 8 Ves. 133 ; 7 R. R. 4.

The court will not interfere to set aside an agreement merely on the ground of inadequacy of consideration, nor on account of the distress of the plaintiff, where no advantage had been taken of his situation. *Purdie* v. *Millett*, 1 Tam. 31 ; 31 R. R. 60.

Inadequacy of value is not in itself sufficient to set aside a contract. *Griffith* v. *Spratley*, 1 Cox, 383.

There may be cases of inadequacy of price so great as to form a ground for cancelling a contract. *Stilwell* v. *Wilkins*, Jacob, 282 ; 23 R. R. 56.

Valuer's Price.]—A. entered into a contract with B. for the sale of property to him at a price to be fixed by two valuers, named in the contract, who afterwards valued the property at an adequate price :—Held, nevertheless, that B. was entitled to a decree for specific performance, there being no proof of fraud or collusion on the part of the valuers. *Weekes* v. *Gallard*, 21 L. T. 655.

Presumption of Oppression.]—It is a general rule that inadequacy of consideration is not alone a sufficient ground to set aside a contract ; but, if inadequacy be very great, that will induce a presumption of oppression. *Darley* v. *Singleton*, Wight. 29.

There is an equity which may be founded on gross inadequacy of consideration, where it involves the conclusion that the complainant either did not understand what he was about, or was the victim of some imposition. *Tennent* v. *Tennent*, L. R. 2 H. L. (Sc.) 6.

Relief will be given in equity upon inadequacy of consideration, if so extreme as to satisfy the court that there must have been oppression or imposition. *Underhill* v. *Harwood*, 10 Ves. 209. Affirmed 14 Ves. 28.

Without Fraud.]—Mere inadequacy of value is not a ground upon which a court of equity will be willing to set aside purchases if unaccompanied by fraud or misrepresentation. *Murray* v. *Palmer*, 2 Sch. & Lef. 488.

Purchase for a valuable consideration, bonâ fide, paid :—Held, a good defence, though the consideration was much less than the real value. *Bullock* v. *Sadler*, Amb. 764.

Relief.]—A conveyance by deed and fine, gained without consideration and indirectly, court relieved against it. *Wilkinson* v. *Brayfield*, 2 Vern. 307.

Price, what is Fraudulent.]—A sale of land at a halfpenny for every square yard, when the purchaser knew that not to be one-fourth part of the value, is fraudulent and void in equity. *Deane* v. *Rastron*, 1 Anst. 64.

Infirmity of Party.]—A conveyance by a weak man for a small consideration, set aside. *Clarkson* v. *Hanway*, 2 P. Wms. 203.

Mere inadequacy of price is insufficient in itself to vitiate a sale, but, where there is weakness in the mental capacity of the vendor, the sale cannot be sustained, unless the vendor has been adequately protected in the transaction. *Longmate* v. *Ledger*, 2 Giff. 157 ; 6 Jur. (N.S.) 481 ; 8 W. R. 386.

Where a vendor of feeble intellect sold his property to a creditor for an inadequate price, the court, on a bill filed by his heir impeaching the transaction, set aside the sale, but directed the deed to stand as a security for moneys actually due on the footing of a mortgage. *Ib.*

Bona fides.]—One, being poor, drawn in to sell an estate at a great undervalue, yet, if no fraud, cannot be relieved. *Wood* v. *Fenwick*, Pre. Ch. 206.

Deed set aside as improvidently obtained, being for an inadequate consideration from persons in low circumstances, and unapprised of their right until the time of the transaction, though no misrepresentation nor actual fraud whatever appeared to have been made use of. *Evans* v. *Llewellin*, 2 Bro. C. C. 150 ; 1 R. R. 49 ; 1 Cox, 333.

Property in Possession and Reversion.]—Where a purchase is made from a poor and ignorant man at a considerable under-value, the vendor having no independent advice, a court of equity will set aside the transaction. This will be done even in the case of property in possession, and, à fortiori, if the interest be reversionary. *Fry* v. *Lane*, 58 L. J., Ch. 113 ; 40 Ch. D. 312 ; 60 L. T. 12 ; 37 W. R. 135.

Mere Inadequacy of Consideration.]—Where, after the death of a vendor, the sale was impeached by his devisees on the ground that at the time of the sale he was an illiterate, bedridden old man of seventy-one years of age, and had acted without professional advice, and had

conveyed away the property in question, of the value of 400*l.*, for the consideration of a provision by way of board and lodging during his life, which only endured six weeks after the conveyance:—Held, that, in the absence of any fraud, and the evidence showing that he had declined to employ professional advice for himself, such a transaction was not impeachable on the ground of mere inadequacy of consideration. *Harrison* v. *Guest*, 6 De G. M. & G. 424; 25 L. J., Ch. 544; 2 Jur. (N.S.) 911; 4 W. R. 585. Affirmed, 8 H. L. Cas. 481.

Bill of Exchange.]—Relief against a bill of exchange, said to be for value received, but gained by fraud, and for a fictitious consideration. *Dyer* v. *Tymewell*, 2 Vern. 122; Free. C. C. 112; 1 Eq. Ca. Ab. 126.

Purchase Deed.]—The court will set aside a purchase deed as fraudulent if the price is inadequate, and there have been contrivance and management, and if the parties have not been on equal terms by reason of the one having, the other not having, professional assistance. *Butler* v. *Miller*, Ir. R. 1 Eq. 195; 15 W. R. 779.

No Fiduciary Relation.]—A purchase set aside on the ground of undue influence and undervalue, although no fiduciary relation existed between the vendor and purchaser. *Clark* v. *Malpas*, 31 L. J., Ch. 696; 6 L. T. 596; 10 W. R. 677.

Where no fiduciary relation exists between two parties dealing for the sale and purchase of an estate, mere inadequacy of consideration, or irregularity in the statement of it in the conveyance, is not sufficient to impeach the contract. *Harrison* v. *Guest*, 8 H. L. Cas. 481. Affirming 6 De G. M. & G. 424; 25 L. J., Ch. 544; 2 Jur. (N.S.) 911; 4 W. R. 585.

Lapse of Time.]—After great length of time, the question of undervalue is not entertainable. *Wilton* v. *Browne*, 1 Ball & B. 130.

Contract on inadequate consideration, and accompanied with fraudulent concealment, etc., set aside after seven years. *Taylor* v. *Obee*, 3 Price, 83: 17 R. R. 548.

Conveyance by lease and release and fine, set aside upon great inadequacy of consideration, combined with misrepresentation and surprise upon parties in extreme distress, ignorant of their interests, and not properly protected; though the transaction took place twelve years before the bill, and a former bill having been dismissed, the plaintiff not appearing, that objection not being made either by plea or answer. The account limited to the time of the bill filed. *Pickett* v. *Loggon*, 14 Ves. 215.

Conveyance to Stand as Security.]—Where conveyance is for undervalue, court will not set it aside absolutely, but it shall stand a security for the money advanced. *Lane* v. *Page*, Amb. 235.

—— **Sailor's Prize Money.**]—Assignment of sailor's share of prize money at great undervalue, set aside for fraud, but still to stand as security for what was really advanced. The same equity as to an under-assignment. *How* v. *Weldon*, 2 Ves. 516.

—— **Lunatic.**]—Sales, at a great undervalue, from one that was afterwards a lunatic, set aside; but the conveyances to stand a security for what was really paid. *Addison* v. *Dawson*, 2 Vern. 678.

Sale by Tenant for Life.]—Where a tenant in tail general of a remainder, expectant on a previous life estate, sold the reversion to B. at an inadequate price amounting to fraud, which B., ten years after, sold for full value, the former party joining in the conveyance to a purchaser with full knowledge of the previous sale being voidable, the court decreed a reconveyance on repayment of the original price to B. *Addis* v. *Campbell*, 4 Beav. 401; 10 L. J., Ch. 284.

—— **and Remainderman.**]—Tenant for life and remainderman in tail, both in distress, join in selling estate for inadequate consideration:—Held, that it could not be considered a sale of reversion, and subject to rules relating to such sale, but that sale was invalid on account of inadequacy of price, coupled with vendors' distress, and their want of advice. *Wood* v. *Abrey*, 3 Madd. 417; 18 R. R. 264.

Between Partners.]—A partner, who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share of the business, for a sum which he knew from accounts in his possession (but which he concealed from his co-partner) was an inadequate consideration; the agreement was set aside. *Maddeford* v. *Austwick*, 1 Sim. 89. Affirmed, 2 Myl. & K. 279; 27 R. R. 167.

If a lease for years, worth 200*l.* a year, belong to two co-partners, and one of them, upon a false suggestion, that a fine of 250*l.* was to be paid for the renewal of it, obtain an assignment of the other's moiety for consideration of 20*l.*; equity will set aside this conveyance, and order assignee to account for a moiety of profits. *Evans* v. *Hoskins*, 9 Mod. 83.

Other Cases.]—D., in 1858, entered into a building speculation with the defendant, each party to contribute an equal amount of money, the net rents to belong to D. for his life, and after his death the lease and houses to belong to the defendant absolutely. D. was also possessed of four leasehold houses for the residue of a term, and in January, 1859, he, by a deed, to which his wife was party, assigned them to the defendant for 200*l.*, upon trust for the benefit of himself and his wife during their joint lives and the life of the survivor. The 200*l.* was paid by a cheque, which got back into the hands of the defendant. In June, 1859, D. died before the buildings were completed. D.'s widow, as executrix, filed a bill to have the deed of January, 1859, set aside on the ground of mental incapacity on the part of her husband and inadequacy of consideration; or, in the alternative, for a declaration that she was entitled to a lien on the houses for 200*l.* The defendant alleged that the 200*l.* was paid back to him by D. to be advanced in the building speculation. The evidence of mental incapacity and inadequacy of value was held to have failed; but, as there was not sufficient evidence of the existence of the contract, the defendant was ordered to pay to the plaintiff 200*l.*, with interest from the 31st March, 1859, and the costs of the suit. *Duckels* v. *Nothard*, 8 Jur. (N.S.) 1030; 7 L. T. 59.

A., who was a labouring man, receiving about

9*s.* a week, and totally uneducated, believing himself to have a contingent interest in an estate in fee-simple, offered, in February, 1838, to sell his interest to B. B. applied to his attorneys, who advised that, as A.'s father might cut off the entail, A. had no saleable interest. B. declined the purchase; but shortly afterwards consented to lend money to A., and lent different sums, amounting in the whole to 20*l.* A., on the 5th of May, 1838, executed a money-bond, conditioned in the penalty of 40*l.*, to secure the payment of 20*l.*, with 5 per cent. interest, on the 5th of November then next. A. was not called on for interest, nor did he hear of the matter again till the 22nd of September, 1840, the day of his father's funeral. His father had not interfered with the descent of the property, and A. had at that time become possessed of the estate. On the 24th September A. entered into an agreement to sell the estate to B., and that agreement was carried into execution by a conveyance on the following 10th of October. The bond, agreement, and conveyance were prepared by B.'s attorney, and executed at his office. A. had no attorney. The estate was sold considerably under its value. A. afterwards filed a bill alleging these facts, and praying that the deed of conveyance might be set aside as fraudulent and void:—Held, that the bill, as a bill charging fraud, was properly dismissed: but, whether A. might not have maintained a bill to set aside the conveyance as improvidently made and hastily executed, quære. *Curson* v. *Belworthy*, 3 H. L. Cas. 742; 16 Jur. 1147.

6. On Public.

Literary Fraud—Fictitious Author's Name on Title-page.]—In an action for specific performance of an agreement for the composition of a literary work by the defendant, the plaintiffs alleged that the defendant had agreed that his name should not appear on the title-page of a work as the author of it; the defendant alleged that it was part of the agreement that his name should so appear. The plaintiffs proposed to publish the book with a title-page, stating that it was edited by K. (assisted by M., the defendant). K. was known as having published other books of a similar description, and had allowed the plaintiffs to make use of his name, but he had taken no part whatever in the compilation:—Held, that the proposed title-page would be a fraud on the public, and that on this ground the plaintiffs were disentitled to relief. *Post* v. *Marsh*, 50 L. J., Ch. 287; 16 Ch. D. 395; 43 L. T. 628; 29 W. R. 198.

Procuring Sale, in Master's Office, to Particular Person.]—An agreement to procure a sale of lands in the master's office to a particular person, at a certain price, is a fraud on the court, on the public, and on the creditor. The court itself, for the sake of the public, is bound to take notice of such an agreement, although the defendant falsely denies the existence of it, and sets up a fictitious case on his answer. *Hamilton* v. *Ball*, Ir. R. 2 Eq. 194.

7. On Particular Statutes.

3 Jac. 1, c. 4—1 Will. & Mary, c. 26.]—Plaintiff, whilst a papist, assigned advowson to defendant for ninety-nine years, and, having conformed, brought his bill for reassignment of the term, suggesting he had only assigned it in trust for himself to avoid the penalties of the statutes 3 Jac. 1, c. 4, and 1 Will. & Mary, c. 26. Lord Hardwicke was inclined to think, if the defendant had demurred, such a fraudulent conveyance would, at the hearing, have been absolute against the grantor. *Cottington* v. *Fletcher*, 2 Atk. 156.

6 Anne.]—By an Irish statute, 6 Anne, all deeds executed after the 25th March, 1708, and and not registered, are declared void. A lease of lands was neglected to be registered, of which the lessor taking advantage granted a new lease to another person, who brought an ejectment, and recovered:—Held, that the original lessee was relievable in equity; for the statute, being made to prevent frauds, shall never be used as a means to cover it. *Forbes* (*Lord*) v. *Deniston*, 4 Bro. P. C. 189.

38 Geo. 3, c. 78.]—A., the proprietor of a newspaper, prevailed on B. to make and deliver to the stamp office an affidavit that he, B., was the proprietor of the paper. B. afterwards agreed to sell the paper to D. A. having become insolvent, his assignees filed a bill to set aside the sale for fraud:—Held, that as B. had at A.'s instance violated the 38 Geo. 3, c. 78, which requires the true names of the proprietors of newspapers to be inserted in the affidavit, his assignees were not entitled to the relief asked. *Harmer* v. *Westmacott*, 6 Sim. 284.

Register Act.]—It is only in cases of fraud the court has broken in upon the Register Act, though one encumbrance was registered before another. *Hine* v. *Dodd*, 2 Atk. 275.

Statute against Clandestine Mortgage.]—A person, who will take advantage of the statute against clandestine mortgage, must be an honest mortgagee; and, therefore, if a man has used any fraud or ill practice in obtaining a second mortgage, he shall not have the benefit of the statute. *Stafford* v. *Selby*, 2 Vern. 589.

8. By Reason of Personal Relations.

a. General Principles.

Generally.]—As to advantage taken by persons in fiduciary situations in general. *Goddard* v. *Carlisle*, 9 Price, 169; 23 R. R. 654.

As to the extent of the doctrine of purchases by persons in fiduciary situations, viz., trustees, assignees, &c. See *Lacey*, *Ex parte*, 6 Ves. 625; 6 R. R. 9.

Circumstances under which the court will restrain a person occupying a confidential relationship from profiting by engagements entered into under undue influence. *Billage* v. *Southee*, 9 Hare, 534. *S. C.*, nom. *Billing* v. *Southee*, 21 L. J., Ch. 472; 16 Jur. 188.

Influence arising from fiduciary relationship is not discountenanced by the court, but it ought to be exercised for the benefit of the person subject to, and not of the person possessing, it. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

No person who stands in a relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, unless a sufficient

protection has been interposed against the exercise of such influence. *Nottidge* v. *Prince*, 2 Giff. 246; 29 L. J., Ch. 857; 6 Jur. (N.S.) 1066; 8 W. R. 742.

The rules which induce a court of equity to look with suspicion into transactions between solicitor and client apply to other cases, when there is a confidential relation between the parties, as employer and agent, surgeon and patient, spiritual instructor, &c. *Dent* v. *Bennett*, 7 Sim. 539; 4 Myl. & Cr. 269; 8 L. J., Ch. 125; 5 *Id.* 58; 3 Jur. 99.

This relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another. *Ib.*

The court of chancery will grant relief in cases of undue influence, although there does not exist between the parties the particular relation of trustee and cestui que trust, guardian and ward, solicitor and client, if, by reason of the confidence reposed in a person, he uses his information to the prejudice of the person from whom he receives it, and to his own advantage. *Hobday* v. *Peters*, 28 Beav. 349; 29 L. J., Ch. 780; 6 Jur. (N.S.) 754; 2 L. T. 590; 8 W. R. 512.

The court will not allow a security to be enforced against the person from whom it was taken, where it had been taken from that person when just of age and living in the house and under the influence of another person who stood in anything like the relation of a guardian or trustee, or in loco parentis to the party from whom the security was taken, unless the security was given freely and without the exercise of any influence either by the party to whom it was given or the party who procured it to be given; and on mere allegations of such undue influence, and that the rate of interest on the security given was not fully stated, an injunction to stay execution was granted until the hearing. *Espey* v. *Lake*, 10 Hare, 260; 22 L. J., Ch. 336; 16 Jur. 1106; 1 W. R. 59.

What Constitutes Fraud.]—Among the various acts which, in a court of equity, constitute fraud, the abuse of confidence is one. *Mackreth* v. *Fox*, 4 Bro. P. C. 258; 2 Bro. C. C. 400; 2 Cox, 320.

Principles.]—Exposition of the principles upon which the court of chancery acts in cases where deeds executed between parties who stand in a confidential relation to each other are impeached. *Ahearne* v. *Hogan*, 1 Dr. 310. And see *Blackie* v. *Clark*, 15 Beav. 595; 22 L. J., Ch. 377.

Principles affecting the decision of the court in cases of incapacity of donor, undue influence, and fiduciary relation, discussed. *Armstrong* v. *Armstrong*, Ir. R. 8 Eq. 1.

Infants—Principles of Relief.]—The jurisdiction of courts of equity will be employed to protect infants, and is not confined to cases where there has been an abuse of a strictly fiduciary character. The principle on which relief is given applies to all cases where influence is acquired and abused, and confidence reposed and betrayed. In the former influence is presumed, in the latter its existence must be proved. *Smith* v. *Kay*, 7 H. L. Cas. 750; 30 L. J., Ch. 45.

Professional Assistance.]—The case of *Harrison* v. *Guest* (6 De G. M. & G. 424) does not establish that the fact of an unprofessional person having employed no solicitor is a matter of no importance. *Denton* v. *Donner*, 23 Beav. 285.

Solicitor Employed by Trustee for Sale—Annuitant with Power of Sale.]—A solicitor, employed about the sale of property by a trustee for sale, is as much disabled from becoming the purchaser as the trustee himself; and an annuitant, with a power of sale to pay arrears, is a trustee within the above proposition. *Bloye's Trust, In re*, 1 Mac. & G. 488; 2 Hall & Tw. 140; 19 L. J., Ch. 89; 14 Jur. 49.

Attorney and Client—Trustee and Cestui que trust.]—The distinction between attorney and trustee to sell, as to contracts with client and cestuis que trustent, is that attorney retaining character may contract, subject to onus of making it thoroughly manifest that he has taken no advantage of his confidential situation. But in trustee it is not sufficient to show he has not taken advantage, the general rule being that he must divest himself of that character. *Cane* v. *Allen* (*Lord*), 2 Dow, 299.

Mortgagor and Mortgagee.]—The rule, that a purchaser cannot purchase from his cestui que trust, does not extend to a purchase by a mortgagee from his mortgagor. *Knight* v. *Majoribanks*, 2 Macn. & G. 10; 2 Hall & Tw. 308. Affirming 11 Beav. 322; 13 Jur. 136.

—— **Application of Principle to.**]—The principle upon which the court restrains persons filling a fiduciary character from having any dealings for their own benefit, does not necessarily apply to the case of mortgagor and mortgagee. *Dobson* v. *Land*, 8 Hare, 221.

—— **Mortgagees and Trustees.**]—Distinction between the cases of mortgagees and trustees in the ordinary sense. *Id.* 220.

Distinction between Cases of Strangers and Families.]—Distinction between the cases where, as between strangers, benefits are obtained by undue influence, and arrangements entered into for the peace of families and the security of family property. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

Without Fraud.]—Contracts contrary to the policy of the law, as a deed of gift by a client to an attorney, by an heir to guardian, the purchase of a reversion from a young heir, a trustee selling to himself, set aside without evidence of fraud. *Morse* v. *Royal*, 12 Ves. 371; 8 R. R. 338.

Practice — Terms.] — Where injunction is granted against proceedings at law, on instrument obtained either as a gift or purchase in fraud of the fiduciary situation of the donee or purchaser, the court will not impose the terms of paying money into court, if the relationship be that of attorney and client. *Goddard* v. *Carlisle*, 9 Price, 169; 23 R. R. 654.

—— **Onus of Proving Fair Dealing.**]—General rule that he who bargains, in matter of advantage, with person placing confidence in him, is bound

to show that no unreasonable use has been made of that confidence. *Gibson* v. *Jeyes*, 6 Ves. 278 ; 5 R. R. 295.

Whenever a person obtains, by voluntary donation, a benefit from another, he is bound, if the transaction be questioned, to prove that the transaction was righteous, and that the donor voluntarily and deliberately did the act, knowing its nature and effect. *Cooke* v. *Lamotte*, 15 Beav. 234 ; 21 L. J., Ch. 371.

The above rule is not confined to the cases of attorney and client, parent and child, &c., but is general. *Ib.*

If a person obtain by voluntary donation a large pecuniary benefit from another, the burthen of proving the transaction righteous falls on the person taking the benefit, and this is proved by showing that the donor fully understood what he was doing : but, where the relation of the parties is such that undue influence might have been exercised, it must also be shown that the disposition of the donor was not produced by undue influence. In many cases the court, from the relations existing between the parties, infers the probability of undue influence, as in the cases of guardian and ward, solicitor and client, spiritual adviser and pupil, medical adviser and patient, and the like. Transactions between such persons are watched with jealousy, not only to see that the party fully understood the act, but also that it was not brought about by the exercise of that influence. The relation of parent and child comes within this class. *Hoghton* v. *Hoghton*, 15 Beav. 278 ; 21 L. J., Ch. 482 ; 17 Jur. 99.

If the right to a benefit taken by a person in a confidential situation be questioned in equity, and it is sought to be sustained as an exercise of liberality, it must be shown that it was the intention of the party from whom the benefit emanated to be liberal ; but intention imports knowledge, and liberality imports the absence of influence, and the onus of establishing a gift in such circumstances rests with the party who has received it. *Billage* v. *Southee*, 9 Hare, 534. *S. C.*, nom. *Billing* v. *Southee*, 21 L. J., Ch. 472 ; 16 Jur. 48.

In transactions where one party stood in such relation to the other party as guardian, attorney, trustee, &c., the proof that no advantage was taken of that relation lies upon the former ; but it is not necessary for the validity of the transaction that it should be effected by the interposition of a third person. Where the relation between the parties was only friendship, the one however habitually relying upon the other for advice, employing him in some sort of business, &c., it is for those who impugn the transaction to prove that an undue advantage was taken of the influence arising out of this relation. *Hunter* v. *Atkins*, Coop. t. Brough. 64.

It is incumbent upon persons who receive benefits from others, towards whom they stand in a confidential relation, to show that they had competent and independent advice, and this general principle is not affected by the age or capacity of the persons conferring the benefits, or the nature of the benefits conferred. But this principle does not extend to interfere with mere trifling gifts, without proof, not only of influence derived from the confidential relation, but of mala fides, or of undue or unfair exercise of the influence. *Rhodes* v. *Bate*, 35 L. J., Ch. 267 ; L. R. 1 Ch. 252 ; 12 Jur. (N.S.) 178 ; 13 L. T. 778 ; 14 W. R. 292.

Duty of Persons Paying, by Direction of Others of Tender Years.]—Persons paying money to one standing in loco parentis, by the direction of persons of tender years, though of full age, are bound to see that such persons thoroughly understand the transaction, and have had access to independent advice. *Dettmar* v. *Metropolitan and Provincial Bank*, 1 H. & M. 641 ; 10 L. T. 63 ; 3 N. R. 364.

Ratification.]—Although a gift made to a person standing in a confidential relation to the donor may be voidable, yet, if, after the confidential relation has ceased to exist, the donor intentionally elects to abide by the gift, and does in fact abide by it, it cannot be impeached after his death, even if it is not proved that the donor was aware that the gift was voidable at his election. *Rhodes* v. *Bate* (L. R. 1 Ch. 252) commented on. *Mitchell* v. *Homfray*, 45 L. T. 694 ; 29 W. R. 558.

b. Trustee and Beneficiary.

i. *Generally.*

Purchase by Trustee and Executor—Trustee and Executor, who.]—A person, named as executor and trustee under a will, did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate, but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir to whom the estate must have descended upon the disclaimer of the trust. During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent :—Held, that he was not, under the circumstances, chargeable as executor or trustee. *Stacey* v. *Elph*, 1 Myl. & K. 195 ; 2 L. J., Ch. 50.

ii. *Trustees.*

Generally.]—Trustee not to derive advantage from a purchase of trust property. *Whelpdale* v. *Cookson*, 1 Ves. 9.

An agent employed to purchase cannot buy his own goods for his principal, neither can an agent, employed to sell, purchase for himself his principal's goods. Principals may either repudiate such transactions altogether, or adopt and take the benefit of them. The same rule applies to the case of trustee and cestui que trust, and to other relations, and even though the transaction be perfectly bonâ fide. *Bentley* v. *Craven*, 18 Beav. 75.

Matters unconnected with Trust.]—The circumstance that two parties stand to each other in the relation of trustee and cestui que trust does not affect any dealings between them unconnected with the subject of the trust. *Knight* v. *Majoribanks*, 2 Mac. & G. 10 ; 2 Hall & Tw. 308. Affirming 11 Beav. 322 ; 13 Jur. 136.

Purchase by Trustee—General rule.]—General rule upon purchase of trust property by trustees on their own account is that, at the option of the cestui que trust, it shall be resold, being put up at the price at which the trustees purchased, who, if there is no advance, shall be held to their purchase. *Lister* v. *Lister*, 6 Ves. 631, a.

Purchase by Trustee.]—The court will, as of

course, and irrespectively of the adequacy of the purchase money, set aside a purchase by a trustee of the trust property. *Dyson* v. *Lum*, 14 L. T. 588; 14 W. R. 788.

The rule in equity which invalidates a sale made by a trustee to himself, admits of qualification; and, where a person acting in a fiduciary character has openly, and with perfect fairness, and with the concurrence of those who have a fiduciary interest in the property, contracted for the purchase, the court will not set it aside. *Dover* v. *Buck*, 11 Jur. (N.S.) 580; 12 L. T. 136.

To invalidate a purchase by a trustee, it is quite enough that the act has a tendency to injure the trust, a tendency to interfere with his duty. *Hamilton* v. *Wright*, 9 Cl. & F. 111.

Purchase by a trustee from the cestui que trust established, under circumstances, with confirmation and acquiescence. *Morse* v. *Royal*, 12 Ves. 355; 8 R. R. 338.

—— **Trustee for Sale.**]—A trustee for sale can neither directly nor indirectly purchase trust property. *Franks* v. *Bollans*, 17 L. T. 309.

There is no general rule that a trustee to sell shall not be himself the purchaser, but he shall not thereby gain profit to himself. *Whichcote* v. *Lawrence*, 3 Ves. 740.

There is no rule that a trustee to sell cannot be the purchaser; but however fair the transaction, it must be subject to an option in the cestui que trust, if he comes in a reasonable time to have a resale, unless the trustee, to prevent that, purchases under an application to the court. *Campbell* v. *Walker*, 5 Ves. 678; 5 R. R. 135.

—— **Trustee for Payment of Debts.**]—Purchase under trust to pay debts by trustee as agent for his father, both creditors in partnership, established under circumstances. *Coles* v. *Trecothick*, 9 Ves. 234; 1 Smith, 233; 7 R. R. 167.

Purchase from his client by a solicitor, who was also trustee for the sale of the estate for payment of debts, confirmed, upon the ground of his having attempted ineffectually to sell, of there being no fraud in the transaction, and of the purchase having been recognised and approved of by the cestui que trust. *Clarke* v. *Swaile*, 2 Eden, 134.

—— **Trustee, who.**]—A., having contracted for the purchase of an estate, agrees, by deed, to convey it to two partners to whom he was indebted, upon trust to sell and, after paying prior charges to retain their own debts; and it was provided that the power of sale might be exercised by the partners before any conveyance should be made to them. No conveyance was ever made or required to be made to the partners, nor did they attempt to exercise the power of sale, and one of them having died, the survivor agrees with an agent of A. to purchase the estate;—Held, that he was not a trustee, but stood in the situation of a creditor, with a security for his debt, and, therefore, was not disqualified from purchasing the estate. *Chambers* v. *Waters*, 3 Sim. 42; Coop. t. Brough. 91. Affirmed sub nom. *Watere* v. *Groom*, 11 Cl. & F. 684.

—— **Setting Aside.**]—Conveyance of an estate to D., by way of security for the investment of a specific sum of stock, and for payment of the dividends in the meantime, with a power of sale in case of default. Under this deed, D. is a trustee for the party making the conveyance, and, as such, disabled from purchasing for himself, so long as he continues to be a trustee without the consent of his cestui que trust; therefore, the estate being put up to sale by auction, at which C. as agent for D. was the only bidder, and it was knocked down to him, the sale was decreed not to stand, although no evidence of fraud or undervalue, and not to be supported by evidence of the plaintiffs having known and approved of the sale taking place, and afterwards attempting to damp it, nor of a previous conversation with her attorney, in which the latter exhorted the purchaser to bid a good price for the estate to keep up the sale. *Downes* v. *Grazebrook*, 3 Mer. 200; 17 R. R. 62.

Purchase by Trustee through Trustee—Setting Aside.]—Trustee for sale purchased through a trustee, at an undervalue; though without fraud, and by auction; and the cestui que trust, being an infant, incapable of discharging the trustees, the purchase set aside with costs. *Sanderson* v. *Walker*, 13 Ves. 601; 9 R. R. 234.

Purchase by Nephew of Trustee—Setting Aside.]—A., a nephew of a former trustee of B.'s property, being commissioned by his uncle to advise B., a young man, aged twenty-three, of intemperate and extravagant habits, in the settlement of his college debts, which amounted to 1,000*l.*, and to advance him 500*l.* for the purpose, offered to give him 7,000*l.* for his undivided moiety of an estate under which there were coal mines, the working of which had been discontinued for fifteen years. Pending the negotiations, A. obtained from C., a mining engineer, an estimate putting the value of the minerals under the entire estate at 20,000*l.* A separate solicitor was employed for B. A. did not communicate the valuation to B., nor did he suggest to him that he should consult a mineral surveyor before concluding the matter. B. accepted A.'s offer of 7,000*l.*, and died shortly after executing the conveyance. On bill by B.'s administrator to set aside the purchase:—Held, that such a fiduciary relation existed, that the suppression from B. of C.'s valuation rendered it impossible for the court to sustain A.'s purchase. *Tate* v. *Williamson*, L. R. 1 Eq. 528; 14 L. T. 163; 14 W. R. 449.

Purchase by Agent of Trustee.]—The agent of trustee for sale of estate employed therein cannot purchase same. *Whitcomb* v. *Minchin*, 5 Madd. 91.

Purchase by Assignee.]—The rule against purchase of trust property by trustee applies with more force to assignees of bankrupt. *Bennett*, *Ex parte*, 10 Ves. 395; 8 R. R. 1.

Liberty to Purchase.]—After an ineffectual attempt to sell by auction an estate devised in trust for sale, liberty was given to one of the trustees to purchase it at the price at which it had been bought in, upon its appearing beneficial to the parties interested. *Farmer* v. *Dean*, 32 Beav. 327.

Trustee Bidding at Sale.]—A trustee is not allowed to bid at the sale of the trust estate, although the sale takes place by the order and under the direction of the court, and the trustee is also a mortgagee of the trust estate, and has likewise a beneficial interest in a share of the equity of redemption. *Tennant* v. *Trenchard*,

17 W. R. 640. Affirmed, 38 L. J., Ch. 661 ; L. R. 4 Ch. 537 ; 20 L. T. 856.

Purchase by Trustee—Right to Beneficial Interest in Purchase.]—A fund was settled on husband and wife successively for life, with remainder to the husband absolutely. The husband became bankrupt, and the trustee purchased his interest in the funds from the assignees, under an agreement between the trustee and the husband to divide the profit. The purchase money was paid out of part of the trust funds :—Held, on the death of the wife, that the trustee could claim no beneficial interest in the purchase, and that the fund belonged exclusively to the representatives of the husband. *Vaughton* v. *Noble*, 30 Beav. 34.

Trustee for Sale instigating Purchase.]—Trustees of the marriage settlement of H.'s wife purchased at his instigation real estate of which he was sole trustee for sale. He was employed as solicitor in the purchase, and advanced some of the purchase money. H.'s cestuis que trustent disputed the sale :—Held, that the sale was not impeachable. *Hickley* v. *Hickley*, 45 L. J., Ch. 401 ; 2 Ch. D. 190 ; 34 L. T. 441 ; 24 W. R. 604.

Engaging in Adventure.]—Trustee having engaged trust property in an adventure cannot sell either to himself or another. *Wilkinson* v. *Stafford*, 1 Ves. J. 42.

Release by Cestui que Trust.]—Degree of weight to be attached to releases executed by cestuis que trust within a few days of their coming of age, when such releases profess to proceed upon the examination of complicated accounts. *Wedderburn* v. *Wedderburn*, 2 Keen, 722 ; 4 Myl. & Cr. 41 ; 8 L. J., Ch. 177 ; 3 Jur. 596.

Compromise Rescinded.]—A deed of compromise executed by cestui que trust, with the representatives and creditors of a deceased trustee, guilty of a breach of trust, rescinded, and co-trustees declared responsible. *Walker* v. *Symonds*, 3 Swanst. 2 ; 19 R. R. 155.

Patron and Living.]—Where the bishop, as patron, being trustee, and bound to protect the interest of a rectory, advanced money to the then rector, for the purpose of erecting a new rectory-house, and obtained a grant of an annuity to be charged on the living under a private act ; and the grant being set aside on the ground of the incapacity of the bishop from becoming the purchaser of the annuity, at the suit of the succeeding rector :—Held, that he had a right to set it aside altogether, and the bishop not entitled to an inquiry as to what was a proper annuity to be granted, and have it charged on the succeeding rectors ; and the amount of the debt incurred having been satisfied, the deed ordered to be cancelled. *Greenlaw* v. *King*, 3 Beav. 49. Affirmed, 10 L. J., Ch. 129 ; 5 Jur. 18.

Purchase of Debts—Account—Undervalue.]—Trustee buying debts for less than is due shall not be allowed for the whole. *Anon.*, 1 Salk. 155.

Purchase of Charge—Undervalue.]—A trustee, who buys up at an under price a charge on the trust property, may, if for a long lapse of years the cestuis que trustent refuse to adopt the purchase, keep it for himself. *Barwell* v. *Barwell*, 34 Beav. 371.

In 1834 A., one of several cestuis que trustent, mortgaged his share for 10,500*l*. In 1842 the trustees bought up the mortgage for 1,200*l*. for the benefit of A.'s widow and family, but they were unable to find the purchase money. Thereupon three other cestuis que trustent became the purchasers, and six years afterwards they became trustees. By an unexpected sale of the trust property in 1863, the mortgage-money was paid. Upon a bill filed in 1864 by the widow :—Held, that she was entitled to no interest in the beneficial purchase. *Ib.*

Purchase by Trustee for Creditors of Annuity for which Debtor was Surety.]—Where the appellant executed a general trust disposition of all his property for the benefit of his creditors, under which deed, by a clause of devolution, the respondent became a trustee, but, in the interval, the appellant had become surety in a bond for the payment of an annuity, of which bond the respondent obtained an assignment for valuable consideration :—Held, that, as, by the purchase of the annuity, he obtained an interest in direct conflict with that of the creditors, and as to the annuity, which was unfettered by the deed, he was in a great measure enabled to defeat its objects, his representatives could not enforce the annuity deed (reversing the judgment below). *Hamilton* v. *Wright*, 9 Cl. & F. 111.

Purchase of Legacy—Setting Aside.]—A bill was filed by a cestui que trust to set aside a purchase by a trustee of a legacy, on the ground that the trustee had improperly alleged that the interest was contingent :—Held, that as the allegation of fraud was not substantiated, and the parties had dealt with one another on equal terms, the sale ought not to be set aside. *Luff* v. *Lord*, 11 Jur. (N.S.) 50 ; 11 L. T. 695. Affirming 34 Beav. 220.

The court supported the sale, though the vendor was in distressed circumstances, on the following grounds : The vendor well knew his position, and employed his own solicitor ; the proposal for the sale proceeded from the vendor ; after unavailing attempts to sell elsewhere, the trustee was an unwilling purchaser ; and the sale was only completed upon threats of the cestui que trust to file a bill for the specific performance ; the assets out of which the legacy was to be paid were in litigation and doubt, so as to make the property unmarketable ; and the legacy was subject to the right of the vendor's wife to a settlement and to her right by survivorship. *S. C.*, 34 Beav. 220.

Purchase by Trustee for Sale—Purchase of Reversionary Interest.]—Distinction between a purchase by a trustee for sale and a purchase of a reversionary interest by a trustee from his cestui que trust. The former is absolutely void, and in the second case the burden of proof lies on the trustee, to show that every possible security and advantage were given to the cestui que trust, and that as much as possible was gained for him in the transaction, and as could have been obtained under any other circumstances. *Denton* v. *Donner*, 23 Beav. 285.

Purchase of Reversionary Interest of Wife.]—If a trustee of a marriage settlement himself purchases a reversionary interest of the wife, comprised in the settlement, the sale will be set

aside, but on the terms that all money actually paid to the wife alone, or by her sole direction, shall be a charge upon that reversionary interest, after all the trusts of the settlement have been satisfied. *Spring* v. *Pride*, 10 Jur. (N.S.) 646; 10 L. T. 473; 12 W. R. 892.

—— **Retirement.**]—A trustee cannot retire from the trust for the purpose of such a purchase. *Ib.*

Grant in Reversion obtained by Trustee—Assignment to Purchaser with Notice—Setting aside Confirmation.]—Grants in reversion obtained by an agent and trustee from his employers and cestuis que trustent by fraud and misrepresentation, afterwards assigned for valuable consideration to a purchaser having notice of the facts and nature of the title, set aside. A conveyance taken after the grants, the fiduciary relations still existing, and the grantor ignorant of his rights, is a continuation of the fraud, and not a confirmation. *Dunbar* v. *Tredennick*, 2 Ball & B. 304.

Trustee becoming Mortgagee under Power.]—The trust deeds of certain Wesleyan-Methodist chapels contained powers of raising money by mortgage for the purposes of the trusts:—Held, that any of the trustees of the chapels might be mortgagees under this power, and that, if they were such mortgagees, they might exercise all the rights of mortgagees, although in opposition to the trusts. *Att.-Gen.* v. *Hardy*, 1 Sim. (N.S.) 338; 20 L. J., Ch. 450; 15 Jur. 441.

Contract by Trustee with Himself.]—A mere contract between a trustee for sale and himself to sell on the one hand, and buy on the other, trust property sold by auction, is not a contract which can be enforced at the instance of his heir-at-law, as against the next of kin. *Ingle* v. *Richards*, 28 Beav. 361; 6 Jur. (N.S.) 1178; 8 W. R. 697.

Contract between Trustee and Beneficiary.]—A., a trustee, verbally promised his cestuis que trustent, that if they would concur in a sale of the trust estate, for its full value to C., he would bequeath to them, by his will, at least as much as they would get under their father's will. A. had an interest in the purchase:—Held, that the contract was binding, though by parol; secondly, that there was a sufficient consideration; thirdly, that it was sufficiently certain; and, fourthly, the court would enforce it. *Ridley* v. *Ridley*, 34 Beav. 478.

Setting Aside—Lapse of Time.]—Purchase of trust property by trustees for their own benefit set aside after a considerable lapse of time and several assignments. *Att.-Gen.* v. *Dudley* (*Lord*), Coop. 146; 14 R. R. 226.

Bill to set aside a purchase by a trustee for himself and his children, and after a lapse of eighteen years dismissed upon the length of time only. *Gregory* v. *Gregory*, G. Cooper, 201. Affirmed, Jacob, 631; 14 R. R. 244; 23 *id.* 167.

Purchase by trustee of trust property set aside, considerable length of time before bill filed having no effect, as it did not distinctly appear that the cestui que trust knew the purchase was made on account of the trustee. *Randall* v. *Errington*, 10 Ves. 423; 8 R. R. 18.

—— **Where Advantage Precluded.**]—Semble, where trustee is in such a situation as precludes advantage over cestui que trust, dealing between them will not be set aside. *Naylor* v. *Wynch*, 1 Sim. & S. 566; 2 L. J. (O.S.) Ch. 132; 7 *id.* 6; 24 R. R. 227.

Purchase by Trustee—Setting Aside.]—A testator bequeathed a sum of long annuities to trustees, upon trust for his daughter for life, for her separate use, and after her death, upon trust for such persons as she should by will appoint. One of the trustees purchased of the daughter and her husband the absolute interest in the long annuities, and took an assignment to himself of the daughter's life interest in them, accompanied by what purported to be an execution by the same instrument of her testamentary power over the reversion, with a covenant by the daughter and her husband for quiet enjoyment, and for further assurance. It was alleged that the price paid was inadequate:—Held, that, independently of any question of inadequacy of price, the transaction could not stand; and upon the daughter's offer, after her husband's death, to repay the consideration money with interest, the deed was set aside. *Scott* v. *Davis*, 4 Myl. & Cr. 87; 2 Jur. 1057.

—— **False Representation—Setting Aside.**]—The trustee of a fund to which a young lady was entitled in remainder after the death of her mother, at the request of a needy father, advanced sums of money amounting to 460*l.*, to enable the father to educate her. Shortly after she came of age, being engaged to be married, she, by deed prepared by the father's solicitor, reciting a contract for sale at the price of 250*l.*, for which a receipt was indorsed, assigned the fund absolutely to the trustee, and married on the following day. The trustee was present at the wedding, but the husband was informed neither of the existence of the fund nor of the deed. On a bill by husband and wife:—Held, that the deed, falsely representing the transaction to be an actual sale, must be set aside. *Lewellin* v. *Cobbold*, 1 Sm. & G. 376; 17 Jur. 448; 1 W. R. 211.

Setting Aside—Lapse of Time.]—A testatrix gave a share in her residuary estate in trust for life, with remainder to the daughter's children, and if none attained twenty-one (which happened) as she should appoint generally. In 1821 the daughter, without any legal advice except that of the acting trustee, who was a solicitor, and was under the will interested in the residuary estate, appointed that certain debts due from her husband to the testatrix should be accepted as part of the daughter's share. Her husband became soon afterwards bankrupt and died in 1853, and she died in 1858, having in settlements of accounts with the trustees from time to time proceeded on the footing of the deed:—Held, that the bill filed by his representatives in 1859 to set aside the deed on the ground of the appointment being a dealing between trustee and cestui que trust, to the advantage of the former and prejudice of the latter, under undue influence and without independent advice, was too late. *Shottowe* v. *Williams*, 3 De G. F. & J. 535.

Purchase by Trustee—Lapse of Time—Setting Aside—Allowance for Improvements.]—A., by will, gave real property to trustees to sell; one of the trustees became the purchaser, the consideration being sums due from the testator's estate to him; the estate descended to his son

and grandson. Bill filed by a person having a reversionary contingent interest in the produce of the sale under the will, forty years after the transaction, and twenty-seven years after she came of age, to set aside the contract :—Held, that the conveyance was void ; that no laches were committed ; and that the representative of the purchaser should be allowed the additional value of the estate, caused by the money expended in improvements, a reference being directed to the master for the purpose of ascertaining it. *Chennell* v. *Martin*, 9 L. J. (o.s.) Ch. 208.

Purchase—Setting Aside—Evidence.]—Where a suit was instituted to set aside a purchase made by a trustee of the trust property :—Held, that it was necessary for the plaintiff to prove that he had a substantial interest in setting aside the sale ; and as it appeared that, according to the plaintiff's own statement, there would be, after paying the creditors, no surplus, the bill was dismissed, but without costs. *Dover* v. *Buck*, 11 Jur. (N.S.) 580 ; 12 L. T. 136.

To set aside a purchase by a trustee of the trust property, it is not necessary to show that he has made an advantage. *James, Ex parte*, 8 Ves. 346 ; 7 R. R. 56. S. P., *Bennett, Ex parte*, 10 Ves. 393 ; 8 R. R. 1.

Onus.]—When a trustee purchases of his cestui que trust, the onus of proving the fairness of the transaction is not shifted by the fact that the vendor is a co-trustee. *Gray* v. *Warner, Biel, In re*, 42 L. J., Ch. 556 ; 28 L. T. 835 ; 21 W. R. 808.

Account.] — One of several trustees to sell having purchased, and afterwards sold at a profit, therefore decreed to account for that profit, with costs. *Whichcote* v. *Lawrence*, 3 Ves. 740.

A trustee, purchasing a leasehold farm devised to him for the use of the plaintiff, at an appraisement, afterwards renewing the lease in his own name, and purchasing part of the testator's stock, declared to be trustee, and to be accountable for the same to the plaintiff. *Killick* v. *Flexney*, 4 Bro. C. C. 161.

A., reposing an unlimited confidence in B., makes him a trustee of his estates, for the purpose of paying his debts. B., at the same time, negotiates with A. for the absolute sale of those estates to himself, and obtains a conveyance at an under-value ; B. afterwards sells the estates at a very advanced price. This conduct of B. was held to be fraudulent, and he was decreed to account to A. for the advanced price, with interest and costs ; although it appeared that the purchaser at the advanced price was a considerable loser by his bargain. *Mackreth* v. *Fox*, 4 Bro. P. C. 258 ; 2 Bro. C. C. 400 ; 2 Cox, 320.

Setting Aside—Costs against Solicitor for Neglect.]—A woman having been induced, by the fraud and undue influence of her agent and trustee, to execute deeds by which, without any consideration, she conveyed all her property to him absolutely, filed a bill against his executor to set them aside. Her former solicitor, who prepared and had the custody of the deeds, was joined as a defendant for purposes of discovery, and costs were prayed against him, as well as the executor, on the ground of neglect of duty. The bill also charged him with fraud, which, however, was not proved. Throughout the litigation he acted as the solicitor of the executor. A decree was made, setting aside the deeds with costs against the trustee's estate, and the solicitor was ordered to pay the whole costs of the suit, in case the estate proved insufficient to pay them. *Baker* v. *Loader*, 42 L. J., Ch. 113 ; L. R. 16 Eq. 49 ; 21 W. R. 167.

Practice—Form of Decree.]—Form of decree against a trustee purchasing the trust estate at an alleged undervalue, and making permanent improvements thereon. *Williamson* v. *Seaber*, 3 Y. & C. 717.

iii. *Executors.*

Purchase—Assets.] — An executor shall not be permitted, either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. *Hall* v. *Hallet*, 1 Cox, 134 ; 1 R. R. 3.

—— **Testator's Stock-in-Trade.**]—Executor is not disqualified from entering into contract with his executor for purchase of testator's stock-in-trade ; it is not in itself a violation of his duty. But the court requires that an executor so dealing shall authenticate the transactions, and have available proof of full value. The onus of doing that he places upon himself. *Kilbee* v. *Sneyd*, 2 Moll. 191.

—— **Share in Partnership.**]—Sale of a testator's share in a partnership trade, and the property belonging to it, by his executors to his partners, for the purpose of being resold to one of his executors, set aside, and his estate held entitled to his aliquot proportion of the subsequent profits, as if the partnership had continued. Interest allowed at 5 per cent. on sums paid out to his estate. *Cooke* v. *Collingridge*, Jacob, 607 ; 1 L. J. (o.s.) Ch. 74 ; 23 R. R. 155, 767.

—— **Testator's Debts.**]—Executor cannot buy, for his own benefit, debts due from the testator's estate. *James, Ex parte*, 8 Ves. 346.

—— **Legacy.**]—The purchase by an executor of his co-executor's legacy in consideration of a life annuity, set aside on the ground of insufficiency of price. *Gray* v. *Warner, Beil, In re*, 42 L. J., Ch. 556 ; 28 L. T. 835 ; 21 W. R. 808.

An executor purchased up the legacies of several legatees for sums of money less in amount than their respective legacies :—Held, that this transaction could not be sustained. *Barton* v. *Hassard*, 3 Dr. & War. 461.

—— **Residue.**]—Purchase by a trustee and executor from his cestui que trust of a portion of an unascertained residue set aside. *Smedley* v. *Varley*, 23 Beav. 358.

—— **Infant's Estate.**]—Party acting as agent or executor cannot purchase an infant's estate. *Mulvany* v. *Dillon*, 1 Ball & B. 418 ; 12 R. R. 43.

—— **By Husband of Administratrix.**]—The husband of an administratrix is in a fiduciary position, and cannot purchase from a co-administratrix without the consent of all the cestuis que trustent. *Pepperell, In re, Pepperell* v. *Chamberlain*, 27 W. R. 410.

Sale by Administrator—To Brother.] — Sale

by an administrator to his brother and co-partner set aside, it appearing to the court from the evidence that the sale was made at an under value so gross that it ought to be deemed fraudulent and void. *Rice* v. *Gordon*, 11 Beav. 265.

—— **To Son.**]—Sale by administratrix of the intestate's property to her own son, under an open contract and for undervalue, set aside. *John* v. *Jones*, 34 L. T. 570.

Purchase of Incumbrance by Personal Representative, Heir-at-Law.]—The heir-at-law, who was also the personal representative of a deceased debtor, purchased up an incumbrance on the estate for less than the sum due on foot of it :—Held, under the circumstances, that he was entitled to the full amount of the sum secured by it, as against a subsequent incumbrancer, a solicitor, who advised the purchase as a means of providing for the heir, and did not disclose that the purchase would enure to his own benefit. *Bayly* v. *Wilkins*, 3 Jo. & Lat. 630.

Deed unduly obtained.]—Two executors and trustees under will would not prove will, nor suffer cestui que trust to take out letters of administration cum testamento annexo till he had executed a deed by which he was to pay sums of money for each :—Held, deed was unduly obtained, and no allowance to be made to executors for such sums of money. *Aylliffe* v. *Murray*, 2 Atk. 58.

Settlement by Legatee, under persuasion of Executor.]—A young lady, entitled to a legacy of stock, was induced by the executors to execute a settlement, under which she and two trustees were to hold the stock, upon trust for herself for life for her separate use, and after her death upon such trusts as she should by deed or will appoint; and in default of appointment, upon trust for the persons who would have been entitled to it as her next of kin if she had died possessed of it intestate and without having been married : with a proviso that the trustees, on her request in writing, should join with her in disposing of all or any part of the fund as she might direct. The young lady executed this settlement without any professional advice, and without having had any communication on the subject, except with the executors. The stock was transferred by the executors directly into the joint names of herself and the two trustees. She married about two months afterwards. Upon her death her husband, as her administrator, filed a bill to set aside the settlement :—Held, that such a settlement made in such circumstances was not binding upon her, and that her administrator was entitled to have it set aside. *Prideaux* v. *Lonsdale*, 1 De G. J. & S. 433; 2 N. R. 144; 2 Jur. (N.S.) 507; 8 L. T. 554; 11 W. R. 705.

Gift to Executor by Beneficiary—Pressure—Cancellation.]—Where a document has been obtained by an executor named in a will, before probate, from a beneficiary, for a gift by the latter to the former, the court will regard the transaction with great suspicion, and will not uphold it unless the circumstances show that there was no misrepresentation, pressure, or unfairness on the executor's part; that the beneficiary acted deliberately, and thoroughly knew and appreciated what he was doing; that he signed the document independently of any influence on the executor's part, and without being actuated by any fear of not complying with the wishes of the executor. *Wheeler* v. *Sargeant*, 3 R. 663; 69 L. T. 181.

Purchase, by Administrator, from Beneficiary—Setting Aside.]—On the death of an intestate leaving four sons and one daughter, the two eldest sons took out administration to his estate. By deed of family arrangement, the five children, of whom the youngest son was an infant, mortgaged to trustees their respective interests in their father's estate for 1,084*l.*, that being the amount of the two fifth shares therein of the daughter and the infant son, as shown by an account set out in a schedule, and based on a valuation made a year previously, in which the figures had been altered to correspond with the increase or decrease of the various items since the valuation, and which showed a balance giving 542*l.* to each child. Subject to the mortgage, in respect of which certified sums were to be paid by the three eldest brothers, the trustees were to hold the property in trust for the three eldest brothers. The sums to be paid by the latter were to form a sinking fund for the reduction of the principal of the shares. By her subsequent marriage settlement the daughter recited that she was entitled to the 542*l.* under the former deed, and settled that on trust for herself for life, then for her husband for life, then for children as she should appoint by deed or will; in default of appointment, for sons at twenty-one, and daughters at twenty-one or marriage; if no children, and she survived her husband, for herself absolutely; or, if she were not the survivor, then as she should appoint by will, or, in default of such appointment, for her next of kin. In an action, commenced more than nine years after the deed of arrangement, by the daughter, her husband and infant children, against her brothers and the trustees of the deed of settlement, to have the deed of family arrangement set aside, except so far as it was a security for 542*l.* on account of her share, on the ground of infancy, undue influence, pressure, and want of legal advice, and to have the settlement rectified :—Held, that the special allegations of impropriety failed on the evidence, but that, inasmuch as the deed of arrangement constituted a purchase by the administrators of the intestate's estate, who were in the position of trustees, from two of their cestuis que trustent, and in such cases the parties must be dealing completely at arm's length, with full disclosure, and with entire absence of influence, the plaintiffs were entitled, immediately after the execution of the deed, to have it set aside, on the ground of the unsatisfactory nature of the valuation and the purchasers not being at arm's length, and that the mere lapse of time was no fatal bar. *Worssam, In re, Hemery* v. *Worssam*, 51 L. J., Ch. 669; 46 L. T. 584.

—— **Bar to Setting Aside.**]—Held, also, that the subsequent marriage settlement constituted a fatal bar to the deed being set aside, since it was not established that the effect of setting aside the deed would be to benefit the parties interested under the settlement, and the settlement could therefore not be allowed to be varied, and, that being so, the plaintiffs were not in a position, supposing the result of setting aside the deed were to show that they had received too much under it, to make good to the defendants the amount so due to them. *Ib.*

—— **Practice—Inquiry.**]—Held, further, that an inquiry could not be granted in the present action whether it would or would not be for the benefit of the parties entitled under the settlement for the deed to be set aside and the settlement varied, since the brothers, who were parties to the action, had no interest in the determination of what was for the interest of the parties entitled under the settlement. *Ib.*

Lapse of Time.]—Where there is fraud in the transaction, a purchase by executor will be set aside after twenty years, but otherwise if done openly and bonâ fide. *Watson* v. *Toone*, 6 Madd. 153. Semble, *S. C.* nom. *Whatton* v. *Toone*, 5 Madd. 54.

c. Family Relations.

i. *Parent and Child.*

a. Gifts and Conveyances.

Generally.]—Where one person possesses undoubted influence over another, he must not, even if the influence springs from ties of the most sacred and legitimate character,—as, for instance, that of a father over his own daughter,—exert his influence for his own advantage. *Brown* v. *Kennedy*, 33 L. J., Ch. 71; 9 Jur. (N.S.) 1163; 9 L. T. 302; 12 W. R. 224.

Deeds from child to parent are not void in se; fraud, &c., must be shown to set them aside. *Manners* v. *Banning*, 2 Eq. Abr. 282.

The relation of father and daughter does not of itself render the validity of an arrangement between persons thus related, respecting a reversionary interest of the daughter, so doubtful as to justify a trustee in refusing to transfer a fund, in pursuance of the arrangement, without the indemnity of the court. A trustee so refusing, and who did not show that he had endeavoured to ascertain the real nature of the transaction, was decreed to pay costs. *Firmin* v. *Pulham*, 2 De G. & Sm. 99; 12 Jur. 410.

A gift by a child to her parent immediately after attaining twenty-one cannot, under ordinary circumstances, be supported. *Bury* v. *Oppenheim*, 26 Beav. 594.

Soon after attaining twenty-one, a daughter sold her reversionary interest, and the amount was received by her father. He said she had determined that the most advantageous course for her to adopt would be to give the money to him to be applied by him in improving and extending his business, in order to increase his estate, and to enable him better to provide for his family after his decease, and she accordingly gave him the money:—Held, that the father was a trustee of the money for the daughter, and bound to repay it. *Ib.*

—— **Relief—Right of Third Party.**]—Equity will relieve against a contract entered into by a child with a parent for an appointment from him; and a purchaser from the parent, with notice of the fraud, will be affected with it. *Palmer* v. *Wheeler*, 2 Ball & B. 30; 12 R. R. 60.

Son's Right to Impeach Exercise of Parental Authority.]—Where a son, who had joined his father in granting an annuity, which was assigned to the defendant, allowed and encouraged the latter to insure the life for which it was granted:—Held, he could not afterwards impeach the annuity as obtained under an undue exercise of parental authority. *Rogers* v. *Bruce*, Beat. 486.

Father and Son dealing with Third Persons.]—When a father and son are dealing with a third person, there is no rule which requires that the father and son should act by separate solicitors. *Cooke* v. *Burtchaell*, 2 Dr. & War. 165.

Release of Orphanage Share.]—On a child's releasing to his father his orphanage part, if the release be gained by threats or unduly, the same will be set aside in equity. *Blundell* v. *Barker*, 1 P. Wms. 639; 10 Mod. 451.

A freeman of London taking advantage of his son's necessities, in consideration of a bond for securing the son an annuity of 50*l.*, prevailed on him to release his share of orphanage. The father also prevailed on another of his sons to give him a release of his share of orphanage in consideration of an annuity of the same nature, but there were not the same proofs of his being forced into the release, and the father had at times advanced him 300*l.* or 400*l.*:—Held, the plaintiff being turned out of doors, left destitute and void of maintenance, a release extorted could not be supported. The other son was equally entitled to be relieved. *Heron* v. *Heron*, 2 Atk. 160.

By the custom of London, the orphanage part must go in equal shares, and, if the father turn the money in any other shape which he thinks may take it out of the custom, yet the court has relieved the children. *Ib.*

If a father, merely for the sake of maintenance, and not for advancement in marriage or trade, oblige his son to release his right to the orphanage share, such release is absolutely void. *Ib.*

Mortgage by Father and Son.]—Where father and son join in mortgage of father's estate, and father receives the money, and son conveys in consideration of 10*s.*, and there is no covenant in mortgage for payment of money, neither the real nor personal assets of son are bound. *Lloyd* v. *Thursby*, 9 Mod. 463.

—— **On Agreement—Specific Performance.**]—An agreement between father and son, being tenants for life and in tail, having joined in a mortgage of the property for a debt of the son, who was to suffer a recovery and resettle the estate, to the use inter alia of the father in fee in case of the son failing to pay interest on the debt and the father paying and releasing the son therefrom; neither the father nor son paid off the mortgage, but the former paid the interest until his death, and his devisees afterwards paid off the mortgage, the court refused to enforce a specific performance of the agreement, neither party having apparently acted upon it, and it being an agreement for the sale of the son's reversionary interest at an undervalue. *Playford* v. *Playford*, 4 Hare, 546.

—— **For Benefit of Father—Validity.**]—J. had a life estate in land in Devonshire, with remainder to his sons in tail male; R. was his eldest son; S. was J.'s solicitor, to whom J. was indebted in a sum above 9,000*l.* On this sum J. was paying 5 per cent. interest, and the debt was (within 950*l.*) secured by eleven policies of assurance on J.'s life, the premiums of which, as

well as the principal money, were charged on his life estate. In March, 1835, it was arranged between J. and S., an arrangement to which R. (who had then only just come of age, and who was living in his father's house) assented, that a disentailing deed should be executed, and that J. and R. should then execute a mortgage to S. for 10,000*l.*, with a power of sale, the difference in the amounts being made up by a further advance, the interest being reduced to 4 per cent., and the policies of assurance assigned to R. for his use; all this was done. In this transaction R. had no other professional advice than that of S., who was his father's solicitor, and was also the mortgagee:—Held, that as to R., this mortgage was invalid. *Savery* v. *King*, 5 H. L. Cas. 627; 25 L. J., Ch. 482; 2 Jur. (N.S.) 503; 4 W. R. 571.

—— **Sale—Validity.**]—J. afterwards borrowed more money from S., repayment of which was secured by charges on the Devonshire estate, executed by both J. and R., and with some of this money property was bought in Hampshire, which was conveyed to R. The incumbrances on the Devonshire estate being thus largely increased, it was afterwards put up to sale (in order to discharge all incumbrances), but was bought in, and was ultimately purchased by S. for a sum of 23,800*l.*, of which 3,000*l.* were paid to R. for his use, and a small balance paid to J. In these various transactions R. had no professional advice but that of S.:—Held, that this sale was invalid, so far as R. was concerned, and accounts were directed. *Ib.*

—— **Delay.**]—The bill to set aside these transactions was not filed till 1847:—Held, that, under the circumstances of this case, the delay was no answer to R.'s title to relief. *Ib.*

Power to Appoint Portions—Father, having Appointed, takes Release of Portion.]—Father under marriage settlement, with power to appoint shares in which his younger children were to take a sum to be raised for their portions, having exercised that power by will, afterwards advances one daughter, took release from her of her portion, and by codicil, revoked his appointment by will as to her:—Held, her portion was to go to the other children. *Noel* v. *Walsingham* (*Lord*), 2 Sim. & S. 99; 3 L. J. (O.S.) Ch. 12; 25 R. R. 164.

Father takes Transfer of Appointed Shares.]—Under a marriage settlement power was given to a father to appoint the trust estates among all or any of his children. The estates were converted into money, and the father obtained a large portion of the trust funds without giving any security for their repayment to the trustees. The father, having one son and four daughters, executed the power in favour of the daughters to the exclusion of the son, and a few days afterwards the daughters transferred their appointed shares in the trust property to their father, who conveyed some real estates, of which he was seised, to them in exchange. The son, after the death of his father, filed a bill to set aside the appointment, and also the deeds effecting the exchange, on the ground of fraud, based upon a collusive agreement between the father and his daughters, by which the father, who was not able to replace the trust moneys, obtained a discharge from the claims of the trustees:—Held, that no benefit had accrued to the father, and that the appointment was good. *Askham* v. *Barker*, 22 L. J., Ch. 769; 1 W. R. 279.

Appointment, under Power, by Father, Tenant for Life, to Son in Tail—Lease by Father and Son for Benefit of Father—Conveyance of Son's Interest to Father.]—By a marriage settlement of the year 1780, certain lands were settled upon the husband for life, with remainder to the use of all and every, or such one or more of the children of the marriage, for such estate, not exceeding an estate in tail male, as the husband should appoint; and, in default of appointment, to the first and other sons of the marriage in tail male. By a deed poll of the 14th of January, 1804, the father appointed the lands to his eldest son in tail male; and by an indenture of lease, executed on the 18th of the same month, the father and son, in consideration of the sum of 1,600*l.* therein stated to be applied in payment of debts affecting the estate of the father, and renewal fines then due, demised part of these lands for lives renewable for ever. By deed of the 11th of December, 1807, the son, in consideration of several debts paid for him by the father, and in discharge of the trust and confidence reposed in him, conveyed the lands included in the settlement, and all his interest therein, to the father, his heirs, and assigns. At the time of the execution of the appointment and lease of 1804, there were judgments appearing upon record against the father to the amount of 2,400*l.*; all these judgments were satisfied upon the same day, being a day after the execution of the said lease, but there was no evidence how the consideration money of the lease had been applied, save so far as the statements in the deeds of 1804 and 1807, relative thereto, and the facts in relation to the judgments, might be deemed evidence thereof:—Held, that the deeds in 1804 and 1807 were fraudulent and void, as constituting a dealing by a father for the benefit of himself, and not of his sons, and ought to be set aside. *Jackson* v. *Jackson*, Dr. 91.

Supposing the appointment by the deed of 1804 to have failed, quære, what was the operation of the conveyance of 1807. How far was the power affected by the union of the two estates in the father, quære. *Ib.*

Conveyance to Father, for Advances to Son during and after Minority.]—A son attained twenty-one in 1855, and in 1847 he conveyed to his father his reversionary estate and interest, in consideration of moneys advanced for his commission, outfit, and debts during his minority, and a further sum of 500*l.* then advanced:—Held, that the deed could not stand except as a security for the 500*l.* *Potts* v. *Surr*, 34 Beav. 543; 13 W. R. 909.

—— **Equality.**]—A deed which might otherwise be set aside as having been obtained under undue influence will be upheld if it is not one-sided. *Ib.*

Conveyance by Son to Father for Son's Benefit—Evidence of Trust—Statute of Frauds.]—A son conveys an estate to his father nominally, as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son; the father died shortly afterwards, and before

any money was raised, having, by a will subsequent to the conveyance, made a general devise of all his real estates; the case is within the Statute of Frauds, and parol evidence is not admissible to prove the trust, but the son has a lien on the estate as vendor, for the apparent consideration, no part of which was paid. *Leman* v. *Whitley*, 4 Russ. 422; 6 L. J. (o.s.) Ch. 152.

Agreement by Son to a Provision for Father's Second Wife.]—A man makes his son by first wife agree to a provision for a second wife, and the issue of that marriage. This provision being in the son's own wrong, and he being at this time ignorant of his right, the agreement is a fraud upon him, and he shall not be held to a performance of it. *Scrope* v. *Offley*, 1 Bro. P. C. 276.

Promise to pay Father's Legacies.]—Where a son promised to pay his father's legacies if he would forbear to alter his will, such promise shall be enforced. *Chamberlaine* v. *Chamberlaine*, 2 Free. C. C. 34.

Semble, it is the constant course of the court to make decrees upon promises of this nature. *Ib.*

Daughter paying Father's Debt.]—About six months after a lady came of age, a creditor of her father obtained from her securities for his debt. The court was of opinion that the creditor had not used any undue or fraudulent means, or availed himself of the fraud of any other party to procure payment, and held that the mere fact of a daughter voluntarily paying the debt of her father, who was in difficulties, was not, of itself, ground for imputing undue influence to the father, or, even if such influence had been exercised, for imputing knowledge of it to the creditor who received payment in that way. *Thornber* v. *Sheard*, 12 Beav. 588.

Bond by Daughter to Step-father for Sum due to Mother for Maintenance.]—A bond given by a daughter who had not received her fortune, to a step-father, for the immediate payment of a sum alleged to be due to her mother for maintenance, ought to be set aside as improvidently executed; the utmost that the mother could claim being a lien on the interest of the daughter's fortune when recovered: an act of the daughter binding the interest of her fortune to that extent would have been valid. *Beasley* v. *Magrath*, 2 Sch. & Lef. 31.

Bond, by one just of Age, as Surety for Step-father—Confirmation.]—A young lady who was living with her mother and step-father in 1859, shortly after she came of age, at the solicitation of her step-father, executed a bond as surety to secure the repayment of a sum of money advanced by the defendant payable at the end of six years. In 1866 the defendant brought an action and recovered judgment against the step-father on the bond, and, to avoid an execution, the lady, who was then twenty-nine years of age, but who still resided principally with her step-father, was induced by him to execute a second bond as surety to secure the amount of the judgment and costs. Both bonds were prepared by the step-father's solicitor, and she had no independent advice. In 1872 the defendant brought an action against her on the bonds, and she then filed her bill to set them aside:—Held, that the second bond must be taken as connected with the first, and that, as there was no proof that she was aware of the invalidity of the first bond, the execution of the second bond was not a confirmation of the first, and both bonds were set aside against her. *Kempson* v. *Ashbee*, 44 L. J., Ch. 195; L. R. 10 Ch. 15; 31 L. T. 525; 23 W. R. 38.

—— **Delay.**]—Held, also, that she was not barred by laches, notwithstanding the time which had elapsed before she asserted her right to relief. *Ib.*

Son, Tenant in Tail, making Family Settlement, from which Father benefits.]—Son, tenant in tail of an estate, upon the death of the mother (who was tenant for life) makes a settlement of it for the benefit of the family, in consequence of an agreement so to do in the mother's life: although the father derives some benefit under the settlement, it shall not be set aside as entered into under undue influence. *Kinchant* v. *Kinchant*, 1 Bro. C. C. 369.

Tenant in Tail raising Money with, and for Use of, Father, Tenant for Life.]—Father, tenant for life, procured his son, who was tenant in tail, to join in raising money which the father received and applied to his own use:—Decreed to exonerate the estate, the son being only in the nature of a surety for it as the debt of his father. *Peirs* v. *Peirs*, 1 Ves. 521.

Child, Tenant in Remainder, agreeing, with Father's Creditor, to give up Interests.]—A child entitled as tenant in remainder after life of father agreeing with creditor of father, in conjunction with and on behalf of father, to give up certain interests, being deprived by conduct of father of benefit of agreement:—Held, not bound by it. *Rhodes* v. *Cook*, 2 Sim. & S. 488; 4 L. J. (o.s.) Ch. 147.

Appointment by Parents to Children—Father procuring Release — Setting Aside.]—By a marriage settlement of 1832, real and personal estate of H., the intended wife, was conveyed to trustees in trust for R., the intended husband, for life, and after the death of the survivor of R. and H., in trust for the children of the marriage, as R. and H. or the survivor should appoint, and in default of appointment for the children equally. The trustees allowed R. to obtain possession of the trust fund, which he mixed with moneys of his own, and in 1861 one of the trustees commenced a suit to compel him to replace the fund. By arrangement of the trustees with R., he and H., by deed of the 25th September, 1861, irrevocably appointed the fund equally among the children, four of whom were of age, and one (the plaintiff) a minor. On the following day the four adult children, and two years afterwards the plaintiff, when of age, executed a deed releasing the trustees from the trusts of the settlement. The children executed the release by the direction of their father, without any professional advice or assistance, and in ignorance of its contents or effect, and of their rights under the settlement. R. from time to time paid sums of money for the plaintiff; he purchased for the plaintiff a commission in the army, paid for his outfit, &c., made him an adequate yearly allowance, and paid a large sum for his promotion. No one of

the sums so advanced was equal in amount to the plaintiff's share of the trust fund nor was there any evidence that it was stated at the time of the advances, or understood between the plaintiff and R., that they were made out of the trust fund in R.'s hands:—Held, 1st, that the release should be set aside; 2nd, that R.'s position was that of a debtor to his five children for their respective shares of the trust fund; 3rd, that the sums advanced, being respectively less in amount than the plaintiff's share, were not a satisfaction of it, pro tanto, and that R. was not entitled to credit for them. *Reade* v. *Reade*, 9 L. R., Ir. 409—C. A.

Charge, by Son just of Age, of Inheritance in Remainder, for benefit of Parents.] — A son entitled in remainder to real estate, expectant on the lives of his mother and father by whom he was maintained, a few days after he attained twenty-one, in order to relieve his parents, who had mortgaged their life interest as a security for moneys borrowed and partly expended in improving the property, from keeping on foot certain life policies, executed a deed charging the inheritance with the mortgage debt, but subsequently filed a bill claiming to have the deeds cancelled on the ground of fraud, which was disproved, and of undue influence. Bill dismissed with costs. *Baker* v. *Bradley*, 2 Sm. & G. 531; 1 Jur. (N.S.) 489; 3 W. R. 361.

The reported decision in *Field* v. *Evans*, (15 Sim. 375), ascertained to be erroneous. *Ib.*

An estate stood limited under a will on trust for A. B., the wife of C. B., for life, for her separate use, with remainder to her husband for life, then to such children or issue of A. B. as she should appoint, and in default, to her children, as tenants in common in tail. The receipt clause applicable to A. B.'s life interest contained expressions which the court held to restrain her from anticipation. During the minority of W. B. B. (the only child of A. B.), C. B. and A. B. mortgaged their interests in the estate of J. B. Five days after W. B. B. came of age, he signed, at the office of the solicitor of his father and the mortgagee, a memorandum acknowledging that the money borrowed had been mainly expended in his maintenance and in the improvement of the property, and agreeing to extend the security over his interest in the estate. Three months afterwards A. B. appointed the estate in fee to W. B. B., who thereupon executed a deed reciting the memorandum, and securing the mortgage debt on the fee. W. B. B. had no independent adviser, the solicitor of the father and the mortgagee being the only professional person employed. No advice was given to W. B. B. as to there being a question whether A. B. was restrained from anticipation, and it was alleged that the solicitor was not aware of the existence of the clause raising the question. He had, however, a copy of the will in his possession:—Held, first, that the transaction was not to be judged according to the principles applicable to family arrangements, but, as its only effect was to make the son's estate liable for the father's debts without any consideration moving from the father, it was to be looked upon in the same light as a gift from the son to the father. *S. C.*, 7 De G. M. & G. 597; 25 L. J., Ch. 7; 2 Jur. (N.S.) 98; 4 W. R. 78.

—— **Rights of Third Parties having Constructive Notice.**]—Held, secondly, that, as the son had no independent adviser, and executed the memorandum immediately on coming of age, and the other instrument shortly afterwards, under the influence of his father and his solicitor, and was never advised that there was a question whether the mortgage of his mother's life interest was valid, the mortgagee, who had constructive notice of these circumstances, could not sustain his mortgage as against the son. *Ib.*

—— **Confirmation.**]—Held, thirdly, that the execution by the son of a subsequent mortgage, expressed to be subject to the mortgage in question, did not operate as a confirmation of it. *Ib.*

—— **Abandonment of Security on Faith of Impeachable Mortgage — Effect of.**] — The mortgagee, on the faith of the impeached security, abandoned another security before the son had received any advice as to the nature of his mother's interest:—Held, that such abandonment did not affect the son's title to relief. *Ib.*

—— **Acquiescence.**] — The son, after being informed that counsel had advised that his mother was restrained from anticipation, acquiesced in the mortgagee's giving up a security from C. B. on the faith of the validity of the mortgage in question:—Held, that under the circumstances, this was not a confirmation, but that the son could only be relieved on the terms of making good to the mortgagee the loss occasioned by giving up C. B.'s security. *Ib.*

Parents, Tenants for Life, inducing Children, Reversioners, to join in Conveying Reversionary Interests.]—See *Hannah* v. *Hodson*, 30 Beav. 19; 5 L. T. 42; 9 W. R. 729, post, col. 272.

Sale by Administratrix to her Son.]—Sale by administratrix of the intestate's property, to her own son under an open contract and for undervalue, set aside. The mere fact of this agreement being made with the son of the administratrix would have been sufficient to vitiate the sale, irrespective of the improvidence of the contract, which imposed no conditions on the intending purchaser, and of the undervalue. *John* v. *Jones*, 34 L. T. 570.

Relief—Fraud.]—Where a father obtained an absolute conveyance from a daughter in order to answer one particular purpose, and afterwards makes use of it for another, the court will relieve under the head of fraud. *Young* v. *Peachy*, 2 Atk. 254.

In the case of *Glissen* v. *Ogden*, the house of lords laid great weight on the circumstance, that the conveyance was obtained by a father from his daughter in distress, and reversed the decree of Lord King, which had refused to give relief. *Ib.*

Bonds by Son to Father—Security only for Running Balance.]—Bonds and mortgages given by a son to his father for specified sums:—Held, under the circumstances, there having been no payment of interest on the securities, and the son having been maintained by the father up to the death of the latter, to be a security only for a running balance of which the amount, there being no other evidence, was taken from the

son's admission. *Melland* v. *Gray*, 2 Y. & C. C. C. 199.

Evidence.]—Where a gift is impeached on the ground of undue influence, in order to sustain the gift, the court requires the clearest and most unequivocal evidence that the transaction was fully understood by, and was the voluntary and deliberate act of, the donor. *Davies* v. *Davies*, 4 Giff. 417 ; 9 Jur. (N.S.) 1002 ; 9 L. T. 161 ; 11 W. R. 1040.

Where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, equity will require the father to be able to show that the son was really a free agent, and had adequate and independent advice. *Savery* v. *King*, 5 H. L. Cas. 627 ; 25 L. J., Ch. 482 ; 2 Jur. (N.S.) 503 ; 4 W. R. 571.

In order to maintain a voluntary deed of gift from a son for the benefit of a father, it must be shown both that the son understood the contents of the deed and that he was not under undue parental influence. *Turner* v. *Collins*, 41 L. J., Ch. 558 ; L. R. 7 Ch. 329 ; 25 L. T. 779 ; 20 W. R. 305.

Onus.]—When a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, if the deed is subsequently impeached by the child, the onus is on the father to show that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with a free intention of giving the father the benefit conferred by it. If this onus be not discharged, the deed will be set aside. This onus extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity, but not further. *Bainbrigge* v. *Browne*, 50 L. J., Ch. 522 ; 18 Ch. D. 188 ; 44 L. T. 705 ; 29 W. R. 782.

If a solicitor purports to act in the transaction on behalf of the child, a purchaser for value is entitled to assume that he has given the child proper advice even though he be also acting as the father's solicitor. There is no absolute rule that in such a transaction the father and the child must be advised by different solicitors. *Ib.*

Presumption of Parental Influence—Onus.]—Where a gift is made by a child to a parent before the parental authority and dominion have terminated, it is to be presumed to be made under parental influence, and therefore invalid ; and the burthen of proof lies on the parent to rebut this presumption, by showing that the child had independent advice, or was otherwise placed in a position to exercise an independent judgment as to the gift. *Wright* v. *Vanderplank*, 2 K. & J. 1 ; 8 De G. M. & G. 133 ; 25 L. J., Ch. 753 ; 2 Jur. (N.S.) 599 ; 4 W. R. 410.

—— **Confirmation.**]—Such a gift, however, though originally invalid, may be confirmed without any express act of confirmation, all that is requisite being proof of a fixed, deliberate, and unbiassed determination on the part of the child that the gift shall not be impeached, which determination may be shown by the lapse of time during which the transaction is allowed to stand, or by other circumstances. *Ib.*

Setting Aside Securities for Father's Debt—Onus.]—Securities obtained from sons for their father's debt set aside, the creditors failing to prove (as they were bound to do) that the sons knew the true nature of the transaction, and that no undue influence had been exercised by the father. *Berdoe* v. *Dawson*, 34 Beav. 603 ; 11 Jur. (N.S.) 254 ; 12 L. T. 103 ; 13 W. R. 420.

Setting Aside.]—A father having advanced a child in his infancy, upon his coming of age takes a bond from him to a greater amount than the sums advanced :—Held, the bond obtained by parental influence, and decreed not to stand as a security for the sums advanced, but to set aside altogether. *Carpenter* v. *Heriot*, 1 Eden, 338.

—— **Fraud on Marital Rights.**]—A mother, who was in embarrassed circumstances, induced her daughter, who had just attained twenty-one, to execute a deed, assigning all her interest under the marriage settlement of the mother to the mother absolutely. The daughter was at the time engaged to be married, and the execution of the deed was not disclosed to her intended husband. Upon bill by the daughter and her husband, the deed was set aside, both upon the ground of undue influence, and of fraud upon the marital rights of the husband. *Chambers* v. *Crabbe*, 34 Beav. 457 ; 11 Jur. (N.S.) 277 ; 12 L. T. 46.

—— **Lapse of Time.**]—Under a marriage settlement, the son of the marriage was entitled to the reversion expectant on the life estate of the father in two sums of money, one of which had come from the father's side, the other from the mother's side. The son had also a large income under the will of his grandfather, and would have a much larger income on attaining the age of twenty-five years. The son had lately attained the age of twenty-one, and was residing with his father. The son, without employing a separate solicitor, executed a deed giving to his father's second wife and her daughter the reversion in both the sums which were included in the marriage settlement, and giving to the father power to appoint the sum which came from the mother's side to any third wife and her children. The son left the father's house five years after the execution of the deed, and employed a separate solicitor two years afterwards, when the subject of setting aside the deed was mentioned. Seven years afterwards the son filed a bill to set aside so much of the deed as related to the sum which had come from the mother's side :—Held, that, though the son understood all the contents of the deed except the power to appoint to a third wife and her children, he was not sufficiently protected from parental influence, and that if the bill had been filed at an earlier time the deed must have been set aside to the extent prayed. *Turner* v. *Collins*, 41 L. J., Ch. 558 ; L. R. 7 Ch. 329 ; 25 L. T. 779 ; 20 W. R. 305.

Held, also, that, as the filing of the bill had been so long deferred, the deed must be rectified only by striking out the power. *Ib.*

Practice—Amending Answer.]—Defendant, by answer, consenting that an award made by her father should be confirmed, prayed she might amend her answer, having made an affidavit that she never read the award, and that her answer was prepared by her father, who had wronged

her in the award. Motion refused. *Harcourt* v. *Sherrard*, 2 Vern. 434.

b. Resettlement of Entailed Estates.

General Principles.] — Parental influence is inseparable from arrangements between father and son for the resettlement of family estates; but its existence and operation are not sufficient to invalidate the transaction, if it be not exerted for the benefit of the person possessing it. *Hartopp* v. *Hartopp*, 21 Beav. 259; 25 L. J., Ch. 471; 2 Jur. (N.S.) 794.

Transactions between parent and child are to be regarded with jealousy; but in arrangements between father and son for the resettlement of family estates, if the resettlement be not obtained by misrepresentation or suppression of the truth, if the father acquires no personal benefit, and if the settlement is a reasonable one, the court will support it, even though the father did exert parental authority and influence over the son to procure the execution of it. *Ib.*

In regarding claims to upset resettlements of family estates the court gives weight to considerations which in other cases would not be allowed in the scale. For the validity of such a resettlement, the son being tenant in tail in remainder, it is not essential that the son should have independent advice and the court will not inquire whether the influence of the father was exerted with more or less force. *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200; 60 L. T. 499; 38 W. R. 12.

An agreement between a child and a father to alter the limitations under a settlement will not be set aside on pretence of being drawn in by the father's power and authority. *Tendril* v. *Smith*, 2 Atk. 85.

Son, tenant in tail of an estate, upon the death of the mother (who was tenant for life), makes a settlement of it for the benefit of the family, in consequence of an agreement so to do in the mother's life; although the father derives some benefit under the settlement, it shall not be set aside as entered into under undue influence. *Kinchant* v. *Kinchant*, 1 Bro. C. C. 369.

Circumstances to be taken into consideration in judging of an arrangement between a father tenant for life, and son tenant in tail, for barring the entail, where the main consideration moving from the son was an undertaking to pay the father's debts, important items left in blank:—Held, insufficient to set the transaction aside as against the father, though the son was only just come of age. *Bellamy* v. *Sabine*, 2 Ph. 425; 17 L. J., Ch. 105.

The court will support contracts entered into to preserve the peace of families; and, therefore, where a son, upon his marriage, joined with his father in resettling the estate, and, by a memorandum executed at the same time, agreed to secure 500*l.* to each of his sisters:—Held, that there was sufficient consideration for the court to decree a specific performance of this agreement, an attempt to show that it had been obtained by an undue exercise of parental influence having failed. *Wycherley* v. *Wycherley*, 2 Eden, 175.

Particular Cases.]—A father, tenant for life, remainder to his first and other sons successively in tail male; the eldest son, soon after he attained twenty-one, joined his father in suffering a recovery; an annuity was secured to him during his father's life, and parts of the estates were limited to the father in fee, the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughters in tail general. The transaction to be considered as a mixed case of bargain and sale, and of family arrangement; and, the eldest son having died without issue, a bill filed by his brother (the next remainderman in tail), who had done confirmatory acts, and accepted interests under the will of his father, to set aside the settlement as obtained by undue influence, was dismissed. *Tweddell* v. *Tweddell*, Turn. & R. 1; 23 R. R. 168.

Transactions of this nature between father and child to be viewed with a reasonable degree of jealousy, not in the light of reversionary bargains. *Ib.*

Where a resettlement of family estates was made, in which the son, as tenant in tail, joined and resettled the estates to such uses as the father and son should jointly appoint, with remainder to the father for life, with remainder to the son for life, with remainder to the first and other sons of the son successively in tail male, with remainder to such uses as the father surviving should appoint, with remainder to the second and other sons of the father for life, with remainder to the first and other sons in tail male, with remainder to any other son of the father in tail male, with remainder to the daughters of the father successively for life, with remainder to the first and other sons of each daughter successively in tail male; with remainder to the father in fee; and power was reserved to the father to appoint, by deed or will, a jointure of 2,600*l.* per annum for any future wife, to be reduced to 1,500*l.* per annum in case he appointed 500*l.* per annum in favour of any stranger,—it was set aside. But various arrangements for the relief of the family from existing burdens, though the father obtained some advantages, were supported, on the ground that the effect of the transactions was known to the son, and even acquiesced in by him. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

The plaintiff was tenant in tail, and the defendant, his father, tenant for life, of family estates. The plaintiff, eleven months after attaining twenty-one, being in pecuniary difficulties, joined his father in a settlement of the estates. The court, though satisfied that parental authority and influence had been exerted to obtain the execution of the settlement, but not for the father's individual advantage, who obtained no direct personal benefit from it, supported the settlement, holding that a jointure thereby provided for the son's mother did not come within the definition of benefit to the father, and that the postponement of the son's daughters to his younger brother was not unreasonable, considering that thereby the estates were made to accompany the family title. *Hartopp* v. *Hartopp*, 21 Beav. 259; 25 L. J., Ch. 471; 2 Jur. (N.S.) 794.

A son, tenant in tail in remainder, shortly after attaining twenty-one, joined with his father, the tenant for life, in resettling the family estates. The son was influenced to make the resettlement by the representation of his father that a portions charge of 5,000*l.* was not (as in fact it was) a subsisting charge on the estates, but was a

charge to take effect only in case the father should so direct, and a release of the supposed power to charge contained in the resettlement was the principal consideration for its execution:—Held, that, although this misrepresentation was innocently made, the resettlement must be set aside as founded on mistake. *Fane* v. *Fane*, L. R. 20 Eq. 698.

Father being tenant for life, remainder in tail to his son, agreed, whilst his son was still an infant, to execute a lease of part of the settled lands, in consideration of 400*l.* as an annual rent upon the son's coming of age; a recovery was suffered to the uses to be appointed by father and son jointly, or in default thereof to the uses of the settlement. The lease was executed according to agreement by both father and son, having been first approved of by their family solicitor. It was proved that a fair value had been given therefor:—Held, on a bill filed by the son, after the father's death, to set aside this lease, there being no allegation of the consideration money not having been applied to the use of the son, and no proof of undue influence by the father, that this lease was unimpeachable. *Cooke* v. *Burtchaell*, 2 Dr. & War. 165.

A father being tenant for life, with power to appoint to children, joined his eldest son in a fine and recovery, and conveyed to a purchaser, receiving all the purchase money:—Held, that the son's interest in the land, at the date of the conveyances, but not that afterwards acquired, was bound by his assent to the conveyance. *Thompson* v. *Simpson*, 2 Jo. & Lat. 110; 8 Ir. Eq. R. 55. And see *S. C.*, 1 Dr. & War. 459.

A., on his marriage, entered into articles, whereby he covenanted to settle his whole estate upon himself for life, with remainder to his first and other sons in tail. No settlement was made pursuant to these articles; but A., when his eldest son attained twenty-one, prevailed on him by threats, promises, etc., and under total ignorance of articles, to join in settlement, whereby estate was limited to different uses, and power given to father for making jointure. This settlement was set aside for fraud as against eldest son, and articles were established; and the father having, on his marriage with second wife, given bond, conditioned for making jointure, this bond was also set aside as against heir, and wife was put to seek satisfaction for penalty of bond out of her husband's personal assets. *Jevers* v. *Jevers*, 1 Bro. P. C. 272.

Evidence.]—If a father, tenant for life, takes advantage of his son's (the tenant in tail) necessities, to draw him in to join in any conveyance which would destroy his remainder, this court, upon very slender evidence of such a practice in the father, would relieve the son. *Wallace* v. *Wallace*, 2 Dr. & War. 452; 1 Con. & L. 491.

Where a father, tenant for life, draws in a son, tenant in tail, to join in a conveyance which would destroy his remainder, the court, on slender evidence, will relieve the son. *Heron* v. *Heron*, 2 Atk. 160.

This court will not support the resettlement of family estates between a father and son, when the father obtains extensive advantages to the prejudice of the son and his family, in the absence of unequivocal proof that the whole of the facts were known to the son, and that the purposes of the deed were fully explained to him, and operation of the respective provisions known to him. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

See also COMPROMISE (FAMILY ARRANGEMENTS).

ii. *Guardian and Ward.*

a. Conveyances, Leases, and other Transactions.

Generally.]—Guardian cannot take anything from his ward for his own benefit, pending the guardianship, nor at its close, nor until the relation and influence have ceased. *Wood* v. *Downs*, 18 Ves. 127; 11 R. R. 160.

Semble, it is not contrary to the policy of the law that a guardian should benefit by the will of his ward. *Moss* v. *Leatham*, 2 Moore, P. C. 73.

Purchase by guardian of ward's estate may be good. *Oldin* v. *Samborn*, 2 Atk. 15.

Relief Against.]—Under a decree for a sale of a competent part of certain leasehold interests, the property of a minor (partly held for lives and partly chattel), the person who acted as receiver to the estate, and appeared in the cause as guardian to the minor, purchased a lease for lives. The sale (though for full value) decreed fraudulent and void under the circumstances. *Cary* v. *Cary*, 2 Sch. & Lef. 173.

Setting Aside—Bond.]—A bond passed by a nephew to his uncle, a solicitor, who had brought him up, though admitted to be without pecuniary consideration, not set aside on bill by the nephew alleging fraud, though the transaction was suspicious. *Ross* v. *Steele*, 1 Ir. Eq. R. 171.

—— **Gift.**]—A gift by a ward to her guardian shortly after her attaining her majority, will be set aside by a court of equity. *Faulkner* v. *Salmon*, 9 L. J. (o.s.) Ch. 155.

Gift of money to guardian or trustee soon after coming of age set aside, upon general principles of public utility: and here also on particular circumstances of imposition. A person, however, may bind himself soon after coming of age, under proper circumstances, as if, being actually in possession and quite sui juris, he makes such a grant by way of reward. *Hylton* v. *Hylton*, 2 Ves. 547.

Leases obtained by an uncle from his nephew but just come of age, and to whom he had been guardian and agent, set aside, being made at undervalue, and other considerations than the reserved rent being held out, for which no security was given. *Dawson* v. *Massey*, 1 Ball & B. 219.

A lease at an inadequate rent obtained by the son of the guardian from the ward, recently after he came of age, set aside thirty years after execution, and length of time no bar; the ward being of weak understanding, and continuing during life under the original pupilage and influence of the guardian and his family. *Aylward* v. *Kearney*, 2 Ball & B. 463.

—— **After Lapse of Time.**]—Conveyance by ward to guardian, under circumstances, set aside on grounds of public policy, after a great lapse of time. *Hatch* v. *Hatch*, 9 Ves. 292; 1 Smith, 226; 7 R. R. 195.

—— **After Accounts Settled.**]—Transaction appearing to have arisen out of the influence

from the relation of guardian and ward set aside, though all accounts had been settled and the relation had ceased. *Wright* v. *Proud*, 13 Ves. 138.

—— After Release.]—Assignments by a minor to his tutor, though voidable, impeached after a lapse of years, sustained the evidence establishing that subsequent dealings had taken place between the minor and tutor, after the former was of age, which amounted to a release of all claims on the part of the minor. *Motz* v. *Moreau*, 13 Moore, P. C. 376; 8 W. R. 395.

The fact that such assignments and dealings had not been impugned by the minor, when of age, until after the death of the tutor, speaks strongly against the claim of the minor for an account and inventory, and to set aside the assignments. *Ib.*

Keeper of House for Lunatics.]—Deed set aside as obtained by fraud and undue influence, by a keeper of a house for lunatics, from a person under his care, as within the general principle arising from the relation of guardian and ward, attorney and client, &c. *Wright* v. *Proud*, 13 Ves. 136.

b. Accounts.

Generally.]—If a guardian buys up the incumbrances upon an infant's lands for less than due, he shall not charge him with more than was paid. *Henley* v. ——, 2 Ch. Ca. 245. S. P., *Anon.*, 1 Salk. 155.

Setting Aside.]—Guardian settling accounts as soon as infants came of age, and retaining a gratuity, set aside. *Oldham* v. *Hand*, 2 Ves. 259.

Opening.]—An account settled between a guardian and an infant soon after he comes of age shall not, under certain circumstances, be conclusive or binding upon the infant. Under what circumstances an account settled between a guardian and his ward shall be binding upon the ward. See *Wych* v. *Packington*, 3 Bro. P. C. 46.

Solicitor who had advanced money to infant for subsistence of him and his family, and acted as his confidential adviser, is in nature of guardian to him, and an account settled between them within a month after infant became of age, and without latter having any assistance, was opened, notwithstanding vouchers had been delivered up. *Revett* v. *Harvey*, 1 Sim. & S. 502; 2 L. J. (O.S.), Ch. 39; 24 R. R. 219.

iii. *Master and Servant.*

Influence of Servant over Master.]—Bill, to have deeds assigning stock delivered up, as obtained by undue influence by a servant over her master, and an account; the evidence of direct influence considerably subsequent to the deeds; the defendant a married woman, her only separate property, stock; and not liable, therefore, without a lien. An issue being declined, bill was dismissed. *Nantes* v. *Corrock*, 9 Ves. 182; 7 R. R. 156.

Articles before marriage to secure annuity out of wife's estate to her servant, who had influence over her, and bond for 1,000*l.*, the bond was delivered up, and a new grant of the annuity after marriage. The consideration of the bond and annuity directed to be tried. *Cole* v. *Gibson*, 1 Ves. 503.

Gift to Confidential Agent.]—Gift by deed, subject to a power of appointment by the donor, from a person upwards of ninety years of age, to a confidential agent who had for many years been in habits of friendship with the donor, without the intervention of a disinterested third person, the solicitor who drew the deed being the solicitor of the person who took the benefit under it, declared void at the Rolls, but supported under all the circumstances upon appeal. *Hunter* v. *Atkins*, 3 Myl. & K. 113.

A. executed an instrument purporting to convey to B. all the household furniture, &c., which at A.'s death should be in two specified rooms in his house, except, &c. A. lived almost exclusively in the said two rooms, and B. was his bailiff and confidential agent. Two years afterwards, A. by will bequeathed his household furniture, &c., on trust for C. and his issue. In an administration suit, B. claimed the benefit of the instrument, but without probate of it, or showing for what consideration, &c., it was executed:—Held, that if testamentary the court could not act on it without probate, and if to be considered as a deed inter vivos effect could not be given to it without further evidence; and, there being no likelihood of further evidence being obtained, an inquiry was refused. *Consett* v. *Bell*, 1 Y. & C. C. C. 569; 11 L. J., Ch. 401; 6 Jur. 869.

Undue Influence of Confidential Clerk over Master.]—Assignment of a policy by a master to a confidential clerk, as to two-thirds of the premium of which the master had paid, the clerk paying the residue; the court, under circumstances, as well as the finding of a jury upon an issue, being satisfied that it was executed under undue influence, declared the assignment as to such two-thirds of the amount of the policy fraudulent and void. *Collins* v. *Hare*, 1 Dow & Cl. 139; 2 Bligh (N.S.) 106.

Fraud by Confidential Agent—Rights against his Representatives.]—Where a person standing in the relation of confidential agent to another, has, by his participation in a fraud, induced the latter to part with his property at an undervalue, his representatives may be proceeded against in equity to make good the loss occasioned by fraud, even though the agent himself derived no pecuniary benefit. *Walsham* v. *Stainton*, 33 L. J., Ch. 68; 9 Jur. (N.S.) 1261; 9 L. T. 357; 12 W. R. 63; 3 N. R. 56.

Transfer of Stock by Aged Lady to Companion.]—When a party in the situation of a companion to a testatrix upwards of eighty-three years of age obtained a transfer of stock from the testatrix, without consideration, and the testatrix by her will gave her property to other parties, the court held it a primâ facie case for inquiry, and ordered the stock to be brought into court, without prejudice; the dividends to be paid to the transferee until the hearing of the cause, which was instituted for the purpose of impeaching the transaction. *Bute* v. *Bank of England*, 9 Jur. 545.

Rights of Steward and Land Agent.]—A steward and land agent may contract to execute works for his employer, provided there be such an interposition as will show that no advantage

has been taken of the confidence reposed in him. *Waters* v. *Shaftesbury* (*Earl*), 14 L. T. 184.

Next Presentation obtained by Tutor.]—Demurrer allowed to a bill to have a presentation to a living upon the next avoidance delivered up, charging the defendant with gross misconduct in obtaining it, and in other respects, while a private tutor in the family. *M'Namara* v. ——, 5 Ves. 824.

Bond given to Servant by Heir Apparent.]—A father entrusts his heir apparent (then an infant) to the care of a servant. The heir comes of age, the servant takes a bond from the heir, which bond is secreted from the father, and heir has not wherewithal to pay the bond, equity will set aside the bond as obtained by fraud and breach of trust. *Osmond* v. *Fitzroy*, 3 P. Wms. 129.

Confidential Agent of Company—Conspiracy to Purchase Shares at Undervalue.]—See *Walsham* v. *Stainton*, 1 De G. J. & S. 678, post, col. 266.

iv. *Other Cases.*

Husband and Wife.]—Where a feme covert having separate property joins in a security for money advanced to her husband, the court acts upon it, not as an agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents and profits of that property and not by sale or mortgage. If the feme covert insists upon the exercise of undue influence by the husband, she must prove it, and it is not for the plaintiff to prove a negative. *Field* v. *Sowle*, 4 Russ. 112.

Security given for Brother's Debt.]—Securities, given by a person six months after he attained twenty-one to the defendants for a debt due to them from his elder brother, were set aside with costs. *Sercombe* v. *Saunders*, 34 Beav. 382.

Voluntary Deed by Sister in Favour of Brother.]—A voluntary deed by an unmarried lady in favour of her brother, with whom she was residing at the time, and executed by her without professional assistance, was set aside at the instance of the lady and her husband. *Sharp* v. *Leach*, 8 Jur. (N.S.) 1026; 7 L. T. 146; 10 W. R. 878.

Voluntary Settlement by Younger in Favour of Elder Sister.]—Voluntary settlement by a younger sister of the whole of her present and future property principally in favour of her eldest sister set aside, the eldest sister having obtained great ascendency and influence over the younger, the circumstances of the transaction being open to suspicion, the settlement being very improvident, and the settlor not having had the benefit of independent professional advice. *Harvey* v. *Mount*, 8 Beav. 439; 14 L. J., Ch. 233; 9 Jur. 741.

Bond by Sister for Debt of Deceased Brother.]—B., while in distressed circumstances, upon the advice and suggestion of A., and upon a supposed right in him to demand it, executes a bond to him for a sum due by a deceased brother, to whom she was next of kin, but who left no personal chattels. The bond set aside under the circumstances, but, if it had been executed by her from a feeling of propriety, after getting possession of an estate to which she became entitled on the death of her brother, she having immediate means of payment and acting with proper advice, it could not have been defeated. *Beasley* v. *Magrath*, 2 Sch. & Lef. 31.

Sale of Reversion by Sister—Lapse of Time.]—The sale of a reversionary interest by a sister to her brother was set aside upon the ground of undervalue, after a lapse of ten years, the sister having continued under the influence of her brother up to a period of within two years of the bill being filed. *Sharp* v. *Leach*, 31 Beav. 491; 8 Jur. (N.S.) 1026; 7 L. T. 146; 10 W. R. 878.

Grant to Grandson and Son-in-Law just before Death.]—Where a person by a deed eight days before his death grants a benefit to his grandson and son-in-law, there is no such confidential relation as to induce this court to presume fraud. *Beanland* v. *Bradley*, 2 Sm. & G. 339.

Sale between Brothers-in-Law — Consideration.]—A transaction of sale made upon a false or mistaken consideration between parties in the relation of brothers-in-law; the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father; and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached if fairly made; but, if the consideration for the purchase was the balance of an account, which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts. *M'Neill* v. *Cahill*, 2 Bligh, 228.

Lease, by one just of Age, to Brother-in-Law and Uncle, on Advice of Father's Executor—Onus.]—A young lady, two years after she came of age, granted a mining lease, as to part of the property in possession and as to the rest in reversion, to her brother-in-law and uncle, at the suggestion and advice of her father's executor, and with no independent advice. Three months afterwards the executor was taken into partnership with the lessees. Applications of other persons to become lessees had been discountenanced, and concealed from the knowledge of the lady:—Held, that, to support the lease in equity, the lessees were bound to show that no better terms could have been obtained; that the grantor had the fullest information on the subject; that she had separate, independent, and disinterested advice, and that she deliberately and intentionally made the grant; and, the lessees having failed in proving this, the lease was cancelled. *Grosvenor* v. *Sherratt*, 28 Beav. 659; 6 Jur. (N.S.) 1228; 8 W. R. 682.

—— **Reversions—Lease and Sale, Difference as to.**]—A reversionary sale and a grant of a reversionary lease stand on the same principles. *Ib.*

Lease obtained by Uncle—Undervalue.]—Leases obtained by an uncle from his nephew but just come of age, and to whom he had been guardian and agent, set aside, being made at undervalue, and other considerations than the reserved rent being held out, for which no security was given. *Dawson* v. *Massey*, 1 Ball & B. 219.

Promissory Note, by one just of Age, to Uncle in Loco parentis—Setting aside.]—Where the plaintiff, whilst an infant, having separate property, out of which an allowance for maintenance was made to her uncle, with whom she resided for seven years until attaining twenty-one, and just after was induced to sign a promissory note in his favour, as a voluntary security; the court, considering him in loco parentis, set it aside, as made under undue influence; in such cases the court will see that the infant, in an act of bounty, just on the eve of emancipation, is placed in a situation of free and unfettered judgment, and independent of any control. *Archer* v. *Hudson*, 7 Beav. 551; 8 Jur. 761. Affirmed, 15 L. J., Ch. 211.

Purchase of Reversion from Nephew.]—Where a tenant for life purchased the reversion of his nephew, on the ground of inadequacy of consideration in the family estate:—Held, that the transaction fell within the ordinary rule as to reversionary interest, and was not to be regarded as a family arrangement. *Talbot* v. *Stainforth*, 1 J. & H. 484; 7 Jur. (N.S.) 961; 5 L. T. 471; 9 W. R. 827.

—— **Onus.**]—The fact that a reversion is dependent on contingencies which do not admit of estimation by actuaries does not relieve the purchaser from the onus of showing that fair value was given. *Ib.*

Bargain to Sell to Aunt.]—A bargain entered into by a person in the absence of his legal adviser, to sell to an aunt at a price less than would have been obtained by a public sale, which was in contemplation, set aside. *Martin* v. *Mitchell*, 2 J. & W. 413; 22 R. R. 184.

Purchase from Uncle—Undervalue.]—Purchase of reversion by nephew, from uncle very old, for price grossly inadequate, the deed of conveyance in the operative part, but not in the recitals, expressing that the grant was made partly in consideration of natural love, &c., not impeached on ground of fraud under the circumstances. *Whalley* v. *Whalley*, 3 Bligh, 1; 1 Mer. 436. See also *Hudson* v. *Beauchamp*, 3 Bligh, 18, n.

Purchase from Aunt—Undervalue.]—J. purchases an estate from his aunt for 10,000*l.* which was proved to be worth 20,000*l.* and upwards; but in the conveyance adds the consideration of natural love and affection:—Held, that this was a gross fraud upon the aunt, and the conveyance was accordingly set aside. *Filmer* v. *Gott*, 4 Bro. P. C. 230.

Sale to Great Uncle's Nephew, by one in Embarrassed Circumstances—Undervalue.]—T., a young man, aged twenty-three, entitled to a moiety of a freehold estate, the entirety of which brought in about 440*l.* a year, being pressed for payment of his college debts, amounting to about 1,000*l.*, and being estranged from his father, wrote to his great-uncle for advice and assistance as to payment of the debts. The uncle deputed the defendant, his nephew, to see T. on the subject. The defendant met T. by appointment, and at this interview T. refused to allow any attempt to compromise the debt, and said he would sell his moiety of the estate, upon which the defendant offered him 7,000*l.* for it, payable by instalments. T. next day accepted the offer. Before an agreement had been signed, the defendant obtained a valuation by a surveyor, estimating the value of the mines under the entirety at 20,000*l.* The sale was completed without this valuation having ever been communicated to T. T.'s heir filed a bill to impeach the sale:—Held, that the defendant stood in a fiduciary relation to T., which made it his duty to communicate to T. all material information which he acquired affecting the value of the property, and that, as he had not communicated the valuation to T., the transaction must be set aside. *Tate* v. *Williamson*, L. R. 2 Ch. 55; 15 L. T. 549; 15 W. R. 321.

Nephew obtaining Post Obit Bond.]—A nephew, who was provided for by his aunt's will, obtained a post obit bond from her. It was set aside, he not having proved that she knew that the effect of the bond was to make her will irrevocable. *Cooke* v. *Lamotte*, 15 Beav. 234; 21 L. J., Ch. 371.

Niece induced to attend to Uncle on Promise of Benefit by Will—Revocation.]—Where a niece was induced to reside with and continue valuable services to her uncle, a testator, who was in advanced years and ill health, on the faith of his representation that by so doing she would become entitled to the benefit of property at his death, trusts of which in her favour had been created by a codicil to his will, and were read over, and explained to her:—Held, that the testator was not at liberty to revoke such trusts. *Loffus* v. *Maw*, 8 Jur. (N.S.) 607; 6 L. T. 346; 10 W. R. 513.

Bond obtained, to Stand as Security.]—Bond obtained from the infant's grandmother for the amount of bill of fees and disbursements directed to stand as a security for moneys justly due on account, and the bill ordered to be taxed. *Brown* v. *Pring*, 1 Ves. 407.

Bond obtained by Relation.]—Plaintiff, being a weak man, was prevailed on by two of his relations to give bond to one of them, to settle his estate to the use of himself in tail male, remainder to his two brothers successively, in tail male. Plaintiff marries, and makes a settlement on his marriage, and brings a bill for delivery up of the bond: and it would have been decreed, had not the plaintiff, by bill, offered to settle part. *Portington* v. *Eglington* (*Countess*), 2 Vern. 189.

Gift by Infant, just before Death, to Relative.]—In the absence of proof of the exercise of control or influence on the part of the donee, or of the existence of the relation of guardian and ward between the donee and the donor, a gift of her property within a month before her death by an infant aged twenty, of business habits, firm will and fully capable of managing her own affairs, to a relative with whom she had been residing from her father's death, for a period of five months, until her own death, is not invalid. *Taylor* v. *Johnston*, 51 L. J., Ch. 879; 19 Ch. D. 603; 46 L. T. 219; 30 W. R. 508.

Imprudent Settlement by Orphan.]—A voluntary settlement was agreed to be made by a young lady, an orphan, some weeks before she attained twenty-one, upon the recommendation of the family solicitor, and was executed by her

eight weeks after she attained twenty-one without any independent advice. Thereby she assigned to her stepfather and an uncle as trustees the whole of her fortune upon trusts for herself for life, with remainder to her children or testamentary appointees, and, in case there were no children, then, in default of appointment, to her next of kin. A power of raising 700*l.*, and paying it to the settlor, was reserved, but the settlement contained no power of revocation or of appointment by deed, and gave her no voice in the investments or in the appointment of new trustees:—Held, that, although the solicitors and trustees acted really with the intention of benefiting the lady, the settlement must be set aside on the ground of imprudence. *Everitt* v. *Everitt*, 39 L. J., Ch. 777; L. R. 10 Eq. 405; 23 L. T. 136; 18 W. R. 1020.

Practice—Pleadings.]—The bill stated that the defendants, relations of a testator, had acquired influence over his mind, and had induced him to make by his will an improper and unequal distribution of his property among his relations to the plaintiff's prejudice. It then stated that after the execution of the will the testator became of unsound mind, and while in that state made underleases and transfers of stock in favour of the same defendants, and by their procurement, and the bill prayed that these underleases and transfers might be set aside. The defendants, by their answers, admitted that by their attention to the testator they might possibly have acquired some influence over his mind, but they denied that they had ever used it to the prejudice of the plaintiffs:—Held, that upon these pleadings the plaintiffs could not impeach the underleases and transfers on the ground of their having been obtained by undue influence, no such issue being raised by the bill, and the allegation or the answer not having the effect of enlarging the issues for this purpose. *Hayward* v. *Purssey*, 3 De G. & Sm. 399.

d. Legal Adviser and Client.

i. *Counsel.*

Generally.]—Personal estate not disposed of by a will drawn by the confidential counsel (the sole executor) without informing the testator of the legal effect of the will:—Held, to be a trust for the next of kin. *Segrave* v. *Kirwan*, Beat. 157.

An elderly lady married a barrister who had for some years been her confidential friend and adviser. Before the marriage a lengthened correspondence took place between them, in which she insisted that her personal estate should be settled so as to be "her's as if unmarried," and her's "to give, to use, and to will." He assented to this, and undertook to prepare the settlement. By the marriage he acquired, under her father's will, a life interest expectant on her decease, in a considerable sum of stock:—Held, that, having undertaken to prepare the settlement, he was bound to prepare such an one as under the circumstances a conveyancer would have drawn, or the court would have sanctioned—that such a settlement would have given him no interest in her absolute property in default of appointment by her, and that, she having died without making any disposition in his favour, he was a trustee of her personal estate for her next of kin. *Corley* v. *Stafford (Lord)*, 1 De G. & J. 238; 26 L. J., Ch. 865; 3 Jur. (N.S.) 1225; 5 W. R. 646.

Knowledge acquired by.]—Where the appellant had for a long period acted as the counsel and legal adviser of a party, and in such employment acquired an intimate knowlege of his property and liabilities, and acted for him in the compromise of securities:—Held, that a purchase by him of these securities, after the relation of counsel and client had ceased, without notice to the principal, and at a price less than their nominal amount, and whilst the compromise was pending and feasible, was a trust for his former client, and that he was only entitled to the sum actually paid by him, with the usual interest. *Carter* v. *Palmer*, 8 Cl. & F. 657; 1 Dr. & Wal. 722; 1 Ir. Eq. R. 289.

—— **As Trustee.**]—It is extremely wrong for a counsel or agent to take a conveyance from the right heir for his own benefit, which he discovered by being a trustee. *Norris* v. *Le Neve*, 3 Atk. 38.

Remuneration.]—A., entitled to an estate, gave a bond to his counsellor B., to give him half of it if he recovered. The bond is void, and B. shall only recover his reasonable charges. *Skapholme* v. *Hart*, Ca. t. Finch, 477.

In 2 Inst. 564, apprentices or attorneys cannot contract to have any part of the thing in demand after the recovery, and Penros' case is there cited. A writ of champerty was brought against Penros for that he had a part of the land recovered at another man's suit; he said he was of counsel for the party who recovered, and had that land for his wages. The taking of the estate for his wages after the recovery could be no champerty, unless there had been a covenant or promise, hanging the plea, on the defendant's part to make the same after the recovery, which was not alleged, but only the taking of the estate; neither doth it appear what became of Penros' plea, and (said the court) we are of opinion it shall remain for ever a blemish upon his reputation as often as it is cited, for Quamvis aliquid ex se non sit malum, tamen si sit mali exempli, non est faciendum. *Kenney* v. *Brown*, 3 Ridgw. P. C. 502.

Counsel is not suffered, if he happen to be a mortgagee, to insist on more than legal interest under pretence of a gratuity for business formerly done in the way of counsel. *Thornhill* v. *Evans*, 2 Atk. 332; 9 Mod. 331.

Making Good.]—Where R. had become surety for her brother-in-law, C., for the payment of sums of money due from him to B., a certificated conveyancer, and B. had, as the professional adviser of R., and through the undue influence of C. and himself, obtained the transfer of a mortgage security from R., to other parties, whereby he had been paid the sums due from C. to himself:—Held, that B. and C. must make good to R. all the moneys which B. had acquired from her, and pay the costs of the suit. *Rhodes* v. *Bate*, 11 Jur. (N.S.) 803; 12 L. T. 443; 13 W. R. 710.

Setting Aside.]—Bill impeaching transactions between plaintiff and defendant on the ground of fraud, plaintiff got a decree, on the principle that being transactions between counsel and client they could not stand; but did not prove

the fraud charged. No costs. *Moore* v. *Moore*, 2 Moll. 445.

A., being standing counsel and manager for B., obtained leases for long terms on different parts of his estate, and a release of the equity of redemption of other part. On a bill brought to set aside these transactions for fraud, it was proved that A. had as great a power over B. as a parent has over child, and could persuade him to do whatever he pleased; but, it being proved on the other side that the purchase-money was nearly equal to the value of the land, and that A. had, in many respects, been exceedingly serviceable to B., the bill was dismissed. *Kingsland* (*Lord*) v. *Barnewall*, 4 Bro. P. C. 154.

M., an Irish barrister, becomes casually acquainted with H., a widow lady, possessed of some property of her own, and having large expectations from an aunt, acquires her confidence, and engages in the management of her affairs, and persuades her to give him a deed of gift of a third of the aunt's property. When that property comes into possession, he persuades her to transfer to him one half of it for himself, and also the other half to be managed by him on her account. He makes misrepresentations to her about her son, and as to other matters, and prevails upon her to execute a release to him. H. at length calls for an account, which he refuses to render. She offers him a full discharge, if he would pay her the two-thirds of her property, calculated by her at 21,000*l*. He refuses. She files her bill in equity, and the deed of gift and release are set aside as having been obtained by fraud, and undue influence, and misrepresentation, and decreed to refund 36,500*l*. to H. This decree affirmed on appeal. *Maccabe* v. *Hussey*, 2 Dow & Cl. 440; 5 Bligh (N.S.) 715.

When a client, two months after protracted and complicated litigation, with reference to the ownership of an estate of considerable value, had been brought to a successful issue under the guidance of a barrister, executed in favour of the latter a grant of the reversion in the estate expectant on the client's own death, charged with the client's debts and legacies to a specified amount:—Held, that the deed must be set aside, whether as a deed of gift or as a contract, undue influence over, and want of independent advice on the part of, the client being established by the evidence. *Brown* v. *Kennedy*, 4 De G. J. & S. 217; 33 L. J., Ch. 342; 10 Jur. (N.S.) 141; 9 L. T. 736; 12 W. R. 360. Affirming, 33 Beav. 133.

ii. *Solicitors.*

a. In General.

Generally.]—General inability of a solicitor to deal with his client. *Rudd* v. *Sewell*, 4 Jur. 882.

An attorney being an officer assisting in the administration of justice, every dealing between him and his client is always a subject of jealousy in a court of equity. *Kenney* v. *Brown*, 3 Ridgw. P. C. 462, 504, 522.

All dealings between attorney and client are anxiously scrutinised in equity, in order to protect the client from his own acts done under the influence or ascendency which an attorney acquires over him. *Bellew* v. *Russel*, 1 Ball & B. 107.

—— **Gifts and Sales—Analogy between.**]—Observations upon the analogy between the rules as to gifts and sales from clients to their attorneys. *Holman* v. *Loynes*, 4 De G. M. & G. 270; 23 L. J., Ch. 529; 18 Jur. 839; 2 W. R. 205.

—— **Undue influence, what.**]—Signification of the term "undue influence" as applied to transactions between solicitor and client. *Casborne* v. *Barsham*, 2 Beav. 76.

—— **Relationship of Solicitor and Client.**]—If an attorney is not acting as an attorney for his client on a particular occasion, he may throw off that character, and exercise his independent rights. *Austin* v. *Chambers*, 6 Cl. & F. I.

The relation of solicitor and client carries with it all its consequences, whether it arises from an already existing relation or is only created for the purpose of a particular transaction; but if it does not exist previously, and first arises in the particular transaction, it must be definitely established, and is not necessarily to be inferred. *Williamson* v. *Moriarty*, 19 W. R. 818.

—— **Evidence—Duty of Solicitor.**]—Where there is the relation of solicitor and client, the solicitor, if he deal with the client in reference to his property, must, whether that client was more or less a man of business, prove that the client had due professional advice and assistance in and for the purpose of explaining the matters to him, otherwise the transaction will be set aside. *Barnard* v. *Hunter*, 2 Jur. (N.S.) 1213.

—— **Duty of Solicitor.**]—Wherever a professional man is called on to give his services to a client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences to result, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit may arise to himself from the instrument so prepared; and, if he fail to do, equity will deprive him of it. *Segrave* v. *Kirwan*, Beat. 166.

—— **Making Gain.**]—It is an established rule that a solicitor shall not in any way whatever, in respect of any transactions in the relation between him and his client, make gain to himself, at the expense of his client, beyond the amount of his just and fair professional remuneration. *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26; 31 L. J., Ch. 369; 8 Jur. (N.S.) 849; 6 L. T. 1; 10 W. R. 359.

—— **Contract—Duty to make entire disclosure.**]—In the case of contracts between solicitor and client, there is a duty to make entire disclosure. *Davies* v. *London and Provincial Marine Insurance Co.*, 47 L. J., Ch. 511; 8 Ch. D. 469; 38 L. T. 478; 26 W. R. 794.

—— **Settlement of Account.**]—Settlement of accounts between attorney and client is not conclusive, the nature of their connection taking their accounts out of the general rule of equity. *Lewes* v. *Morgan*, 5 Price, 42; 4 R. R. 860.

Beneficial Contracts, decreed a Security—Confirmation.]—Beneficial contracts and conveyances, obtained by an attorney from his client during their relation, as such, and connected with the subject of the suit, being also liable to

the charge of champerty, decreed to stand as a security only for what was actually due; and purchases by the attorney declared a trust. A subsequent deed, not relating to separate, independent, voluntary transaction, but under the same pressure, and called for under the covenant for further assurance, no confirmation. *Wood* v. *Downes*, 18 Ves. 120; 11 R. R. 160.

Onus—Solicitor a Creditor.]—The principle which throws on a solicitor who has dealt with his clients the burden of showing the fairness of the transaction applies to causes of voluntary agreement, but not to a case where the solicitor is in the hostile attitude of an urgent creditor. *Johnson* v. *Fesemeyer*, 3 De G. & J. 13.

Practice—Terms of Relief—Payment into Court.]—Where injunction is granted against proceedings at law, on instrument obtained either as a gift or purchase, in fraud of the fiduciary situation of the donee or purchaser, the court will not impose the terms of paying money into court, if the relationship be that of attorney and client. *Goddard* v. *Carlisle*, 9 Price, 169; 23 R. R. 654.

Within what Time proceedings against Solicitor to be instituted.]—The court will allow a client to institute proceedings against a solicitor within a reasonable number of years after the connection of solicitor and client has ceased. *Champion* v. *Rigby*, 1 Russ. & M. 539; Tam. 421; 9 L. J. (o.s.) Ch. 211; 31 R. R. 107.

Account—Statute of Limitations.]—The ordinary relation of a solicitor to his client in questions of account is not of such a fiduciary character as to bar the Statute of Limitations, 21 Jac. 1, c. 16. *Watson* v. *Woodman*, 45 L. J., Ch. 57; L. R. 20 Eq. 721; 24 W. R. 47.

b. Gifts inter vivos.

Generally.]—Though a court of equity holds that it is highly improper for a solicitor to derive a personal advantage in the shape of gifts from his clients, or in the shape of the liquidation of his bills untaxed and undelivered, still the court cannot approve of clients entering into transactions with their solicitors, whereby they obtain from them present relief, and at the same time indulge the expectation that the court will afterwards, at their instance, annul the whole transaction on the ground of the relation subsisting between them. *Gardener* v. *Ennor*, 35 Beav. 549.

—— **Undue influence, Inference of.**]—There are transactions in which there is so great an inequality between the transacting parties, so much of habitual exercise of power on the one side, and habitual submission on the other, that, without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence. *Casborne* v. *Barsham*, 2 Beav. 76.

—— **Jurisdiction of Court.**]—When undue influence is to be inferred from the nature of the transaction, or when the transaction is contrary to the policy of law, it is the province of the court to determine the point; and the question ought not to be sent to a jury. *Ib.*

—— **New Trial.**]—Where a jury had found that a deed had been obtained from the client, not by fraud, but by undue influence, the court held that the question, whether undue influence is to be inferred from the nature of the transaction, or is against the policy of the law, being one for the court and not for the jury, and being of opinion that the circumstances, although suspicious, did not show that the deed was obtained by the influence of the party in the character of a solicitor, granted a new trial. *Ib.*

—— **Duty of Solicitor.**]—Where a client executes a deed in favour of a solicitor, reserving a life interest and a power of revocation, it is the duty of the solicitor to leave a counterpart of the deed in the hands of the client. *Balch* v. *Symes*, Turn. & R. 92; 23 R. R. 195.

—— **Gift on the face a Purchase.**]—A., who was proved to have entertained feelings of peculiar personal regard for B., his solicitor, conveyed to him certain real estate by a deed, on the face of it a purchase deed; the consideration was 100*l.*, the real value upwards of 1,200*l.* B. produced evidence to show that no money passed; that the transaction was never intended to be a purchase, but a gift for his services; and, from affection, B. had himself prepared the deed, and A. had no other advice:—Held, that the rule is absolute that a solicitor cannot sustain a gift from his client, made pending the relation of solicitor and client, and the deed was set aside. *Tomson* v. *Judge*, 3 Drew. 306; 24 L. J., Ch. 785; 1 Jur. (N.S.) 583; 3 W. R. 561.

While Relationship of Solicitor and Client Exists.]—An attorney shall not take a gift or reward from his client while the connection subsists; it must as in the instance of guardian and ward be previously dissolved. *Montesquieu* v. *Sandys*, 18 Ves. 313; 11 R. R. 197.

Attorney cannot take anything from his client for his own use pending the suit but his demand, nor at its close, nor until the relation and influence have ceased. *Wood* v. *Downes*, 18 Ves. 127; 11 R. R. 160.

A gift made by a client to his solicitor during the subsistence of the professional relation between them is invalid. *O'Brien* v. *Lewis*, 4 Giff. 221; 32 L. J., Ch. 569; 9 Jur. (N.S.) 528; 8 L. T. 179; 11 W. R. 318.

Gift by a client to a solicitor while that relation subsisted between them declared invalid at the instance of the residuary legatees of the donor. *Walker* v. *Smith*, 29 Beav. 394.

It is an established rule in courts of equity that no gift or gratuity to an attorney, beyond his fair professional demands, made during the time that he continues to conduct or manage the affairs of the donor, shall be permitted to stand; and more especially, if such gift or gratuity arises immediately out of the subject then under the attorney's conduct or management, and if the donor is at the time ignorant of the nature and value of the property so given. *Middleton* v. *Welles*, 4 Bro. P. C. 245.

—— **Without Fraud.**]—And then without any proof of actual fraud. *S. C.*, 1 Cox, 112.

Independently of fraud, an attorney shall not take a gift from his client while the relation subsists. *Wright* v. *Proud*, 13 Ves. 138.

—— **Relationship of Solicitor and Client hav-**

ing Ceased.]—Gift to an attorney after the cause was over, without proof of anything improper, not set aside; it would have been otherwise if before the cause, as in contemplation of it, or during its progress. *Oldham* v. *Hand*, 2 Ves. 259.

While Relationship Exists—Gift to Solicitor's Wife—Rebuttal of Presumption.]—The rule of equity, that where the relation of solicitor and client existed at the time when a voluntary gift was made to the solicitor the gift will be set aside unless the donor had competent and independent advice, is absolute, and it applies to the case where a gift is made not to the solicitor but to the solicitor's wife. The presumption that there was undue influence cannot be rebutted by evidence to the contrary. *Liles* v. *Terry*, 65 L. J., Q. B. 34; [1895] 2 Q. B. 679; 73 L. T. 428; 44 W. R. 116—C. A.

Relationship of Client and Solicitor, between Mother and Son.]—A son acted as his mother's solicitor, and with her consent lent 2,500*l.* belonging to her, with other money, upon bond, conditioned for payment to himself absolutely of the amount thereby secured, without any declaration of trust, except a memorandum, whereby the son acknowledged that he held 2,500*l.*, and undertook to pay the interest thereof to the mother during life. The son died in his mother's lifetime, and his executors claimed the principal sum, subject to a life-interest in the mother, as a gift from her to the son:—Held, that the relation of solicitor and client subsisting between the son and mother excluded the ordinary presumption in favour of the transaction being a gift, and threw the burden of proof upon the executors; and, the evidence being insufficient to establish their case, the court declared the son's executors to be merely trustees for the mother. *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

Present from, and Settlement with, Client—Validity and Re-opening Accounts.]—Securities taken by an attorney from his client during the time of their connection as such, for a present, the balance of accounts settled for money lent and laid out, costs and business done, and the price of a horse sold, void as to the present, and, the plaintiff submitting to pay what should be actually due, the accounts were opened as to the whole; the horse being sold soon after, he was purchased from the attorney for a price much less than was then stipulated, inquiry into his value directed. *Newman* v. *Payne*, 2 Ves. J. 199; 4 Bro. C. C. 350.

Validity.]—A testator, in a cause in 1856, employing A. as his amanuensis, wrote to his solicitor B., requesting the solicitor to prepare the necessary deeds for transferring certain mortgages to A., for his own use and benefit absolutely. The testator added, "Also I wish to assign to yourself the bond of Mr. M., which I have forwarded you." The testator signed the letter, and forwarded the same with the bond to the solicitor by A., who was his confidential adviser. The solicitor accordingly prepared a deed, whereby the bond was purported to be assigned to himself, "his executors, administrators, and assigns absolutely for ever." A power of attorney was included in the deed, enabling B. to sue in the name of the testator for his own use and benefit. At the time of execution the testator expressed his wish that B. would enforce the bond against the obligor, who was a relative of the testator, with whom he was offended. Some discrepancy appeared as to whether it was the testator, or C. on his behalf, who told B. at this interview that the bond was an absolute and unconditional gift to him. The money was recovered by B. from the obligor, and afterwards borrowed from him again by the testator. The testator died, and B. claimed the sum against his estate. Contemporaneous entries in the books of the firm of which B. was a member were inconsistent with a view that the assignment was intended as a gift:—Held, that, independently of the infirmity arising from the relation of solicitor and client, the evidence failed to show that the assignment was a clear, well-understood act of bounty on the part of the testator. *Holmes, In re, Woodward* v. *Humpage*, 3 Giff. 337; 8 Jur. (N.S.) 252; 5 L. T. 378.

Setting Aside.]—Deed between husband and wife improperly obtained from the husband through the wife's solicitor, who took a benefit under it, set aside, with costs to be paid by such solicitor. *Proctor* v. *Robinson*, 25 Beav. 329.

A delay of some years in seeking to set aside a deed accounted for. *Ib.*

Transactions between a solicitor and his client, by which the former obtained gifts, and an undue advantage, set aside, and the securities ordered to stand good only to the extent of what might be found justly due to the solicitor. *Gardener* v. *Ennor*, 35 Beav. 549.

Confirmation by Will.]—The plaintiff claimed as heir-at-law of A., who, as the bill alleged, when in very embarrassed circumstances, had executed a voidable conveyance to his solicitor. The bill, after stating a pretence, on the part of the defendants who claimed under the solicitor, that A. had confirmed the conveyance by his will, charged that he had died intestate as to the premises in question, and prayed that the conveyance and any testamentary disposition by him in confirmation thereof might be declared null and void. Plea, that A. by will, after reciting the probability of the conveyance being disputed, had ratified and confirmed it, allowed. *Stump* v. *Gaby*, 2 De G. M. & G. 623; 22 L. J., Ch. 352; 17 Jur. 5; 1 W. R. 85.

Assuming that the conveyance was voidable, the interest which remained in A. after its execution was not a right of entry under the old law, but an equitable estate which was clearly devisable. *Ib.*

Grant of Leasehold Interest—Setting aside — Acquiescence.] — A grant of a leasehold interest from a client to his attorney, a near relation, for whom, being on bad terms with all his other relations, he expressed great friendship, in consideration of 1,000*l.* secured by bond, afterwards released, and in consideration of being indemnified from all costs, suits, and expenses, if the title should be impeached, the attorney redemising the lands, at a nominal rent, for the lives of the client and his wife:—Held, not such a dealing between attorney and client as is impeachable on a bill by the next-of-kin of the client, who acquiesced in it for several years till his death, and who, in his answer to a bill, recognised it as fair, and a mere preference of one

relation to others who had disobliged him. *Bellew* v. *Russel*, 1 Ball & B. 96.

Conveyance to Agent—False Recital—Setting aside—Lapse of Time—Confirmation.]—See *De Montmorency* v. *Devereux*, 7 Cl. & F. 188; West, 64; 2 Dr. & Wal. 410; 4 Jur. 403. Post, col. 428.

Voluntary Gift—Election to abide by—Confirmation—Action by Personal Representative.]—A solicitor had in the year 1880 acted as the solicitor of G. in an action against B. The action was compromised by the payment by B. of 5,000*l*. The solicitor's costs were paid, and in consideration of his exertions G. on the 7th June, 1880, made him a special gift of 1,000*l*. out of the money recovered. The gift was made without independent advice. The relationship of solicitor and client closed shortly after the gift. There was subsequently another business transaction between G. and the solicitor, and the relationship of solicitor and client was severed in March, 1882. In April, 1883, G. called upon the solicitor. There was some evidence that on that occasion he told G. she was entitled to demand back her gift, but that she stated in effect that she intended to adhere to it. G. died in June, 1883:—Held, that the evidence did not show that, after the relationship of solicitor and client had come to an end, G. had, with full knowledge of her rights, confirmed the gift, and her personal representative was therefore entitled to repayment of the 1,000*l*., with interest at 4 per cent. per annum from the date of the gift. *Tyars* v. *Alsop*, 61 L. T. 8; 37 W. R. 339; 53 J. P. 212—C. A.

Evidence.]—Influence arising from the professional relations between solicitor and client will vitiate a gift from the latter to the former, but the effect of that influence may be removed by evidence. *Holmes, In re, Woodward* v. *Humpage*, 3 Giff. 337; 8 Jur. (N.S.) 252; 5 L. T. 378.

To prevent the operation of the rule that a solicitor shall not take a gift from his client while the relation subsists, there must not only be a total absence of fraud, misrepresentation, or even suspicion, but there must be a severance of the confidential relation. *Morgan* v. *Minett*, 6 Ch. D. 638; 36 L. T. 948; 25 W. R. 744.

In order to bring a case within the rule that a solicitor can receive no gift or reward from his client, there must be clear and unequivocal evidence of the relationship between the parties, that advantage was taken of that relationship, and that what was given was a reward to the solicitor for his services. *Richards* v. *French*, 22 L. T. 327; 18 W. R. 636.

c. Testamentary Gifts.

Generally.]—The circumstance of a solicitor preparing for a client a will containing dispositions in his own favour does not of itself take away the right of the solicitor to be for his own benefit a devisee or legatee. *Hindson* v. *Weatherill*, 5 De G. M. & G. 301; 23 L. J., Ch. 820; 18 Jur. 499; 2 W. R. 507.

The considerations applicable to a gift inter vivos from a client to his solicitor are not universally applicable to a testamentary disposition. *Ib.*

Where a testator makes a disposition by his will in favour of the solicitor, employed by him to make the will, in such language and under such circumstances as that upon the trial at law of an issue devisavit vel non, brought by the heir-at-law of the testator, or upon the hearing by the ecclesiastical court of a suit touching the validity of the will, the disposition in question would be upheld, this court will not, on the mere ground that the relation of solicitor and client existed between the solicitor and the testator, interfere, at the instance of the heir-at-law or next-of-kin, to fix a trust for the benefit of either of them upon the property devised or bequeathed to the solicitor. *Ib.*

Legacies by a client to a solicitor, his wife and children, supported. *Walker* v. *Smith*, 29 Beav. 394.

Duty of Solicitor in drafting Will—Legacy to Solicitor's Wife.]—B., a solicitor, drew the will of R., his father-in-law, which bequeathed a share of residue, amounting to 45,000*l*., to B.'s wife, and appointed B. sole executor. The will contained no direction that this sum should be for the separate use of B.'s wife. There was no evidence as to what had passed between B. and R. at the time of the execution of the will:—Held, that, in the absence of evidence, the court could not assume such a dereliction of duty on B.'s part in not informing R. of the effect of the will, as to make B. a trustee for his wife. *Birchall, In re, Wilson* v. *Birchall*, 44 L. T. 243; 29 W. R. 461.

Evidence.]—Where an attorney who draws the will of the testator takes a benefit under it, the case is to be considered with peculiar jealousy, and the jury who try the validity of the will must be satisfied that the testator knew its contents; but their consideration need not be confined to direct evidence, and they may find for the will upon circumstantial evidence only. *Barworth* v. *Marriott*, 1 Myl. & K. 643.

The circumstance that one residuary devisee was the attorney who drew the will, not decisive evidence of fraud. *Paine* v. *Hall*, 18 Ves. 475.

d. Purchases.

Generally.]—How far attorney may contract to purchase from his client. *Cane* v. *Allen* (*Lord*), 2 Dow, 289.

The solicitor who conducts the sale of property cannot become the purchaser without full explanation to the vendor, and informing him that he (the solicitor) is to become the purchaser. *Bloye's Trust, In re*, 1 Macn. & G. 488; 2 Hall & Tw. 140; 19 L. J., Ch. 89; 14 Jur. 49.

—— **Duty of Solicitor.**]—An attorney may deal with a client as a stranger where the circumstances are not such as to put him under the duty of advising the client. *Holman* v. *Loynes*, 4 De G. M. & G. 270; 23 L. J., Ch. 529; 18 Jur. 839; 2 W. R. 205.

Semble, that an attorney purchasing from his client ought to insist on the intervention of another professional adviser. *Pisani* v. *Att.-Gen. for Gibraltar*, L. R. 5 P. C. 516; 30 L. T. 729; 22 W. R. 900.

—— **Onus to Show Diligence.**]—An attorney cannot sustain his purchase from a client unless he can prove that his diligence to do the best for the vendor has been as great as if he was only

an attorney dealing for that vendor with a stranger. *Holman* v. *Loynes*, 4 De G. M. & G. 270; 23 L. J., Ch. 529; 18 Jur. 839; 2 W. R. 205.

—— **Consideration Untruly Stated.**]—The court will not support a deed where an attorney is the purchaser, his client the vendor, and the consideration is untruly stated. *Uppington* v. *Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291.

—— **Purchase to stand as Mortgage.**]—A beneficial purchase by a solicitor from his client pending that relation cannot be supported, but the solicitor may insist on and obtain a mortgage from his client for whatever is justly due to him. *Pearson* v. *Benson*, 28 Beav. 598.

—— **Power of Sale.**]—Where an absolute purchase is held, in consequence of the relation between the parties, to be available as a security only, the court will not import into the transaction a power of sale. *Ib.*

—— **Setting aside—Delay.**]—Delay of seven months in taking proceedings to set aside a sale, during which the purchaser was improving the property:—Held, no bar to the plaintiff's right to relief. *Ib.*

—— **By Solicitor in name of Another.**]—If an attorney or agent can show he is entitled to purchase property, notwithstanding his character of attorney or agent, yet, if, instead of openly purchasing it, he purchases it in the name of a third person, as his trustee or agent, without disclosing the fact, such purchase is void. *Lewis* v. *Hillman*, 3 H. L. Cas. 607. S. P., *McPherson* v. *Watt*, 3 App. Cas. 254.

—— **By Solicitor of Mortgagee.**]—A purchase of mortgaged property by the solicitor of a mortgagee, without any instructions from him, or of any apparent benefit to him, at a time of temporary depreciation of the property, is not a valid transaction. *Gibbs* v. *Daniel*, 4 Giff. 1; 9 Jur. (N.S.) 636; 7 L. T. 27; 10 W. R. 638.

Mortgage Debt — Purchase by Solicitor's Clerk.]—A solicitor's clerk consulted confidentially by a mortgagor cannot purchase the mortgage debt at less than was due upon it, and retain the same for his own benefit. *Hobday* v. *Peters*, 28 Beav. 349; 29 L. J., Ch. 780; 6 Jur. (N.S.) 754; 2 L. T. 590; 8 W. R. 512.

—— **By Solicitor-Trustee for Sale.**]—Purchase from his client by a solicitor, who was also trustee for the sale of the estate for payment of debts, confirmed, upon the ground of his having attempted ineffectually to sell, of there being no fraud in the transaction, and of the purchase having been recognised and approved of by the cestui que trust. *Clarke* v. *Swaile*, 2 Eden, 134.

Solicitor being also Judgment Creditor.]—Although an agent or solicitor, acting at the time as such for the vendor, cannot purchase for his own benefit, yet, where it was denied that he was employed in the sale by his client, and it was urged that being himself a judgment creditor, he had a right to be present and become a purchaser at the sale:—Held, that he might throw off his former character of solicitor at that particular time, and exercise the right belonging to him in another character. *Austin* v. *Chambers*, 6 Cl. & F. 1.

By Solicitor of Trustees under Creditor's Deed.]—Where a solicitor to trustees under a deed, whereby a debtor assigned all his property for the benefit of his creditors, with a resulting trust to himself, on a sale of the property by public auction became the purchaser of the property, and claimed to hold it as purchaser; but, on a bill being filed by the debtor, by his answer disclaimed to hold the property as purchaser, and declared himself ready and willing to be dealt with as a mortgagee in possession; he was allowed all the costs of the suit subsequently to the filing of his answer, and also of another suit subsequently filed by himself in the same matter, such costs having been mainly occasioned by the production of evidence to establish that which had been admitted by the solicitor himself. *Yetts* v. *Hilton*, 9 L. T. 502.

From Client's Trustee in Bankruptcy.]—The question was, whether the rule of law, which prevents a solicitor from purchasing the property of his client without giving full and complete disclosure, applied to a purchase by a solicitor from the trustee in bankruptcy of his client:—Held, that the trustee in bankruptcy so stood in the place of the bankrupt that the bankrupt's solicitor could not be allowed, as against the trustee, an advantage obtained by him on a purchase from the trustee by means of the knowledge he had gained while acting as solicitor for the bankrupt; and, therefore, that the transaction could not be supported in equity, and that the defendants must be declared to be trustees of all the advantage of the purchase for L.'s trustee in bankruptcy. *Luddy's Trustee* v. *Peard*, 55 L. J., Ch. 884; 33 Ch. D. 500; 55 L. T. 137; 35 W. R. 44.

By Solicitor for Creditors of Bankrupt (in Scotland).]—A common agent or solicitor in court employed on behalf of the creditors of the estate of the bankrupt in Scotland may be considered in the nature of a trustee, a purchase, therefore, by him of any part of the bankrupt's estate may be set aside; and at all events will be so if it appear there are any circumstances of improper or negligent conduct in such agent. *York Buildings Governor* v. *Mackenzie*, 8 Bro. P. C. 42.

In Litigation.]—Upon the principles of policy, no attorney shall be permitted to purchase anything in litigation, of which litigation he has the management. *Hall* v. *Hallet*, 1 Cox, 135; 1 R. R. 3.

—— **By Solicitor not on the Record.**]—A purchase of the subject-matter of a suit by an attorney is void as against the policy of the law, and it makes no difference that the purchaser is not the attorney on the record. *Simpson* v. *Lamb*, 7 El. & Bl. 84; 26 L. J., Q. B. 121; 3 Jur. (N.S.) 412; 5 W. R. 227.

Where suit Ended.]—Secus, where litigation is at an end. *Smith* v. *Selwyn*, 5 W. R. 682.

Assignment of Fruits of Verdict before Exis-

tence of Relationship.]—An assignment of the fruits of a verdict to a solicitor, which would be void as being against the policy of the law if the relation of solicitor and client existed at the time of its execution, does not become void by reason of that relationship being subsequently created. *Simpson* v. *Lamb* (7 El. & Bl. 84) approved. *Davis* v. *Freethy*, 59 L. J., Q. B. 318; 24 Q. B. D. 519—C. A.

Of Charge.]—Semble, that the solicitor or counsel of the owner of an estate, if he purchase a charge upon the estate, will be entitled only to the amount he actually paid. *Carter* v. *Palmer*, 11 Bligh (N.S.) 397; 8 Cl. & F. 657.

Of Annuity at Undervalue.] — B. E. L., being solicitor and land agent of W. M., and engaged in redeeming annuities charged upon the estate of W. M., took an assignment of one of the annuities, for his own benefit, for a less sum than that which had been agreed upon by the deed of annuity for its repurchase :—Held, that B. E. L. was a trustee for W. M. for the repurchase of the annuity. *Lawless* v. *Mansfield*, 1 Dr. & War. 557; 4 Ir. Eq. R. 113.

Of Annuity — Payment of Costs out of Purchase-Money.]—Where a solicitor purchased an annuity from a person not previously his client, but was himself the only solicitor employed in the transaction, and charged the vendor the costs of the deed, which were paid out of the purchase-money immediately after the completion of the purchase :—Held, first, that this was not a dealing within the rule against purchases by solicitors from their clients. *Edwards* v. *Williams*, 32 L. J., Ch. 763; 8 L. T. 477; 11 W. R. 561.

Held, secondly, that there was no such retainer or return of any portion of the purchase-money as avoided the annuity under s. 6, 53 Geo. 3, c. 141. *Ib.*

Of Equity of Redemption—Setting Aside.]—D. and C., solicitors, who had acted for the mortgagees and the plaintiffs, contracted, under a forced sale, and under a pressure created by themselves, to purchase from the plaintiffs the equity of redemption; but twenty-one days prior thereto, at the time when they offered to purchase the property, D. and C. ceased to act as solicitors for the plaintiffs, and another solicitor acted on their behalf, and sanctioned the agreement, who, it did not appear, had sufficient information as to the state of the plaintiffs' affairs, or of the circumstances, or of the value of the property :—Held, that the deeds must be set aside, with costs. *Gibbs* v. *Daniel*, 4 Giff. 1; 9 Jur. (N.S.) 636; 7 L. T. 27; 10 W. R. 688.

Lease, under power, to Solicitor.] — G., tenant for life in settlement, is thereby empowered to make lease for lives of lands in Ireland, at the best rent, and without fine, and with consent of trustees to raise any sum of money. The trustees, in pursuance of power, consent that G. should by mortgaging all or any part of lands, or in any other manner he should think fit, raise any sum of money, not exceeding 5,000*l.* G., being in distress and involved in litigation, in consideration of 300*l.* and rents, grants to B., his solicitor, part of the lands in settlement upon lease for lives. The grant and receipt, expressing that 300*l.* was raised under power and consent, as part of 5,000*l.*, were duly registered. The rent and premium calculated at 6*l.* per cent. were considerably short of the annual value. On appeal :—Held, a good execution of power, but void as fraudulently obtained by B. *Ward* v. *Hartpole*, 3 Bligh, 470; 22 R. R. 61.

Obtaining Lease—Setting aside—Defence.]—Where an attorney obtains from his client a fee farm lease of part of the lands which were the subject of a suit, equity will set it aside, and a fraudulent dereliction of a suit, by a solicitor, cannot be pleaded by him in defence of an imposition on his client. *Kenney* v. *Browne*, 3 Ridgw. P. C. 462, 504, 522.

Under Decree.]—The solicitor to a mortgagee of an estate sold under a decree, consenting to the sale, but not a party to the suit, having become the purchaser, not allowed to retract, although before the hammer fell, and the motion refused with costs. *Freer* v. *Rimmer*, 14 Sim. 391.

A party to a suit, who was also a solicitor, and had the conduct of a sale decreed by the court, purchased at the sale under a feigned name. The court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and, if there should be no higher bidder, the party to be held to his purchase. *Sidney* v. *Ranger*, 12 Sim. 118.

It is a settled rule of the court that the plaintiff or his solicitor cannot bid at a sale under a decree, without the leave of the court; non-compliance with that rule will vitiate the sale. *Popham* v. *Exham*, 10 Ir. Ch. Rep. 440.

—— **In Name of Another.**]—If a solicitor or trustee secretly purchase, in the name of another at a sale under the court, the sale is void. *Ib.*

—— **Laches.**]—Where there has been concealment, a violation of a rule of the court, or the sale was void, laches, or lapse of time, will not purchase relief. *Ib.*

Sale under Decree.]—Semble, a solicitor having the conduct of a sale under a decree is under an absolute incapacity to purchase at it. *Atkins* v. *Delmege*, 12 Ir. Eq. R. 1.

—— **Rule as to Purchase by Solicitor.**]—The rule that, at a sale in a suit by an order of the court, parties to the suit and their solicitors cannot become purchasers, will not be extended so as to embrace the case of a purchase by a person who, being the solicitor in another suit for persons interested in the proceeds of such sale, has obtained an order to attend the proceedings in the first suit on their behalf, and whose name, without his consent or knowledge, has been placed in the particulars of sale, as that of a person from whom copies and information could be obtained. *Guest* v. *Smythe*, 39 L. J., Ch. 536; L. R. 5 Ch. 551; 22 L. T. 563; 18 W. R. 742.

But if the purchaser's position had been brought within any of the well-established rules of equity, the court would not have been precluded from opening the sale by reason of the 30 & 31 Vict. c. 48, s. 7. *Ib.*

Leave to bid at a sale by the court, granted to a solicitor on the record, relieves him from his fiduciary character, and places him in the same position as an ordinary purchaser. *Coaks* v. *Boswell*, 55 L. J., Ch. 761; 11 App. Cas. 232; 55 L. T. 32—H. L. (E.) Reversing 33 W. R. 376—C. A.

—— **Relief—Lapse of Time.**]—Relief in such cases is given after a great lapse of time; and where there is a deception on the court. Semble, there is no fixed period of limitation to bar relief. *Atkins* v. *Delmage*, 12 Ir. Eq. R. 1.

A., a solicitor, having a charge on real estate, caused a bill to be filed, in his partner's name, to raise the charge; a sale having been decreed, A., without obtaining the leave of the court, purchased the lands in the name of B., to whom the conveyance was made. The fact that A. was the real purchaser was never disclosed to the master, or to the parties in the cause; and several orders were made, on applications in the name of B., calculated to lead the court to believe that he was the real purchaser, though the purchase money was paid by A. The court, after nineteen years, and after the death of A., and his partner, set aside the sale, although it was not proved to have been fraudulent or at an undervalue. *Popham* v. *Exham*, 10 Ir. Ch. R. 440.

Confirmation of Purchase.]—In the case of a contract by a solicitor to purchase his client's property, a confirmation to give a title to the solicitor to have the contract specifically performed, must be strong and plain, and with knowledge of the infirmity of the contract. *Cutts* v. *Salmon*, 4 De G. & Sm. 125. Affirmed, 21 L. J., Ch. 750; 16 Jur. 623.

—— **By Will.**]—A solicitor purchased a property from his client, who, by a codicil, confirmed the sale and devised the property to the solicitor. The court having, on the evidence, held the sale invalid, also decided that the codicil was inoperative in equity. *Waters* v. *Thorn*, 22 Beav. 547.

Rights of Purchasing Solicitor's Mortgagee.]—A sale by auction of a policy of insurance by a client to his solicitor, in whose possession the policy was, set aside; but the claim of a mortgagee without notice, with whom the policy had been deposited by that solicitor to secure the payment of the money, was established. *Lawrence* v. *Galsworthy*, 3 Jur. (N.S.) 1049.

A sale between solicitor and client having been set aside and the property sold, and the purchase money brought into court in another suit, a mortgage created by the solicitor who had purchased was refused priority on the fund in court, although the mortgagee alleged that he was a purchaser for value without notice. *Barnard* v. *Hunter*, 2 Jur. (N.S.) 1213; 5 W. R. 92.

Rights of Sub-purchaser.]—A. purchased an estate from his client, and afterwards sold it to B. B. employed no other solicitor than A.:—Held, that B. was affected with the knowledge possessed by A. of the objectionable nature of the transaction between himself and his client. *Spencer* v. *Topham*, 22 Beav. 573; 2 Jur. (N.S.) 865.

Setting aside Right of Third Party.]—If a solicitor make a purchase of an annuity from his client, and institute a suit against third parties to recover payment of such annuity, such third parties cannot sustain an objection to the purchase on the ground that it was made by a solicitor from his client; the client alone can sustain the objection. *Knight* v. *Bowyer*, 27 L. J., Ch. 520; 4 Jur. (N.S.) 569. Affirming 23 Beav. 609.

Of Annuity — Setting aside at Instance of Heir.]—Annuity obtained at an inadequate price by a confidential attorney from his client, cognisant of all the facts, under no legal disability, and acquiescing thirty years, set aside at the suit of the heir of the client, succeeding to the estate under a family settlement; no evidence having been lost, or facts thrown into obscurity by lapse of time, and the client being ignorant of his power to resist. Sufficient privity existed between the client and his heir so succeeding to the estate, to entitle the heir to the assistance of the court to disencumber the estate. From the delay, and also that the client, though under no legal disability, had voluntarily paid the annuity, whereby the attorney's family must have acted under the persuasion that they were well entitled to use the money so paid as their own, no retrospective account directed to make the attorney's representative refund. *Molony* v. *L'Estrange*, Beat. 406.

Setting aside.]—Agreements entered into between an attorney and his client for the purchase by the attorney, at an under price, of estates to which the client had good title, but of which he was not in possession, set aside for fraud and maintenance. *Jones* v. *Thomas*, 2 Y. & Coll. 498.

Purchase of a reversionary interest by an attorney from his client, though in the event advantageous, without fraud or any misrepresentation, the proposal coming from the client, and no confidence upon the subject, both ignorant of the value; the bill charging fraud and misrepresentation; confidence and knowledge on one side, with ignorance on the other, and bringing forward the only incorrect circumstance, the receipt taken as for money paid, though the consideration was by deduction from a bill of costs not then of that amount, dismissed with costs. *Montesquieu* v. *Sandys*, 18 Ves. 302; 11 R. R. 197.

——**Existence of Relationship of Solicitor and Client—Evidence.**]—An attorney was engaged in the sale of his client's property by auction, on which occasion a small portion only of the property was sold. He was subsequently employed in making out abstracts of title of the portion unsold, and sixteen months after the completion of the abstracts, during which term there had been no employment of the attorney professionally by the client, the attorney bought a portion of the unsold property, and debited the client in his books for drawing the agreement for sale. The consideration which was on the face of the purchase deed stated to have been paid was in fact composed partly of a previous debt for costs, and partly of such an annuity as the balance of the purchase money would, according to the government tables, obtain for a healthy life. The client died three years and a half

after the sale. It was in evidence that the client was of intemperate habits for many years previously and up to the transaction in question. It did not appear that the attorney had made any special inquiries as to the state of health of the client, or endeavoured in any other quarter to obtain a higher annuity, which from the intemperate habits of the client might in all probability have been procured :—Held, on a bill filed by the heir-at-law of the client, to set aside the transaction, that the relation of attorney and client subsisted at the time of the sale, and that the attorney had failed to show that no industry he was bound to exert would have got a better bargain for his client, and the sale was accordingly set aside. *Holman* v. *Loynes*, 4 De G. M. & G. 270 ; 23 L. J., Ch. 529 ; 18 Jur. 839 ; 2 W. R. 205.

—— **Notwithstanding Order in Administration Suit.**]—A suit was instituted to set aside for fraud a sale by client to solicitor. The solicitor had died, and his estate had been administered in a suit under the decree in which the present plaintiffs had come in, and in their presence an order had been made in the administration suit declaring the sale good. The fraud for which it was sought to set aside the sale was discovered subsequently to the order in the administration suit :—Held, that the sale could be set aside notwithstanding the order in the administration suit, and without a bill of review. *Turner* v. *Tepper*, 46 L. J., Ch. 703 ; 25 W. R. 726.

—— **Undervalue.**]—Purchase by a solicitor from his client for 1,820*l.* upheld, though he had given about 100*l.* less than the value, and had two years afterwards sold part of the property at a fancy price, making a profit of 970*l.* *Spencer* v. *Topham*, 22 Beav. 573 ; 2 Jur. (N.S.) 865.

In February, 1837, A. sold and conveyed real estate to his solicitor, B. In October, 1837, A. died, having by his will, dated in May, 1837, given all his real estate to his wife for life, and after her death to C. for life, with remainder to C.'s first and other sons successively in tail male. C. died in 1847, but his eldest son, D., did not attain twenty-one until January, 1852. B. died in 1853, having by his will, dated in 1851, given all his real estate to E. and F. In 1855 D. filed a bill against E. and F. to set aside the conveyance from A. to B. In that suit A.'s widow was a defendant. B. had been A.'s solicitor for several years prior to the date of the conveyance ; he acted in relation thereto as the solicitor for A., as well as on his own behalf ; he continued to be A.'s solicitor until A.'s death ; and the conveyance was made at an under-value :—Held, that such conveyance by A. to B. was void ; and it was accordingly set aside as against A. and D., but without prejudice to any question between A.'s widow and E. and F. in respect of her life interest. *Gresley* v. *Mousley*, 4 De G. & J. 78 ; 28 L. J., Ch. 620 ; 5 Jur. (N.S.) 583 ; 7 W. R. 427.

—— **Absolute Conveyance reduced to Mortgage.**]—An absolute conveyance of a reversionary interest to a solicitor reduced by decree to a mortgage, the solicitor standing in a quasi though not absolute relationship of trustee and solicitor, and failing to prove that the transaction was clearly understood, and that full value was given. *Denton* v. *Donner*, 23 Beav. 285.

—— **Loss of right to Relief by Delay and Conduct.**]—At a meeting between A., plaintiff in a suit revived by her as executrix of her deceased husband, and B., her solicitor, and C., solicitor for the defendant, terms of compromise were considered, but not finally agreed upon. On the following day, viz. the 17th October, 1844, B. and C. entered into a written agreement for the compromise of the suit on behalf of their respective clients, of which A. was immediately informed. A part of the agreement was that A. should have 3,000*l.* allowed to her as executrix and it was arranged between B. and C. that that sum should be assigned to B. in full satisfaction of his claims against A.'s late husband, and A. as his legal personal representative ; that C. should be substituted as solicitor for A. in the suit ; and that all papers in B.'s possession relating thereto should be handed over to C. The claims of B. were founded on advances of money and on bills of costs against A.'s deceased husband, which bills had not been delivered, and on which bills and advances B. had charged compound interest, on the principle of annual rests, in pursuance of a mutual agreement to that effect. On the 19th October, 1844, A., without having any independent professional advice, and without having any account rendered to her by B., was induced by him to execute an assignment to him of the 3,000*l.* in satisfaction of the aforesaid claims ; and soon afterwards C. was substituted as solicitor for A. in the suit, and the papers in B.'s hands were handed over to him. In 1844 A., in consideration of 600*l.*, assigned to B. a further interest under the compromise ; but this interest was subsequently, in 1851, reassigned to A. on repayment of the 600*l.* Before 1845 the relation between A. and B. of solicitor and client, had ceased ; and before 1846 A. had independent professional advice, and became aware of her rights in relation to the assignment made by her to B. in October, 1844. In 1852 A. filed a bill against B. to set aside the assignment of the 19th October, 1844, and to procure the taxation of B.'s bills of costs :—Held, that, although A. had originally, and during some years after 1844, a case for setting aside the assignment of the 19th October, 1844, yet she had, by her own delay and conduct, subsequent to the relation of solicitor and client between B. and herself having ceased, and subsequent also to her having had independent professional advice and information in respect of her rights, lost her title to relief. *Lyddon* v. *Moss*, 5 Jur. (N.S.) 637 ; 7 W. R. 433.

—— **Lapse of Time.**]—An owner in fee of an estate, in 1807, agreed to sell it to his solicitor while the relation of solicitor and client was continuing between them. The agreement, for particular reasons, was not finally carried out till 1823. In 1826 the relation of solicitor and client ceased. The purchaser died in 1828, and the vendor died in 1829, without having taken any steps to impeach the transaction. In 1859 the trustee and cestuis que trustent under the will of the vendor filed a bill to set aside the sale, on the ground that the estate was sold at an under-value, while the relation of solicitor and client subsisted between the parties :—Held, that lapse of time was alone a bar to the suit, and, as it appeared that full value was given for the

property, the bill was dismissed, with costs. *Clanricarde* (*Marquis*) v. *Henning*, 30 Beav. 175; 30 L. J., Ch. 865; 7 Jur. (N.S.) 1113; 5 L. T. 168; 9 W. R. 912.

The solicitor for X., who was plaintiff in a suit to raise a charge on certain lands, purchased in the name of a trustee the lands at a sale under the decree, which was conducted by him in a manner that showed either great negligence or a design to depreciate the property, and the proceeds of which were insufficient to discharge his demand for costs, without paying anything to X. The sale was declared void on a bill filed by X. sixteen years afterwards, without any proof of its being at an under value. *Atkins* v. *Delmege*, 12 Ir. Eq. R. 1.

—— **Settlement by Purchaser—Notice.**]—The solicitor settled the estate on the marriage of his son; he himself prepared the settlement for all parties, which recited the documents connected with the purchase:—Held, that, although where a solicitor, being vendor, acts for the purchaser from him, his knowledge may not always be constructive notice, yet such a doctrine did not apply to this case; and that the son, his wife, and children, were bound, as purchasers, with notice. *Ib.*

—— **Lapse of Time—Costs.**]—Three farmers, being entitled to land, employed as their solicitor in the sale of it by auction the owner of adjacent land, whose bailiff was one of the vendors. The solicitor prepared and settled the conditions of sale, and attended as a bidder at the sale, and, after a competition, was declared the purchaser of one of the lots. The plaintiff, who was one of the vendors, was not then of age, being in his twenty-first year only. After attaining his majority, he and his brothers received from the solicitor sums on account of the purchase money, and let the solicitor into possession. Nearly three years afterwards the plaintiff filed a bill to rescind the sale:—Held, that, there having been no conveyance, and there being no obstacle to the plaintiff recovering the land in ejectment, and there having been acts of acquiescence on the plaintiff's part, the bill was filed too late, and it was dismissed; but, having regard to the relation between the plaintiff and defendant, and the duty imposed upon a solicitor, without costs. *Cutts* v. *Salmon*, 4 De G. & Sm. 125. Affirmed, 21 L. J., Ch. 750; 16 Jur. 623.

Agreement for Reversionary Lease obtained by Attorney from Client's Son—Specific Performance.]—An agreement for a reversionary lease having been obtained by an attorney from the son of his employer, who was remainderman in a settlement, under which his father, who had granted the existing lease, was tenant for life: on a bill for specific performance the court refused under the circumstances to enforce the agreement. *Blakeney* v. *Bagot*, 3 Bligh (N.S.) 237; 1 Dow, 405.

Bill by Solicitor for Specific Performance—Evidence.]—Where the defendants (vendors) signed a contract of sale, without professional assistance, and the plaintiff (purchaser) is a solicitor, circumstances of evidence, generally leading to the notion of surprise or mistake, and objections, otherwise not decisive per se, will be sufficient to induce the court to withhold a decree for specific performance. *Deardon* v. *Bamford*, 10 L. J., Ex. Eq. 54.

—— **Onus.**]—A solicitor, having agreed to purchase of his client a certain property, filed a bill for specific performance:—Held, under the circumstances of the case, that the burden of supporting the contract lay on the plaintiff; and that, whatever the rule might be in other cases, this was one in which demonstration of the full value having been given was part of the burden thrown on him who supported the contract; and that, he not having proved that full value was given, the contract could not be enforced. *Thomas* v. *Phillipps*, 11 Jur. 80.

—— **Costs.**]—The answer having alleged circumstances of gross fraud and circumvention, which the defendant failed to prove, the court refused to give him his costs. *Ib.*

Title—Objection to, by Solicitor.]—A solicitor who has been employed to advise on a title cannot, on purchasing the property himself, set up an objection which he did not think important when advising his principal. *Beevor* v. *Simpson*, Tam. 69; 31 R. R. 67.

Title Depending on Purchase from Client.]—A title depending on the validity of a purchase by a solicitor from his client forced on an unwilling purchaser, on proof of the validity of the transaction, though given in the absence of the client. *Spencer* v. *Topham*, 22 Beav. 573; 2 Jur. (N.S.) 865.

Evidence.]—Where a purchase by a solicitor from a client is defended on the ground of the intervention of other professional assistance, it must be shown that the new adviser had a proper opportunity of discharging his duty. But the intervention of a solicitor who is known by the purchaser to neglect his duty is no protection; or if it appears that a solicitor, purchasing from his late client, is aware of neglect of duty in the new adviser, and, especially if the purchaser withholds or suppresses from him any information of importance, the transaction is vitiated. *Gibbs* v. *Daniel*, 4 Giff. 1; 9 Jur. (N.S.) 636; 7 L. T. 27; 10 W. R. 688.

—— **Duty of Solicitor.**]—A solicitor who purchases from his client is bound to establish that the sale was as advantageous to the client as it could have been if the solicitor had used his utmost endeavours to sell the property to a stranger. *Spencer* v. *Topham*, 22 Beav. 573; 2 Jur. (N.S.) 865.

When a solicitor purchases or obtains a benefit from a client, he must show that he has taken no advantage of his professional position, but has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger. *Savery* v. *King*, 5 H. L. Cas. 627; 25 L. J., Ch. 482; 2 Jur. (N.S.) 503; 4 W. R. 571.

—— **Costs.**]—A solicitor is not incapacitated from purchasing from his client, but he will be bound to show that he paid that price for the property which, in the exercise of his professional duty, he would have advised his client to accept from a third person; and, though a bill to set aside such a sale is dismissed, the court will frequently refuse the solicitor his costs of the suit.

Champion v. *Rigby*, Tam. 421; 1 Russ. & M. 539; 9 L. J. (O.S.) Ch. 211.

Practice.]—On a bill filed to set aside the sale of an estate, on the ground of fraud practised by the defendant on the plaintiff, the plaintiff is not at liberty to give evidence of the defendant's having stood in the relation of his attorney at the time of the sale, with the view of raising an inference, that he had acted fraudulently by taking advantage of that character, the fact of his having been such an attorney not being stated, or put in issue by the bill. *Williams* v. *Llewellyn*, 2 Y. & J. 68.

—— **Evidence of Payment of Purchase-money.**]—A purchase by a solicitor from a client having been set aside on the ground that the sufficiency of the consideration was not established, an inquiry was directed with a view to ascertain whether the purchase-money was paid. No evidence was adduced on the inquiry to prove the payment, except the acknowledgment in the body of the deed and the usual indorsed receipt. It appeared that no further evidence could be had, and that there was no reason to suppose that any evidence had been destroyed:—Held, that the acknowledgment and receipt were not sufficient evidence as against parties claiming under the client, and that the purchase-money must be considered not to have been paid. *Gresley* v. *Mousley*, 3 De G. F. & J. 433; 31 L. J., Ch. 537; 8 Jur. (N.S.) 320; 6 L. T. 86; 10 W. R. 222.

—— **Evidence—Onus.**]—The court does not hold that an attorney is incapable of purchasing from his client, but watches such a transaction with jealousy, and throws on the attorney the onus of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser. The circumstances of the employment may be considered, and the amount of influence estimated. *Pisani* v. *Att.-Gen. for Gibraltar*, L. R. 5 P. C. 516; 30 L. J. 729; 22 W. R. 900.

—— **Lapse of Time.**]—The burden of sustaining a purchase by a solicitor from his client, at least within twenty years from its date, is on the solicitor. *Gresley* v. *Mousley*, 4 De G. & J. 78; 28 L. J., Ch. 620; 5 Jur. (N.S.) 583; 7 W. R. 427.

During the continuance of the relation of solicitor and client the same weight ought not to be given to lapse of time as when no such relation exists. *Ib.*

—— **Evidence—Onus—Taxation after Long Time.**]—On a question of the propriety of a purchase by a solicitor from his client, it is the general rule that the onus of showing the transaction to have been fair lies upon the solicitor, but the nature and degree of the evidence required for that purpose will vary according to the mode of employment of the solicitor, and to the influence which his position may appear to have given him either as to costs or otherwise. In such a case, where the price was shown to have been fair with reference to the surface value of the land (which alone was usually looked to in purchases in that part of the country), but, shortly after the purchase, the coal, which was known to both parties to be under the soil, acquired great additional value from the formation of a railway, the transaction, which had taken place seventeen years before the bill was filed, was sustained, although a large part of the consideration was a bill of costs due to the solicitor, for which a previous mortgage had been given; but the court referred the bill to the master, to inquire whether there were any and what items improper and such as would not have been allowed upon taxation, the court reserving further directions. *Edwards* v. *Meyrick*, 2 Hare, 60; 12 L. J., Ch. 49; 6 Jur. 924.

—— **Relationship of Solicitor and Client.**]—Although the relationship of attorney and client may exist, yet, if it has no existence in hâc re, the rule with regard to the onus of proof may no longer be applicable. *Ib.*

—— **Setting Aside—Production of Deeds.**]—A suit was instituted by a cestui que trust, to set aside a sale by trustees to their solicitor. The solicitor submitted to give up the purchase on repayment. He admitted the possession of the title-deeds, but resisted their production, unless the plaintiff consented to repay the purchase money, saying that the title was bad, and that the plaintiff would have the power, as he had the inclination, to expose the title, in case he abandoned the suit:—Held, that the solicitor was bound to produce the deeds. *Shallcross* v. *Weaver*, 12 Beav. 272. Affirmed, 2 Hall & Tw. 231; 19 L. J., Ch. 450.

—— **Setting Aside—Costs.**]—A primary decree having set aside as an absolute conveyance an assignment of lands by a client to his solicitor, which, however, was ordered to stand as a security for the amount to be found due to the latter at its date for cash advances and costs:—Held, that the solicitor should pay the costs of the suit up to and including the first hearing, but that each party should bear his own subsequent costs, it appearing doubtful, on the taking of the account, whether there was not still a small balance due to the solicitor at the date of the final decree. *Shannon* v. *Casey*, Ir. R. 8 Eq. 307.

—— **Discharging Solicitor.**]—The court refused to discharge the solicitor in the cause from a purchase before the master, with a view to prevent a sale at under value. *Nelthorpe* v. *Pennyman*, 14 Ves. 517.

—— **Absolute Covenant for Title—Restraining Action on Covenant.**]—When a solicitor, acting on behalf of both parties, prepares a conveyance to himself containing an absolute covenant for title on the part of the vendor, when he knows or must be taken to have known that his title was defective, he will be restrained by perpetual injunction from proceeding with an action on the covenant. *Williamson* v. *Moriarty*, 19 W. R. 818.

—— **Parties.**]—To a bill seeking a declaration that a purchase by a solicitor of an annuity charged on his client's estate was made with the client's money, or that the client was entitled to the benefit of the purchase, and for consequential relief, registered judgment creditors of the client are not necessary parties. *Ford* v. *Tennant*, 3 De G. F. & J. 697; 29 Beav. 452; 7 Jur. (N.S.) 615; 9 W. R. 674.

—— **Form of Decree.**]—A purchase was set

aside on the ground that the purchaser was at the time solicitor for the vendor, and the judgment directed the usual accounts of his receipts during his possession :—Held, upon the balance of authority, that the decree must order him to account for such sums as, but for his wilful default, he might have received, though the bill did not charge wilful default, nor pray relief in respect thereof. *Adams* v. *Sworder*, 10 L. T. 49; 12 W. R. 615.

e. Mortgages.

Generally—For Debt due or Services rendered.]—A security which has been given to an attorney by his client for a debt really due, or as a reward for services already rendered, will not be set aside in equity. *Cheslyn* v. *Dalby*, 2 Y. & C. C. C. 170.

—— **On Settled Account.**]—Where the solicitor and client settled an account, and a mortgage security was given with covenant to pay ; and the solicitor having sued on the covenant, the defendant filed a bill, impeaching the transaction on the ground of undue influence, error, fraud, and suspicion, which was denied by the answer ; an injunction refused, with costs. *Jones* v. *Roberts*, 9 Beav. 419.

—— **For Balance of Account.**] — Where a solicitor has lent money to his client and taken a mortgage for the balance appearing to be due to him by certain accounts in which the items of his demand are specified, the court will not, merely because the parties stood in the relation of solicitor and client, deprive the mortgagee of any part of the benefit of his security. *Hampson* v. *Nicoll*, 6 L. J. (O.S.) Ch. 22.

—— **Mortgage—Settlement—Account.**]—Bill for general account lies against a solicitor and agent taking security without a settlement of accounts. *Detillin* v. *Gale*, 7 Ves. 584.

—— **Security for Debt due from third Person.**]—A solicitor is not at liberty to deal with his client for a security for a debt due to him by a third person, without giving to his client all the information he possesses connected with his demand and the nature of his security. *Higgins* v. *Joyce*, 2 Jo. & Lat. 282.

—— **Special Provisions in.**]—When a solicitor takes a security from his client, the court will not give effect to any stipulation, if unusual and disadvantageous to the client, such as postponing the right to redeem or to pay off the debt for twenty years. *Cowdry* v. *Day*, 1 Giff. 316 ; 29 L. J., Ch. 39 ; 5 Jur. (N.S.) 1199 ; 1 L. T. 88 ; 8 W. R. 55.

Stipulations for commission on receipt of rents and conversion of arrears of interest into principal, inserted by a solicitor mortgagee in a mortgage deed prepared by himself, and insisted upon by him as the condition of any further advance to his client, will not be allowed in taking the account between the solicitor, as mortgagee in possession, and his client in a foreclosure suit. *Eyre* v. *Hughes*, 45 L. J., Ch. 395 ; 2 Ch. D. 148 ; 34 L. T. 211 ; 24 W. R. 597.

—— **Unusual Provisions in.**]—The owner of leasehold property, part of which was subject to six mortgages, was threatened with an immediate sale by the third mortgagee of the greater part of it, who had bought in the second mortgage, and was in treaty for the purchase of the first. The defendant, a solicitor, advanced the money needful to pay off the mortgagee and prevent a sale, stipulating that the whole of the mortgages should be paid off, and that he should have a mortgage for the total sum paid by him, including costs of the different mortgagees, to bear interest at the rate of 6*l.* per cent., the first and second mortgages having previously been at 5*l.* per cent. He also stipulated that the mortgage should include a separate property which was in mortgage at 5*l.* per cent., and that he should be entitled to costs as if a client had been mortgagee. All these stipulations were distinctly explained to the mortgagor, and were carried into effect by the mortgage deed. In an action for redemption brought by the mortgagor :—Held, that as the unusual provisions had been fully explained to the mortgagor, they were binding upon him, except that, as to the additional property, which had been included solely for the mortgagee's own protection, the additional rate of interest must be disallowed. *Jones* v. *Linton*, 44 L. T. 601.

—— **Omission of Usual Provisions.**]—A solicitor advanced money to his client on a second mortgage, in which was inserted a power of sale exercisable at any time without the usual proviso requiring that notice should be given, or some interest should be three months in arrear ; and it was not shown that he explained to the client that the power was not in the usual form. The solicitor afterwards took possession, and for several years received the rents, which, together with some payments made by the mortgagor, exceeded the interests on both mortgages. He then sold the property without notice :—Held, in an action by the mortgagor against the solicitor, that the omission from the power of sale of the usual qualifying clause was a breach of duty, and that the mortgagee was liable in damages as for an improper sale, unless it could be shown that some interest was three months in arrear ; and whether the absence of explanation did not make it improper even if there was interest in arrear, quære. *Cockburn* v. *Edwards*, 51 L. J., Ch. 46 ; 18 Ch. D. 449 ; 45 L. T. 500—C. A. Affirming 29 W. R. 136.

—— **Costs by way of Damages.**]—Held (reversing the court below), that the difference between party and party costs and solicitor and client costs of the present action could not be given to the plaintiff by way of damages. *Ib.*

Champerty — Mortgage taken by Solicitor through a Nominee.]—T., being rightful heir to lands, employed L. as his attorney to prosecute his claims, on the terms that he should have, in lieu of all claim for costs, one-third of the estate which might be recovered. The proceedings being successful, L. entered, as agent of T., into possession of the rents and profits of the estate. L. afterwards pressing for a settlement of his claims, T. required an advance by way of mortgage, and applied to L. for it. L. refused to advance any money himself, but procured G. to advance the necessary amount for payment of his own claim and a further advance to T. A mortgage was executed by T. to G., with a power of sale. Immediately after the mortgage L. procured from T. an authority to pay 120*l.* for the purpose of obtaining the title-deeds, which remained in the possession of a solicitor to the

wrongful heir, who claimed a lien thereon for 120*l.* for costs. Shortly after this, notice was given by G. calling in the mortgage money; and, default being made, the power of sale was exercised, and the lands advertised for sale. It turned out that G. was merely a nominee for L., and had advanced no moneys of his own, and that L. had concealed this fact, and the fact that the original retainer was void for champerty:—Held, therefore, that the agreement and retainer were void; and that the mortgage must be cut down, and stand as a security for so much only as was justly due from T. to L. *Thomas* v. *Lloyd*, 3 Jur. (N.S.) 288.

A great part of the amount consisted of bills of costs; but interest at 4*l.* per cent. was directed. *Ib.*

Notwithstanding very suspicious circumstances, the 120*l.* was allowed to be added by L. to the other sums due to him. *Ib.*

Solicitor acting as Agent and Advancing Money.]—Attorney acting as agent for mortgagor and mortgagee in mortgage, and as agent and quasi banker for mortgagor, will not be allowed to charge the mortgaged premises with a greater sum (although actually advanced by him on account of his principal and client, and within the amount of the sum to be borrowed on mortgage) than shall be proved to have been really paid to him in money by mortgagees on account of, and as agent for, the mortgagor; nor will the most minute fraction advanced by him to make up the integral sum of money be allowed to stand as a charge on the estate. *Lewis* v. *Morgan*, 5 Price, 42; 4 R. R. 860.

Bond for Money Lent—Repayment out of Money received for Debtor.]—M., the solicitor and agent of L., having been paid all his costs, &c., as such, lent L. the sum of 500*l.* (for which L. gave his bond), which he was to repay himself out of a sum of 600*l.*, a fine for abuse which he was to receive for L. M. received the 600*l.*, and retained thereout 500*l.*, and, L. dying soon after, he entered judgment on the bond, and assigned it for the full amount which the assignee claimed out of L.'s estate. The trustee of L.'s will produced a letter of M. setting forth the agreement as to the loan, and praying that M. should be ordered to pay over the 500*l.* so retained by him. M. denied the letter to be genuine, and an issue was directed; and, the jury finding that it was in his handwriting, the court ordered M. to pay over the amount of the bond, and all costs of the issue, petitions, &c. *Bucke* v. *Murphy*, 3 Ir. Eq. R. 373.

Composition Deed with Creditors, of whom Solicitor is One—Failure of Debtor to Comply with Terms.]—A person, being embarrassed in his circumstances, enters into a composition with his creditors, one of whom is his solicitor. The solicitor prepares and (with the other creditors) executes the deed of composition, by the terms of which the debtor is to pay 1,500*l.* to his creditors by instalments, and to insure his life for that amount, and, on failure of such payment and insurance, the deed is to be void. There is no evidence that the solicitor ever explained to his client the nature of the legal and equitable obligations imposed on him by the deed, or ever instructed him that the covenants in it were to be strictly performed, or that he, the solicitor, was bound by it; but there is evidence of a private understanding between the solicitor and the client, that the solicitor, notwithstanding the deed, shall be paid in full. The debtor fails to insure his life for the whole 1,500*l.* His solicitor cannot, as between himself and his client, insist upon this failure as ground for avoiding the deed. *Watts* v. *Hyde*, 2 Coll. 368; 10 Jur. 127.

Incumbrance Bought Up at Undervalue—Solicitor taking Second Incumbrance—Priority.]—The heir-at-law, who was also the personal representative of a deceased debtor, purchased up an incumbrance on the estate for less than the sum due on foot of it:—Held, under the circumstances, that he was entitled to the full amount of the sum secured by it, as against a subsequent incumbrancer, a solicitor, who advised the purchase as a means of providing for the heir, and did not disclose that the purchase would enure to his own benefit. *Bayly* v. *Wilkins*, 3 Jo. & Lat. 630.

Solicitor taking Assignment of Legatees' Interest—Rate of Interest.]—F., who acted as solicitor to trustees and executors, and also to some of the legatees, under a will, took assignments, absolute in terms, from the legatees of their reversionary interests, the consideration being smaller than the actual value of the interests assigned. F. died insolvent, and in the administration of his estate a question was raised as to the rate of interest to which the estate was entitled in respect of these advances to the legatees, as it was admitted that the assignments could not be treated as absolute, but only as securities for the moneys advanced:—Held, that interest at the rate of 5 per cent. must be allowed, though no general rule could be laid down as to the rate of interest to be allowed in cases of the kind. *Unsworth*, *In re*, 12 L. T. 49.

Solicitor taking Mortgage from Client on Different Terms from those on which he Procures one for Client.]—When a solicitor had procured a loan of money on mortgage for his client, and the mortgage deed contained mutual stipulations that there should be no redemption and no foreclosure, provided the interest was regularly paid for five years, and the solicitor afterwards took from his client a mortgage which did not contain this provision:—Held, that he was not entitled to proceed upon this mortgage within the five years. *Lawless* v. *Mansfield*, 1 Dr. & War. 557; 4 Ir. Eq. R. 113.

For Debt Due and Professional Services.]—A client executed a mortgage to his solicitor to secure the payment of 2,500*l.* The deed recited that the former was indebted to the latter both for professional services and for money advanced on account, the amount of which was not at that time precisely ascertained, or immediately ascertainable, but which was computed, and was agreed to be taken, at the above sum, as the parties thereby admitted. In consideration of the sums mentioned in the deed, and also of 2,500*l.* expressed to be justly due and owing from the client to the solicitor, estates of the former were conveyed to the latter, but subject to a proviso for redemption. In the transactions the sole professional adviser of the client, who was a sufferer from disease, and lived in close retirement, was the solicitor, and it was

not shown that any third person was called in upon the occasion. The executors, after the client's death, filed a bill, praying for a declaration that the deed ought to stand as a security for such amount as could be shown and proved to be justly due, and that the solicitor might be ordered to make out and deliver proper bills of costs. By his answer the solicitor set forth accounts of receipts and payments made by him, but showed no balance due to him on the cash account; and he submitted, that from lapse of time he could not set forth full and accurate bills of costs, and that, by the terms of the deed, he was not lawfully bound to set forth any:—Held, that as the relation of solicitor and client was subsisting between the parties, that relation constituted an imperfection in the ability of the client to consent to the transaction. *Morgan* v. *Higgins*, 5 Jur. (N.S.) 236; 7 W. R. 273.

Held, also, that as there were no circumstances occurring in the case to remove the pressure arising from the existence of that relation, the executors were entitled to the relief prayed. *Ib.*

Mortgage of Settled Charge to Solicitor having Notice—Setting Aside.]—Where by a post-nuptial deed, a sum of money which had been charged on land, and was the property of the wife, was settled in trust for the husband for life, remainder to the wife and their issue; and the husband, after the death of his wife, joined by the issue, mortgaged the entire charge to A. and B., who at the time were solicitors for him and his issue, and who had notice of the settlement; the mortgage deed was set aside as far as it affected the issue, it being fraudulent as against them. *Ashe* v. *Lowe*, Hay. & J. 287.

Other Cases—Mortgage procured by Solicitor from Client by Misrepresentation, assigned to Innocent Transferee.]—A solicitor having by misrepresentation procured his client to sign a deed of mortgage of estates, which the latter had purchased by auction, afterwards assigned the mortgage so obtained to another client to secure a sum of money advanced, the assignee taking the assignment without notice of the fraud, but without the concurrence or communication with the mortgagor. The solicitor subsequently absconded, and was declared bankrupt. The court, on a bill filed by the mortgagor, and supported by his own personal evidence only of the particulars of the fraud by which his signature to the deed had been obtained, directed the deed to be delivered up to be cancelled, the defendant, the assignee of the mortgage, having declined to cross-examine the plaintiff, and the collateral facts bearing on the case tending to corroborate rather than impeach the plaintiff's evidence. *Vorley* v. *Cooke*, 27 L. J., Ch. 185; 4 Jur. (N.S.) 3.

—— **Bill of Sale improperly Obtained, one Solicitor advising both Parties.**]—C., a solicitor, not at that time acting in his professional character, advanced to Miss R. money on the security of bills of exchange, believing her, on her own representation, to be a person of wealth and family. On the 20th February, for the first time, he discovered that she was in insolvent circumstances and without expectations. She had been taken in custody on a capias on the 17th February, and discharged on the 18th on a special bail-bond. On the 20th she was in custody of the police under a magistrate's warrant. She was also on the same day arrested under a capias to hold her to bail at the suit of a creditor, the plaintiff. She remained at her own house, in charge of a policeman, being confined to her bed by illness. On the 21st B., an auctioneer, a client of C., agreed on C.'s proposal to advance Miss R. 863*l.*, on the security of a bill of sale of the furniture in the house. B. himself valued the furniture on the 21st and 22nd; and on the latter day the bill of sale was executed by R., who was still in custody. The evidence showed that the 863*l.* was never in the hands of Miss R. as a free agent. B. stated that C. informed him to the effect that Miss R.'s connections were in the highest degree respectable, and that he believed that her embarrassments, and the proceedings in respect of which the policeman was there, were such as she would be relieved from by an advance on her furniture. C. was the only professional adviser of both parties in the transaction:—Held, that the bill of sale was unduly and improperly obtained, and must be set aside, but without costs, as the bill contained unsubstantiated charges of fraud against B. *Sykes* v. *Bond*, 4 L. T. 859.

—— **Agreement by Husband to charge Property of Wife, for Debt due to Solicitor—Assignment, to Solicitor, of prior Charge.**]—Hereditaments belonging to the plaintiff were, upon her marriage with W. in 1831, vested in trustees, to the separate use of the plaintiff for life, with remainder to the use of such person as she should appoint; and in default, in trust to pay the rents to or permit her to receive the same for life; and after her death, to the use of her husband for life, with remainder to the children. At the date of the marriage the hereditaments were subject to a term of 1,000 years, created to secure 300*l.* and interest, but such sum had long been paid off, although no assignment of the term was made. In March, 1833, the hereditaments were, by the plaintiff and her husband, appointed to secure 250*l.* and interest, and the term was assigned to a trustee to secure the payment, and subject thereto, in trust for the person entitled to the equity of redemption. The husband died in October, 1836, and the plaintiff shortly after his death paid off the 250*l.* In March, 1837, the plaintiff charged the hereditaments with the payment to T. of 400*l.* and interest, and the term was again assigned to a trustee for him, and subject thereto, in trust for the person entitled to the equity of redemption. In February, 1838, the plaintiff married U., but no settlement was then made; and in October, 1838, the 400*l.* due to T. was paid off, and the deed of March, 1837, and the title-deeds of the hereditaments, were given up to U., but no reconveyance of the hereditaments, or reassignment of the term was made. U. delivered the deeds to his solicitor B., to whom, as alleged, he was indebted to a large amount; and in February, 1841, U., by deed, agreed with B. to charge the debt upon the hereditaments. The plaintiff did not execute the deed of February, 1841. The greater part of the debt due to B. was for costs incurred in defending a suit, first, on behalf of the plaintiff, and subsequently of herself and her husband. In 1843 B. entered into possession of the hereditaments, and had since continued in such possession. Although all principal and interest due to T. had been paid, yet it was alleged that he, as mortgagee, had paid 175*l.* for costs, which he was

entitled to recover under the mortgage security; and in September, 1854, he, in consideration of 40*l.*, assigned this debt to B., and conveyed the hereditaments to him to secure the amount due to him. U. died in December, 1855, and shortly afterwards the plaintiff filed a bill to have the deed of February, 1841, declared void, that B. was not entitled to any larger sum than 40*l.*, and that in taking the accounts he would not be entitled to be paid the sum alleged to be due, and secured by the deed of 1841:—Held, that B. was entitled to the principal and interest secured by the deed of 1841, and also to the 40*l.* and interest from September, 1854; to his costs of the suit and in defending his mortgage title; and that the deed of March, 1837, and the amount due thereon to T., were to stand as security for the payment of the amount found due to B.: and the court ordered an account against B. as mortgagee in possession. *Nelson* v. *Booth*, 3 Jur. (N.S.) 951; 5 W. R. 722.

—— **Solicitor acting in Partnership negotiation not disclosing Mortgage.**]—The plaintiff, in 1865, entered into partnership with L., the terms being that L. should bring in as capital the business premises, to be taken at a valuation, and so much money as might be required to make up 6,000*l.*, and that the plaintiff should bring in 6,000*l.* and pay a premium to L. C. acted as solicitor for L. in this transaction, and furnished the valuer with the particulars of his interest in the business premises. Four years afterwards L. became bankrupt, having drawn all his capital out of the partnership, and being in debt to it at the time; and C. then informed the plaintiff that he and his brother held a mortgage on L.'s interest in the business premises for 850*l.*, the sum advanced being trust money. This mortgage had been created before the partnership was agreed upon, and neither C. nor L. had ever mentioned it to the plaintiff, nor was it noticed in the particulars furnished to the valuer, and the interest had been paid upon it by L. in cash, or by cheques on his private account:—Held, that C. was bound to make good to the plaintiff the amount of the mortgage and any interest which he might have to pay on it, and that he must pay the costs of the suit. *Sterry* v. *Combs*, 40 L. J., Ch. 595; 25 L. T. 10; 19 W. R. 964.

Enforcing Security.]—Where a solicitor took from his client a security on a sum of money charged upon the estate of the principal debtor, for the recovery of which the client was then prosecuting a suit in equity, and did not disclose to him the circumstances connected with that estate, and particularly that he, the solicitor, had other demands affecting it, a bill to enforce that security was dismissed with costs. *Higgins* v. *Joyce*, 2 Jo. & Lat. 282.

Practice — Terms of Relief — Payment into Court.]—The ordinary rule that the court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee. *Macleod* v. *Jones*, 53 L. J., Ch. 145; 24 Ch. D. 289; 49 L. T. 321; 32 W. R. 43.

—— **Production of Mortgage Deed ordered.**]—In a suit to set aside a mortgage deed, as having been obtained by the mortgagee under circumstances of pressure and surprise, which alleged circumstances were, however, denied by the answer of the mortgagee, the court, upon motion, ordered the production of the mortgage deed, it appearing that the mortgagee was a solicitor, and that he had been the mortgagee's only professional adviser in the transaction. *Davis* v. *Parry*, 1 Giff. 174; 27 L. J., Ch. 294; 5 Jur. (N.S.) 758; 6 W. R. 171.

—— **Account.**]—The defendant, a solicitor-mortgagee, took from the mortgagor an authority to receive the rents of the property accruing due at the date of the mortgage, and in fact received the rents from that date. He sold some of the properties included in the mortgage, under his power of sale, and contracted for the sale of another at a price which appeared on the evidence to be below its value; the last-mentioned sale was not completed, owing to the pendency of the action:—Held, that the mortgagor was entitled to an account in the usual form as against a mortgagee who has entered into possession before there was any interest in arrear, and that the sale not yet completed must be set aside. An account of costs in respect of several abortive sales, and of the sales finally carried out, which had been signed by the defendant without any independent advice, was ordered to be reopened and taxed. *Jones* v. *Linton*, 44 L. T. 601.

—— **Mortgage to stand as Security for Amount found due.**]—A mortgage, to secure moneys alleged to be advanced and also certain costs, ordered to stand as security only for what, on taking a general account, should be found due, it appearing that the defendant on taking the security produced to his client no stated account of the amount due, and had kept no record of the transactions; and the solicitor, having in his answer made misstatements as to some of the items, was ordered to pay the costs of the suit to the hearing. *Davis* v. *Parry*, 1 Giff. 174; 27 L. J., Ch. 294; 5 Jur. (N.S.) 758; 6 W. R. 171.

—— **Taxation, Relief on.**]—A. was an illiterate person, and B. formerly acted as his solicitor. After some years A. called upon B. to furnish a bill of costs, it being his practice, by consent, to charge his clients with a gross sum, instead of delivering a bill of costs. An order to deliver a bill of costs was obtained, and B. furnished a cash account of receipts and payments, consisting of several items, one of which was his bill of costs, and showing a balance of 83*l.* due to him from A. One of the items for which he had taken credit was a sum of 300*l.* and interest. The taxation was being proceeded with, and the master having allowed most of the items on the bill of costs, A. began to dispute the items in the cash account, but did not at first impugn the 300*l.* Some months afterwards he disputed the item of 300*l.* and interest, which was shown by B. to have been secured by a mortgage of A. to B. This mortgage was afterwards transferred, and the debt discharged. The master denied the right of A. to dispute this

item, whereupon he denied that he had ever executed such a deed. A. afterwards filed a bill, alleging that he had never received the consideration money for the mortgage deed (which was alleged by B. to have been made up of various payments made on A.'s behalf by B., and a sum of costs), and prayed for an account of the receipts and payments of B. on behalf of A., and that, if necessary, the mortgage deed might be declared not binding on A.:—Held, that as A. had already had the investigation to which he was entitled in equity, and the result of that investigation had been not to disturb a single item in the account, no further relief could be given to him. *Judd* v. *Ollard*, 5 Jur. (N.S.) 755.

—— **Evidence.**]—B. had taken an acceptance and two I O U's of A., as acknowledgments of sums due to him, which were afterwards included in the mortgage debt:—Held, in the absence of anything to throw discredit on the holder, that these acknowledgments must be taken as primâ facie evidence of the advances. *Ib.*

f. Sale to Client.

Setting Aside.]—Sale of annuity by attorney to client set aside under circumstances. *Gibson* v. *Jeyes*, 6 Ves. 266; 5 R. R. 295.

A solicitor, who was employed to procure an investment for a sum of money, sold to his client ground rents at eighteen years' purchase, for which he had paid but fifteen years' purchase. There being no evidence that the solicitor had communicated to his client the price which he had given, nor even the fact that he was vendor:—Held, the sale must be set aside. *Driscoll* v. *Bromley*, 1 Jur. 238.

A. B., being desirous of raising money to enable him to prosecute his claim to a fund in court, applied to a solicitor for that purpose. An agreement was executed, by which the solicitor agreed to lend 1,000*l.*, and A. B. agreed to purchase from him some land for 6,000*l.* (ten times its value). The land was conveyed, and the funds in court mortgaged by A. B. for the 6,000*l.*; but the 1,000*l.* was not advanced at the time. The court, on the ground of the gross inadequacy of value, coupled with the other circumstances of the case, set aside the whole transaction with costs. *Cockell* v. *Taylor*, *Collett* v. *Preston*, *Preston* v. *Collett*, 15 Beav. 103; 21 L. J., Ch. 545.

—— **Sufficiency of Value.**]—Inadequacy of value, though it is not by itself a sufficient ground for avoiding a sale, is yet of great weight when coupled with circumstances of oppression. *Ib.*

The court looks with suspicion at the evidence of value derived from the mere opinion given by surveyors, unsupported by any other circumstances. *Ib.*

Retaining Purchase.] — Purchaser from his solicitor, who impeaches the sale, cannot retain his purchase at a valuation. *Driscoll* v. *Bromley*, 1 Jur. 238.

Sale to Company.]—A firm of solicitors purchased leasehold property, and soon afterwards they formed a company (of which they were appointed the solicitors) to take over the property, which they sold to the company at a price greatly in excess of that which they had paid for it:—Held, that no fiduciary relation having existed between the parties at the time when the solicitors purchased the property, and there having been no fraud, concealment, or misrepresentation on the part of the solicitors, and all the then members of the company having been fully aware of the facts, the sale could not be opened, and the solicitors were not accountable for the profit made on the transaction. *Masons' Hall Tavern Co.* v. *Nokes*, 22 L. T. 503.

T., a solicitor, acting for the promoters of an intended company, with an understanding that he should be its solicitor when formed, entered into arrangement with R., who had purchased property suitable for the company as a speculation, that such purchase should be on their joint account, and that all negotiations relating to the property should be in the name of R. alone, and that the name of T. should not appear. The company, whilst T.'s interest in the property was concealed from it, and under the advice of the firm in which he was a partner, purchased from R. a portion of the property at a sum larger than the price paid by R. and T. for the whole, and the profit was divided between them. The company afterwards discovered the circumstances under which the sale had been made to it:—Held, that the company was entitled as against T. to the benefit of his contract with R., so far as related to the premises sold to them; and that T. was entitled to receive from the company only the difference between the sum paid by him for his share of the property and the value of the portion of the property retained by him, and that the surplus which had been paid by the company to him must be repaid with interest at the rate of 5*l.* per cent. *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26; 31 L. J., Ch. 369; 8 Jur. (N.S.) 849; 6 L. T. 1; 10 W. R. 359.

e. Medical Adviser.

Relief.]—Relief, on the principle of correcting abuses of confidence, given against the liability of the maker of a promissory note taken from a poor patient on the occasion of a change in his position in life by his medical attendant without any account having been rendered, and for an amount beyond what was due for his attendance on the most extravagant scale of charges. *Billage* v. *Southee*, 9 Hare, 534. *S. C.*, nom. *Billing* v. *Southee*, 21 L. J., Ch. 472; 16 Jur. 48, 188.

The plaintiff was held entitled to a declaration that the note should stand as a security only for the amount due for medical attendance on the plaintiff. *Ib.*

Setting Aside.]—Upon a suit for the delivery up of a bill of exchange for 262*l.* 10*s.*, accepted by an aged captain in the navy in favour of a dentist, the latter, by his answer, stated the consideration for the bill to have been a verbal agreement, that the dentist would, during the captain's life, attend to his teeth, and supply him with new ones as occasion might require:—Held, that the captain's executors were entitled to have the bill delivered up. *Allen* v. *Davis*, 4 De G. & Sm. 133; 20 L. J., Ch. 44.

A patient executed instruments, whereby he secured to the defendant, his surgeon, an annuity of 100*l.* during the life of the de-

fendant, in consideration that the defendant would live with him and give him the benefit of his professional assistance during his life. Four days before the execution of these instruments, the defendant called in an eminent physician to visit the patient, who stated to the defendant his opinion that the patient could not recover nor live long: and about the same time the defendant expressed to a witness in the cause that the patient could not live more than a month or six weeks. These instruments cannot be maintained, even if the patient were of sound mind and capable of business. *Popham* v. *Brooke*, 5 Russ. 8; 6 L. J. (O.S.) Ch. 184.

Agreement obtained by a surgeon from a deceased patient, set aside upon the ground that the court was satisfied that the patient never did agree to or intend to direct what in the alleged agreement he was represented as agreeing to and directing, and that his signature, if genuine, must have been obtained by fraud, or under such circumstances as rendered it the duty of a court of equity to protect the patient and his estate from being prejudiced by it. *Dent* v. *Bennett*, 4 Myl. & Cr. 269; 8 L. J., Ch. 125; 3 Jur. 99.

A deed purporting to be a conveyance by way of sale of real estate from an aged and infirm person to his intimate friend and medical attendant, set aside for fraud, the money apparently paid at the execution of the deed having been provided by the grantor for the purpose, and the transaction having been kept secret from the household and family of the grantor. *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; 7 Jur. 875.

The court refused to set aside a voluntary deed executed by an old and infirm man in favour of a person who had attended him as a surgeon, and received the dividends of some stock for him, it appearing that the nature and effect of the deed were fully explained to the grantor, by his solicitor, before he executed it, and that no undue influence had been exercised over him. *Pratt* v. *Barker*, 1 Sim. 1; 4 L. J. (O.S.) Ch. 149; 6 L. J. (O.S.) Ch. 186; 27 R. R. 136.

A medical man obtained an agreement for the sale of land from his patient, an aged and infirm man; the testimony as to the value of the property was very conflicting. The court, being of opinion that the patient was aware of the nature of the contract into which he was entering, decreed specific performance with costs. *Holmes* v. *Howes*, 20 W. R. 310.

Ratification.]—Although a gift made to a person standing in a confidential relation to the donor, as by a patient to a physician, may be voidable, yet, if, after the confidential relation has ceased to exist, the donor intentionally elects to abide by the gift, and does in fact abide by it, it cannot be impeached after his death, even if it is not proved that the donor was aware that the gift was voidable at his election. *Rhodes* v. *Bate* (L. R. 1 Ch. 252) commented on. *Mitchell* v. *Homfray*, 50 L. J., Q. B. 460; 8 Q. B. D. 587; 45 L. T. 694; 29 W. R. 558—C. A.

f. Spiritual Adviser.

Generally.]—A strong case must be made out to set aside a will on the ground of undue influence, but where a person acting as the spiritual adviser of a testator takes advantage of that situation to become the agent and manager of the testator's temporal affairs, and, while holding those opposite characters, becomes a donee of very large gifts under the testator's will, there is strong ground made out for inquiry as to undue influence. *Middleton* v. *Sherburne*, 4 Y. & C. 358.

Assignment for Benefit of Convent.]—Where A., being about eighteen years of age, and possessed of considerable real and personal property, entered a convent, whether as postulant or pupil was controverted, but upon an agreement on the part of the nuns that she should not be professed under age, or without their apprising her friends previously; and it appeared that she was professed under age, and in the absence of all her friends; and there was no evidence of any notice having been given to any of them, save an allegation in the answer of the defendants that they did communicate the fact to her sister; and afterwards, when she arrived at full age, she assigned nearly all her property to the nuns, for the benefit of the convent; and it appeared that previous to this she had been excluded from the society of her friends, and that the deed for this purpose was prepared by the professional agent of the convent, and that she had no friend of her own present; and, having, in some time after, quitted the convent, she filed a bill to set those proceedings aside, for a reconveyance of her real estate, and for an account:—Held, that the transactions in this case fell within the principle of the cases of guardian and ward, which decide that dealings between them ought not to stand. *Whyte* v. *Meade*, 2 Ir. Eq. R. 420.

Convent—Rules of Poverty and Obedience—Voluntary Gift—Laches—Acquiescence.]—In 1868 A. was introduced by N., her spiritual director and confessor, to S., the lady superior of a sisterhood, and became an associate of the sisterhood. N. was one of the founders, and also the spiritual director and confessor of the sisterhood, which was an association of ladies who devoted themselves to charitable works. In 1871, A., having passed through the grades of postulant and novice, became a professed member of the sisterhood, and bound herself to observe (inter alia) the rules of poverty, chastity, and obedience, by which the sisterhood was regulated, and which were made known to her when she became an associate. These rules were drawn up by N. The rule of poverty required the member to give up all her property, either to her relatives, or to the poor, or to the sisterhood itself, but the forms in the schedule to the rules were in favour of the sisterhood, and provided that property made over to the lady superior should be held by her in trust for the general purposes of the sisterhood. The rule of obedience required the member to regard the voice of her superior as the voice of God. The rules also enjoined that no sister should seek advice of any extern without the superior's leave. A., within a few days after becoming a member, made a will bequeathing all her property to S.; and in 1872 and 1874, having become possessed of considerable property, handed over and transferred several large sums of money and railway stock to S. In May, 1879, A. left the sisterhood and immediately revoked her will, but made no demand for the return of her property until 1885, when she commenced an action against S., claiming the return of her

property on the ground that it was made over by her while acting under the paramount and undue influence of S., and without any independent and separate advice : — Held, that although A. had voluntarily and while she had independent advice entered the sisterhood with the intention of devoting her fortune to it, yet as at the time when she made the gifts she was subject to the influence of S. and N., and to the rules of the sisterhood, she would have been entitled on leaving the sisterhood to claim the restitution of such part of her property as was still in the hands of S., but not of such part as had been expended on the purposes of the sisterhood while she remained in it: — But held (dissentiente Cotton, L.J.), that under the circumstances the plaintiff's claim was barred by her laches and acquiescence since she left the sisterhood. *Allcard* v. *Skinner*, 56 L. J., Ch. 1052 ; 36 Ch. D. 145 ; 57 L. T. 61 ; 36 W. R. 251— C. A.

Assignment for Benefit of Roman Catholic Institution—Right of Assignor to carry out.]— A professed nun, who had taken the vows of poverty and obedience, and had executed a deed assigning all her property to trustees for the benefit of a Roman Catholic ecclesiastical institution, presented a petition, asking for the transfer to the trustees of that deed of a fund in court to which she was entitled : — Held, that her being a professed nun did not affect her capacity to take or dispose of property, and that, whether the deed was or was not liable to be impeached on the ground of her being, when she executed it, so circumstanced as to be unable to exercise her own free will, the court could not refuse to order a transfer of the fund to the trustees upon her application. *Metcalfe's Will, In re*, 2 De G. J. & S. 122 ; 33 L. J., Ch. 308 ; 10 Jur. (N.S.) 287 ; 10 L. T. 78 ; 12 W. R. 538 ; 3 N. R. 657.

Setting aside Grant of Annuity.]—Grant of an annuity fraudulently obtained by a person having a spiritual ascendency over a woman, who was under a state of religious delusion, set aside upon principles of public policy. *Norton* v. *Relly*, 2 Eden, 286.

Setting aside Voluntary Settlement.]—Voluntary settlement by a widow upon a clergyman and his family set aside, as obtained by undue influence ; and abused confidence in the defendant as an agent undertaking the management of her affairs, upon the principles of public policy and utility applicable to the relation of guardian and ward, etc. *Huguenin* v. *Baseley*, 14 Ves. 273 ; 9 R. R. 148, 276.

g. Principal and Agent.

i. *Agent to Sell, Purchase by.*

Generally.]—Agent employed to sell cannot purchase for himself his principal's goods. Principal may either repudiate such a transaction altogether, or adopt and take the benefit of it. *Bentley* v. *Craven*, 18 Beav. 75.

Agent of Trustee for Sale.]—The agent of trustee for sale of estate, employed therein, cannot purchase the same. *Whitcomb* v. *Minchin*, 5 Madd. 91.

Stock-broker.]—Defendant, a broker, had 5,000*l.* stock of plaintiff's to sell at a stipulated price ; he made a pretended sale, and made entries in his books which appeared to be done after the stock had risen considerably : the court deemed this transaction fraudulent, and said that defendant should have taken earnest, without which it was nudum pactum, and within the Statute of Frauds. *Crull* v. *Dodson*, Sel. Ch. Ca. 41. See also *Rothschild* v. *Brookman*, 5 Bligh (N.S.) 165 ; 2 Dow & Cl. 188. Affirming 3 Sim. 153 ; 7 L. J. (O.S.) Ch. 163 ; 30 R. R. 147.

Purchase in Name of a Trustee.]—An agent, employed to sell an estate, secretly buys it himself in the name of a trustee, whom he represents to his employer to be the real purchaser ; he cannot call for an execution of the trust until the transaction is confirmed by the vendor. *Woodhouse* v. *Meredith*, 1 J. & W. 204.

Purchase of Reversion—Confirmation.]—An agent employed by a young man to sell a reversionary legacy shall not be permitted to be purchaser thereof himself at an undervalue, and nothing shall amount to a confirmation of such a transaction, until the vendor be fully apprised that he might be relieved against the original transaction, if he chose to impeach it. *Crowe* v. *Ballard*, 2 Cox. 253 ; 1 Ves. J. 215 ; 3 Bro. C. C. 117 ; 1 R. R. 122.

Contract by Agent for Re-sale — Onus.]— Where an agent for the sale of lands purchased of his principal, having previously entered into a contract for the resale of them at a higher price ; he was declared a trustee for his principal to the extent of such profit : and in the suit :—Held, that the burden of disproving parts of the plaintiff's case, resting not on direct proof, but on circumstantial evidence only, lay on the defendant. *Barker* v. *Harrison*, 2 Coll. C. C. 546.

Onus.]—Where an agent employed to sell property purchases it himself, he is bound to show that there was no concealment or unfair representation, and that in purchasing himself, the same advantages were afforded to his principal as if the property had been sold to a stranger. *Trevelyan* v. *Charter*, 4 L. J., Ch. 209. Affirmed sub nom. *Charter* v. *Trevelyan*, 11 Cl. & F. 714 ; 8 Jur. 1015.

Setting aside—After Arbitration and Lapse of Time.]—A steward and agent, being employed to sell an estate, purchased part of it himself at an undervalue, and secretly, in the name of another person. All actions and matters of difference between the parties were afterwards submitted to arbitration ; an award was made, and mutual releases executed. The court, forty-seven years after the purchase, and twenty-eight years after the award, set aside the purchase,— holding, first, that the principal having been kept ignorant of the fraud, was not bound by lapse of time ; and, secondly, that he was not bound to award and release, on the ground, that the deception had been continued, and that the purchase and the fraudulent circumstances relating to it, had not been brought under the consideration of the arbitrator. *Trevelyan* v. *Charter*, 4 L. J., Ch. 209. Affirmed sub nom. *Charter* v. *Trevelyan*, 11 Cl. & F. 714 ; 8 Jur. 1015.

Practice — Jurisdiction — Issue directed.]— Jurisdiction by bill in equity for the delivery of

a specific chattel, a valuable picture, deposited by an executor with a dealer in pictures, and claimed to be retained by him as purchased at a very low price. Issue directed to ascertain whether there was a sale, or the possession was as agent or trustee for sale, who therefore could not purchase without full communication. An objection that the transaction not being in the usual course of administering assets, could not protect a purchaser from the executor, was therefore not determined. *Lowther* v. *Lowther*, 13 Ves. 95.

—— **Inquiry directed.**]—Agent employed to sell estates took them for himself under colour of a fictitious purchase, and sold part; after his death an inquiry was directed to ascertain the real value according to which his estate was to be charged, the principal having an option to take what remained unsold, and, the agent having fraudulently prevailed on his principal to execute a lease at a rent under the real value, the agent's estate was charged with loss arising from that. *Hardwicke* (*Lord*) v. *Vernon*, 4 Ves. 411; 4 R. R. 244.

ii. *Agent to Purchase.*

a. Sale by.

Generally.]—Agent employed to purchase cannot buy his own goods for his principal. Principal may either repudiate such transaction altogether, or adopt and take the benefit of it. *Bentley* v. *Craven*, 18 Beav. 75.

Stockbroker.]—A broker or agent being employed by a customer to sell foreign stock, on a day specified by him in a letter of instructions, purchased the stock in the name of his partners, a firm in Paris, at the market price of the day. Being also employed to purchase foreign stock and bonds for his customer, according to his, the agent's, recommendation, he transmitted accounts of the transactions to his employer, with broker's notes, &c., as if he had purchased the stock of third persons. In fact, no stock or bonds were purchased; no transfers were made; no broker's notes passed, but the sales were nominal of stock and bonds remaining in the hands of the agent and his partners, and not set apart or appropriated to the customer. In order to effect these purchases, loans of money were made by the agent to the customer, upon agreement that the stock and bonds should remain as a deposit in the hands of the agent, to secure the repayment of money advanced. The stock and bonds were afterwards sold at a loss under the advice of the agent. In 1819 an account of these transactions was rendered, and settled between the customer and the agent, and great loss having been incurred upon the transactions, a large balance was paid by the customer to the agent. Upon a bill filed in 1824, all the transactions were set aside, and an account decreed against the agent. *Rothschild* v. *Brookman*, 5 Bligh (N.S.) 165; 2 Dow & Cl. 188. Affirming 3 Sim. 153; 7 L. J. (O.S.) Ch. 163; 30 R. R. 147.

Setting aside—Lapse of Time—Stockbroker.]—A. employed B., a stockbroker, to purchase some canal shares. B. apparently bought them from C., the ostensible owner, but who afterwards turned out to be a mere trustee for B. The court, after a lapse of several years, and without entering into the fairness of the price:—Held, that the transaction was void on grounds of public policy, and set it aside with costs. *Gillett* v. *Peppercorne*, 3 Beav. 78.

Director of Company.]—H. being a director of a joint stock company, established for the building, purchasing, hiring, and employing of steam-vessels, purchases a vessel for 1,340*l*., and afterwards sells it to the company as from a stranger for 1,500*l*., charging the company with commission at 1*l*. per cent., the broker's earnest money, and the expenses of the bill of sale to himself, there being but one bill of sale. Such a transaction cannot stand in a court of equity. *Benson* v. *Heathorn*, 1 Y. & C. C. C. 326.

Transfer between Directors.]—The plaintiff and defendant were directors of a railway company. The plaintiff was desirous of obtaining 1,000*l*. "unallotted" shares, in order to promote its success. The defendant clandestinely caused 1,000*l*. of his own "allotted" shares to be transferred to the plaintiff. The transaction took place in July, 1853, but was discovered in June, 1854, and the bill was filed in November following. The court held that the transaction was void, and set it aside, and that there had been no laches. *Blake* v. *Mowatt*, 21 Beav. 603.

Shares in Company.]—B. having bought shares in a company at 2*l*. per share, and knowing that K. was desirous to buy such shares, represented that he knew of some shares which were to be had for 3*l*. or less, and requested K. to give him authority to buy at that price. K. gave him authority, but told B. to do his best for him and to get them for less if possible. B. transferred his shares to K. at 3*l*. per share, pretending that another person was the vendor:—Held, that on the facts B. was an agent for K., and must account to him for the difference between the price at which he bought and the price at which he sold the shares to K. *Kimber* v. *Barber*, L. R. 8 Ch. 56; 27 L. T. 526; 21 W. R. 65.

Setting aside—Shares in Mines.]—A. purchased mining shares advertised by B., believing them to be a third person's, while in reality B.'s, and the transaction was held voidable. A. also gave B., the broker, an order to purchase other shares for him. B. sold shares of his own to A.:—Held, that such a transaction might be set aside. *Maturin* v. *Tredinnick*, 9 L. T. 82.

—— **Calls on Shares—Forfeiture—Inquiry.**]—On some of these shares so purchased calls had subsequently been made. A. had not paid up these calls, and the shares had therefore become forfeited, and were sold. It was admitted that A. had not informed him of these calls, although it was alleged that B. was chairman of the committee of management of the mining company, and must have known of the cause of forfeiture:—Held, that A. was entitled to an inquiry as to all the circumstances attending the forfeiture and sale of these shares. *Ib.*

b. Purchase by.

Generally.]—If an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees* v. *Nuttall*, 1 Russ. & M. 53;

Tam. 282. Affirmed on appeal, 2 Myl. & K. 819; 31 R. R. 99.

Fraud of Principal — Account.]—A. usually employed B. as his agent to buy hops of the several planters in and about Canterbury, but having, in a particular season, omitted to give them any orders at the usual time, B. enters into a partnership with three others, for purchasing hops of that year for their mutual benefit. The hops are accordingly purchased; but A., having intelligence of this transaction before they were delivered, prevails upon B. to declare to the planters that he bought them as A.'s agent, and by that means A. got the hops delivered to him: —Held, that this was a fraud upon the partners of B., and that A. should account for the value of the hops, according to the highest price for which he sold them. *Hunter* v. *Sheppard*, 4 Bro. P. C. 210.

iii. *Transactions between Principal and Agent.*

Generally.]—It is doubtful whether equity ought to allow a dealing between an agent and his principal, under any circumstances, there being such a conflict between interest and duty. *Dunbar* v. *Tredennick*, 2 Ball & B. 319.

Purchase from Principal.]—An agent may purchase from his principal, provided he deals with him at arm's length, and after a full disclosure of all that he knows with respect to the property. *Murphy* v. *O'Shea*, 2 Jo. & Lat. 422; 8 Ir. Eq. R. 329.

Existence of Relationship.]—The rule that an agent, dealing with his principal, must impart knowledge acquired in his office, does not apply where the relation has ceased, and there is another agent with equal means of knowledge to guard the interest of the principal in that transaction. *Scott* v. *Dunbar*, 1 Moll. 442.

—— **Lapse of Time—Acquiescence.**]—Reversionary leases at undervalue obtained by agent from principal, the relation of creditor and debtor also subsisting, after an acquiescence of twenty-seven years, not set aside; the fiduciary character having, during that period, ceased to exist, and the transactions being recognised on oath by the principal as fair. *Medlicott* v. *O'Donel*, 1 Ball & B. 156.

Purchase of Share in Colliery, in Trust for Manager.]—Purchase of a share in a colliery, in trust for the agent and manager, confirmed under particular circumstances, but with reluctance. *Wren* v. *Kirton*, 8 Ves. 502.

Obtaining Leases.]—A., being standing counsel and manager for B., obtained leases for long terms of different parts of his estate, and a release of the equity of redemption of other part; on a bill brought to set aside these transactions for fraud, it was proved that A. had as great a power over B. as a parent has over a child, and could persuade him to do whatever he pleased; but it being proved on the other side, that the purchase money was nearly equal to the value of the land, and that A. had in many respects been exceedingly serviceable to B., the bill was dismissed. Decree of the court of chancery in Ireland affirmed. *Kingsland* (*Lord*) v. *Barnewall*, 4 Bro. P. C. 154.

Lease—By Employer to Steward.]—There is no policy which prevents a steward from being lessee of his employer, nor from receiving a beneficial lease; but, where transaction is upon contract, steward must prove he gives full consideration; and, where transaction was mixed with motives of bounty, he must show that employer was aware of every circumstance relating to transaction. *Selsey* (*Lord*) v. *Rhoades*, 2 Sim. & S. 49; 25 R. R. 150.

—— **Obtained by Agent from Principal — Generally.**]—An agent may take a lease from his principal, but he must be always prepared to prove that full information had been imparted to the principal, and that the contract had been entered into with perfect good faith. *Molony* v. *Kernan*, 2 Dr. & War. 31.

—— **By Principal and Agent — Position of Assignee of Lessee.**]—A party who takes an assignment of lease from the agent of a lessor, with notice of the assignor's character as agent, has the same liability of sustaining the lease cast upon him that the agent has, and if the lease cannot be upheld by the agent, neither can it be supported by the purchaser from the agent. *Molony* v. *Kernan*, 2 Dr. & War. 31.

—— **Obtained by Agent—Setting Aside.**]—Leases for lives obtained by agents of a deceased person of weak intellect upon inadequate considerations set aside as fraudulent. *Gartside* v. *Isherwood*, 1 Bro. C. C. 558.

Valuable leases and agreements for leases, obtained by an agent from his principal, the principal reposing confidence in the agent, and the agent availing himself of the inexperience, negligence, and extravagance of the principal, set aside, or held securities only for money advanced. *Watt* v. *Grove*, 2 Sch. & Lef. 492.

—— **Obtained by Agent and Attorney from Principal—Setting Aside.**]—Bill to set aside leases obtained by an agent and attorney from his principal, dismissed as to voluntary leases, being pure gift, and no fraud, misrepresentation, &c., with costs as to some, intended as a provision upon, and inducement to the marriage of the defendant; without costs as to others, the relation of the parties, and the circumstances upon general principles of public policy and utility justifying inquiry. Another lease decreed to be delivered up, the verdict in an issue establishing that a full consideration was not paid. *Harris* v. *Tremenheere*, 15 Ves. 34; 10 R. R. 5.

Setting Aside—Lease under False Power of Attorney.]—A., who was agent over a property held by four sisters as tenants in common, and had a power of attorney from three of them to make leases, having, when about to leave the country under suspicious circumstances, executed, as by a power of attorney from the four sisters, a lease of the property to B., his under-agent, the lease was, at the suit of the four sisters, decreed to be set aside. *Rossiter* v. *Walsh*, 2 Con. & L. 562; 4 Dr. & War. 485.

Agreement to sell to Agent—Specific Performance—Abandonment.]—A principal agreed to sell part of his estate to his agent, including the only turf bog on the estate, of which he was ignorant, there being no concealment or know-

ledge on the part of the agent. The agent was named a trustee for sale in his will, and assisted his co-trustees, and did not insist on the agreement for nearly a year after the death of principal and advertisement for sale:—Held, that the first circumstance would be a ground to refuse specific performance, and the latter was a virtual abandonment of the agreement. *Chambers* v. *Betty*, Beat. 488.

Voluntary Conveyance, by one just of Age, to Agent.]—Voluntary conveyance, by one lately come of age to an agent, of a reversion of no great value, for a nominal consideration of 180*l*., and containing covenants, as in the case of a purchase, not absolutely rescinded, as not being a case of fraud, but the transaction modified by decree that the agent should release the covenants at his own expense, and recite the impropriety of them as referable to a gift. *Cray* v. *Mansfield*, 1 Ves. 379.

Sale to Agent's Daughter—Misrepresentation—Setting Aside.]—Where a single woman was informed by her brother's agent that on his death she had succeeded to a small estate, of which she knew nothing, and on the agent's representations of its value, which were inaccurate, and, without legal advice, she conveyed the estate for an inadequate sum to the agent's daughter, the court set the deed aside with costs. *Haygarth* v. *Wearing*, 40 L. J., Ch. 577; L. R. 12 Eq. 320; 24 L. T. 825; 20 W. R. 11.

Held, also, that there was no such relation between the parties as to incapacitate the agent from purchasing. *Ib.*

Held, also, that the agent's claim for advances to the brother, as to which he pledged his oath, but of which there was no corroborative evidence of any kind, must be disallowed. *Ib.*

Sale to Agent—Setting Aside—Inadequate Consideration—Vendor in Precarious Health.]—Sale by a retired solicitor to his agent of property at a distance, which had been proposed and pressed by the vendor, and completed without any compulsion or fraud, set aside, it appearing to the court that the consideration (a life annuity) was inadequate, that the vendor, who had not seen the property for twenty years, was ignorant of its value, and that the vendor was known to be in a precarious state of health. *Dally* v. *Wonham*, 33 Beav. 154; 32 L. J., Ch. 790; 8 Jur. (N.S.) 980; 9 L. T. 75; 11 W. R. 1090.

Purchase by Agent—Setting Aside—Notice—Lapse of Time.]—A bill to set aside a purchase of property by an agent dismissed with costs, it being proved that the plaintiff had distinct notice, at the time, that the agent was one of the beneficial purchasers, and the vendor not having instituted a suit for six years. *Wentworth* v. *Lloyd*, 32 Beav. 467. Affirmed, 10 H. L. Cas. 589; 10 Jur. (N.S.) 961; 10 L. T. 767.

Sale to Agent—Rights of Creditors of Vendor—Bankruptcy.]—A trader was entitled to leaseholds, subject to an annuity for lives granted to an insurance company, which, at the instance of the trader, and on his representation that he was in failing circumstances, agreed to release it for less than its estimated value. The trader's solicitor afterwards wrote to the company, stating that difficulties had been met with in attempting to sell the leaseholds, by reason of a mortgage, and proposing that the annuity should be sold at the reduced price to an auctioneer who had acted for the trader in attempting to sell the property (at a loss to himself), and who would be "still able to serve the trader in some degree." The company assented, provided the trader signed a written consent. This was done, and the annuity was assigned absolutely to the auctioneer. The trader immediately afterwards became bankrupt:—Held, that the creditors were entitled to the benefit of the purchase on repayment to the auctioneer of the purchase-money, and interest; and the latter was ordered to pay the costs of the assignees in a suit instituted by them, in which he insisted that he was entitled to retain the purchase for his own benefit. *Baskett* v. *Cafe*, 4 De G. & Sm. 388.

Practice.]—In a suit for administration of assets of obligors in a common money bond, the master under an order of reference made by consent, enabling him to inquire into the consideration and all the circumstances relative to the bond, reported that it was a voluntary bond, given as a bounty to the obligee. The representatives of the obligors, and the obligee, took exceptions to the report; the former alleging that it was a bond of indemnity, the obligee claiming it partly for money advanced, and partly for services performed. The court below refused leave to withdraw the obligee's exceptions, and directed issues to try whether the bond was given for money and services, or as a gift, or for indemnity. This house on appeal reversed that order, and remitted the case to the court below to decide these questions on the evidence before it. The court below decided accordingly upon a new hearing, and declared the bond to be partly for counter-security, partly as gifts for services. This house, upon appeal, reversed that decision also, and ordered the master's report to be confirmed. The court below subsequently, upon hearing of counter-petitions (one presented by the representative of the obligor, praying payment of the bond and interest, the other by the representative of the obligors, praying for leave to institute a new suit to impeach the bond), on the ground that a gift from a principal to an agent was invalid in equity, decreed for such suit, and granted an injunction against any proceedings on the bond in the meantime. This house, upon appeal, reversed that decree, holding that, as the respondent omitted to take advantage of any of the opportunities of raising that objection to the bond in the preceding inquiries, it was not now competent for him to harass the other party by a new suit in which no new evidence could be produced. *Nicol* v. *Vaughan*, 1 Cl. & F. 495; 5 Bligh (N.S.) 505—H. L. (E.) Reversing *Winchilsea (Earl)* v. *Garretty*, 1 Myl. & K. 253; 2 L. J., Ch. 115.

On this subject see the important case, *Rhodes* v. *Beauvoir*, 5 Bli. (N.S.) 195.

—— **Ascertainment of Proper Consideration for Payment — Setting Aside — Cancellation of Deeds.**]—D., being entitled to an estate in fee-simple, subject to his wife's life interest, but believing that he was entitled to the fee-simple in possession, sold it to W., his agent, who acted under the same belief, in considera-

tion of an annuity during the lives of D. and his wife, and the survivor. D. shortly afterwards died, leaving his wife his residuary devisee. The wife filed a bill to set aside the sale, on the ground of inadequate value and undue advantage. The consideration was inadequate for the purchase of the fee-simple in possession, and W. took an undue advantage of the vendor:—Held, that the court could not ascertain the proper proportion of the annuity which ought to be paid for the purchase of the reversion; and, D. declining to take the reversion upon payment of the whole annuity, the transaction was directed to be set aside, and the deed delivered up to be cancelled. *Dally* v. *Wonham*, 33 Beav. 154; 32 L. J., Ch. 790; 8 Jur. (N.S.) 980; 9 L. T. 75; 11 W. R. 1090.

—— **Setting Aside — Rights of Sub-Purchasers.**]—A decree was made against A. B., setting aside, as fraudulent, a purchase by an agent from his principal, and a reconveyance and the usual accounts of rent and purchase-money were directed, in which an allowance was to be made for substantial repairs and lasting improvements. A. B. sold and conveyed part of the property pendente lite, and died before the accounts were completed. A supplemental bill was filed against purchasers and the heir and personal representatives of A. B. The bill charged that the purchasers, in case of eviction, claimed compensation out of the estate of A. B. The conveyances pendente lite being set aside:—Held, that the purchasers were entitled in this suit as against their co-defendants, the personal representatives of A. B., to an order for the repayment of their purchase-money, and were entitled as against the plaintiff to an allowance for substantial repairs and lasting improvements, but that no greater relief could be given them in this suit. *Trevelyan* v. *White*, 1 Beav. 588.

—— **Setting Aside—Evidence.**]—If in a transaction between principal and agent it appears that there has been any underhand dealing by the agent—e.g. that he has purchased the estate of the principal in the name of another person instead of his own, however fair the transaction may be in other respects, it has no validity in a court of equity. To set aside a sale from a principal to his agent, it is not necessary to show that it was made at an undervalue. *Murphy* v. *O'Shea*, 2 Jo. & Lat. 422; 8 Ir. Eq. R. 329.

—— **Setting Aside — Conveyance and Accounts.**]—A secret purchase by an agent from his principal was set aside. By the decree possession was directed to be given and a conveyance to be executed. Accounts were also directed to be taken of the rents and purchase-money, and the balance was directed to be paid, but no lien was given:—Held, that the conveyance must at once be made, without waiting for the result of the accounts. *Trevelyan* v. *Charter*, 9 Beav. 140; 1 H. L. Cas. 714.

Secret Profits by Agents.]—*See* PRINCIPAL AND AGENT.

h. Other Persons.

Arbitrator.]—A purchase by an arbitrator of claims under reference cannot be supported. *Blennerhassett* v. *Day*, 2 Ball & B. 116.

Confidential Agents of Company—Conspiracy to Purchase Shares at Undervalue.]—A. and B., who were confidential agents of a company, conspired together to depress the selling price of the shares by a system of false accounts and concealment, in order that they might purchase them at an undervalue. By reason of this scheme, fifty-five shares belonging to C. were sold much below their real value, fifteen to A., and forty to B. The executor of C., upon discovering the frauds which had been practised, filed a bill against A.'s executor and the executors of B. for relief in respect of all the shares. The representative of A. demurred for want of equity and multifariousness:—Held, that, although A. derived no benefit from the sale of the forty shares at an undervalue, yet, as he stood in a fiduciary position towards the shareholders, and was a party to the fraud, he, as well as B., was liable to C. for the real value of the shares, and that his executor was a proper party to a suit in respect of them. *Walsham* v. *Stainton*, 1 De G. J. & S. 678; 33 L. J., Ch. 68; 9 Jur. (N.S.) 1261; 9 L. T. 357; 12 W. R. 63; 3 N. R. 56.

Held, also, that as both sales were effected by the same fraud, it was not multifarious to combine the cases as to the fifteen and the forty shares in the same bill. *Ib.*

Execution Creditor.]—A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. No jurisdiction in equity to set aside a sale under an execution. Semble. *Stratford* v. *Twynam*, Jacob, 418; 23 R. R. 107.

The court having jurisdiction in personam, upon equity arising out of transaction concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies, by a creditor under his own execution, was, upon the circumstances, held only a security for the debt, the expenses of the proceeding and incumbrances paid by him with interest; and subject thereto, a reconveyance was decreed. *Cranstown* (*Lord*) v. *Johnston*, 3 Ves. 170; 3 R. R. 80.

Person having Limited Interest—Power.]—A power of sale given without restriction to a party having a limited interest only may well be held to import a negative upon the power by the same party to buy, for the power to sell is in the nature of a trust; but as the rule does not extend to prevent in all cases a party having a power to sell from becoming the purchaser, so neither where there is a restriction upon the power of sale is the party having the power to sell in all cases at liberty to become the purchaser. It must in each case depend upon the circumstances under which, and the purposes for which, the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. *Beadon* v. *King*, 9 Hare, 519; 22 L. J., Ch. 111.

In the proportion in which the power is restricted, the danger incident to allowing the donee to purchase is diminished. *Ib.*

Private Tutor.]—Demurrer allowed to a bill, to have a presentation to a living upon the next avoidance delivered up, charging the defendant with gross misconduct in obtaining it, and in other respects, while a private tutor in the family. *M'Namara* v. ——, 5 Ves. 824.

Purchase, by Mortgagor's Agent, from Trustee

for Sale.]—A person who has managed the affairs of and acted as agent for a mortgagor, cannot purchase from the trustee for sale, who is acquainted with the fact of his having acted as agent. *Edgecumbe* v. *Stranger*, 1 Jur. 400.

Tenant for Life.]—As a tenant for life, though his consent may be requisite to the exercise of a power of sale, stands in no fiduciary position towards the remainderman, and is as free as anyone else to buy from the trustees, a sale to him cannot be impeached on the ground of the purposes for which he buys, his motives being immaterial to the trustees, provided they sell on terms advantageous to the estate. *Dicconson* v. *Talbot*, L. R. 6 Ch. 32 ; 24 L. T. 49.

The doctrine that a tenant for life, with a power to sell or lease, may sell or lease to a trustee for himself is an established exception to the rule as to dealings by persons filling fiduciary positions. *Bevan* v. *Habgood*, 1 J. & H. 222 ; 8 W. R. 703.

—— **Mortgagor.**]—Under a mortgage, power was reserved to the mortgagor until entry by the mortgagee to grant building leases :—Held, that the case fell within the principle of the above exception, and that a lease to a trustee for the mortgagor was good. *Ib.*

—— **Lease by and Purchase from.**] — A., tenant for life of part of an estate, devised upon trusts for the benefit of persons in remainder, in conjunction with C., and B. his son-in-law, the latter being manager of a railway company, granted a lease to B., the son-in-law, of a portion of the estate adjoining the terminus of the railway, for three lives. The railway company was empowered to purchase twenty acres of land anywhere along their line of railway, for the purposes of erecting wharves and warehouses, or for such purposes connected with the railway as the management might think requisite and necessary. B. and C., by contrivance, agreed to purchase of the tenant for life portions of the settled estates for the purpose of conveyance to the company, upon which they might, as authorised by their acts of parliament, erect wharves, staiths, &c., and by arrangement part of these lands were reconveyed by the company to the defendants by separate conveyances, by which they individually obtained benefits to themselves in derogation of the rights of the parties entitled in remainder :—Held, that such lease and conveyances could not stand ; and the same were declared to be illegal and void, and set aside, with directions for reconveyance by the defendants. *Stepney* v. *Biddulph*, 12 L. T. 176.

Residuary Legatee, Tenant for Life, Reversioner.]—Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the master's office. *Williams* v. *Attenborough*, Turn. & R. 76 ; 1 L. J. (O.S.), Ch. 138 ; 23 R. R. 186.

Residuary Legatee.]—A residuary legatee has not such an interest as to prevent his becoming himself a purchaser of premises sold under a decree in the cause. *Hooper* v. *Goodwin*, Coop. 95.

There is no rule of equity which prevents one of several residuary legatees buying the share of another, or purchasing for less than the amount or charge on the share of another. *Barwell* v. *Barwell*, 34 Beav. 371.

Releasee to Uses.]—An estate was settled on husband and wife for life, with a limitation to their issue, and in default a power of appointment was given to the wife. There was one child only of the marriage, who died an infant. The wife survived her husband, and appointed the estate to G. D. F., who was the releasee to uses, and had possession of the settlement. G. D. F., shortly after his wife's death, made a feoffment, and levied a fine with proclamations. After the expiration of the five years, the heirs of the child claimed the estate, insisting that, under the terms of settlement, the child took the estate in fee, and that the power of appointment had never arisen. He filed a bill against G. D. F., to avoid the fine, alleging that it had been levied with full knowledge of the plaintiff's rights, and with a fraudulent view to bar them :—Held, that the act of G. D. F. did not constitute a fraud ; that G. D. F. stood in no fiduciary relation towards the plaintiff, and the bill was dismissed with costs. *Langley* v. *Fisher*, 9 Beav. 90 ; 15 L. J., Ch. 73.

Sale by Elderly Spinster to Social Superior—Onus on Purchaser to show Sufficiency of Price.] —A small freehold property was agreed to be sold by an elderly spinster in humble life to a person far above her in station. The agreement was come to between the parties alone. In respect of the consideration, the vendor sought and obtained a slight advance on that offered by the purchaser. The purchaser's solicitor drew the conveyance, and it was presented to the vendor ready for execution, and executed by her without any advice. The Master of the Rolls having set aside the conveyance :—Held, that his decree was right, because the parties to the contract were in such relative positions, that (a case of undervalue being on the evidence affirmatively deposed to) it lay on the purchaser (contrary to the usual rule) to show affirmatively that the price he had given was the value, and on the evidence he had failed in doing so. *Baker* v. *Monk*, 4 De G. J. & S. 388 ; 10 Jur. (N.S.) 691 ; 10 L. T. 86, 630 ; 12 W. R. 779. Affirming 33 Beav. 419.

Practice — Restraining Action at Law.] — Injunction granted to restrain action at law to recover arrears of annuity granted to wife of person, who, from fiduciary connection with grantor, was held to have abused his confidence by undue exercise of influence, ordered at hearing to be continued. *Goddard* v. *Carlisle*, 9 Price, 169 ; 23 R. R. 654.

9. By Reason of Infirmity.

a. Expectant Heirs and Reversioners.

i. *In General.*

Generally.]—Expectant heirs are not to be more highly favoured than other persons in ordinary money transactions. *Tynte* v. *Hodge*, *Tynte* v. *Baum*, 11 L. T. 490 ; 13 W. R. 172.

Liability of person dealing with an heir apparent for his expectancy. *Davis* v. *Marlborough (Duke)*, 2 Swanst. 139.

The privilege of an expectant heir dealing substantially for his expectancy not affected by

the addition of a present possession or security. *Ib.*

—— **Age.**]—In the privilege of an expectant heir age is material. *Ib.*

Heirs, even when of age, are under the care of a court of equity, and then want it most, the law taking care of them till that time. *Osmond* v. *FitzRoy*, 3 P. Wms. 131.

—— **Usury Laws Repeal, Effect of.**]—The repeal of the usury laws has not altered the rules of the court as to dealings with expectant heirs. *Croft* v. *Graham*, 9 Jur. (N.S.) 1032. Affirmed, 2 De G. J. & S. 155; 9 L. T. 589.

Nor has it affected the court of chancery to give adequate protection, in cases of sales of reversions at inadequate prices, to expectant heirs or persons under pressure. *O'Rorke* v. *Bolinbroke*, 2 App. Cas. 814; 26 W. R. 239.

—— **Reversionary Interest—Tenant for Life and Remainderman joining.**]—The rules of equity regulating the purchase of reversionary interests from expectant heirs are not applicable to a case where the tenant for life and remainderman join, for then the whole estate is represented. *Cooke* v. *Burtchaell*, 2 Dr. & War. 165. See *Wood* v. *Abrey*, infra.

—— **Full Age.**]—A sale of a reversionary interest by a young man of full age for a substantial purpose stands on the same footing as other contracts. *Judd* v. *Green*, 45 L. J., Ch. 108; 33 L. T. 597.

—— **31 & 32 Vict. c. 4.**]—An exorbitant rate of interest agreed to be paid by a young and needy man, on the security of property in reversion held by an indefeasible title, is unfair dealing within 31 & 32 Vict. c. 4. *Tyler* v. *Yates*, 40 L. J., Ch. 768; L. R. 6 Ch. 665; 25 L. T. 284; 19 W. R. 909.

—— **Judgment to stand as Security.**]—A judgment of 6,000*l.* being taken at the time of a purchase (from a remainderman in tail, being distressed, of two manors of yearly value of 300*l.* for 300*l.*), as a security for the performance, Lord Hardwicke directed it should stand only as a security for principal, interest, and costs, and no further. There are all the material ingredients in this case to set aside this agreement as a catching bargain against a necessitous heir. What guides the court in all these cases is the taking advantage of an heir's being distressed, and this is the principal ground of these decrees. The courts have always extended their relief in such cases for the sake of the public, to prevent people's gaming to the prejudice of improvident persons and the ruin of families. The defendant was decreed to pay plaintiff's costs in original cause, and the cross bill was dismissed with costs. *Bernardiston* v. *Lingood*, 2 Atk. 133.

—— **Sale by Tenant for Life and Remainderman.**]—Tenant for life and remainderman in tail, both in distress, join in selling estate for inadequate consideration:—Held, that it could not be considered as the rule of reversionary interest, subject to rules relating to such sales; but that sale was invalid on account of inadequacy of price, coupled with distress of vendors, and their want of advice. *Wood* v. *Abrey*, 3 Madd. 417; 18 R. R. 264. See *Hamilton* v. *Grant*, 3 Dow, 33; 1 Bligh (N.S.) 584; 15 R. R. 5.

—— **Mortgage of Reversion, to secure a Rent Charge, by Reversioner entitled to a Rent Charge for Life.**]—A. was entitled, for the joint lives of himself and his father, to a rent charge of 500*l.* charged on an estate of which his father was tenant for life, with remainder to A. in fee; A. having agreed to sell to B. a perpetual rent charge of 500*l.* issuing out of the estate, assigned to B. the rent charge to which he was entitled, and conveyed his reversion in fee to trustees, in trust to secure to B. a rent charge of 500*l.* a year, to commence on the termination of the prior rent charge:—Held, that the transaction was not to be considered as a sale of an interest in reversion, as A., when he made the agreement, had it in his power to secure to B. a perpetual rent charge of 500*l.* in possession. *Wardle* v. *Carter*, 7 Sim. 490.

—— **Mortgage by Person entitled to Income of Property.**]—W. was entitled to the income of property, subject to the payment of a life annuity to C., and of the interest on mortgages, whereby the present income was reduced to a small amount. In consideration of advance of 1,000*l.*, W., assigned the income by way of security for the payment of 3,300*l.* on the death of C., redeemable on payment of 1,500*l.* at the end of the first year. By a memorandum, W. further agreed to repay 400*l.* and interest at 5 per cent. per month, which security was to be tacked to the former security:—Held, that W.'s interest in the income was not a reversion, and that the transaction therefore could not be set aside as a sale at an undervalue. *Webster* v. *Cook*, L. R. 2 Ch. 342; 18 W. R. 1001.

Held, also, that the security for 400*l.* was valid. *Ib.*

—— **Onus.**—Courts of equity protect expectant heirs in their contracts, as they do those who act from distress or ignorance, and the burden of proving the transaction fair is thrown on those dealing with them. *Bernal* v. *Donegal* (*Marquis*). 3 Dow, 133; 1 Bligh (N.S.) 594.

The general rule is this: Where a person deals with an expectant heir for his reversion, the burden of proof lies upon such person to prove the fairness of the transaction. *Bromley* v. *Smith*, 26 Beav. 644; 29 L. J., Ch. 18; 5 Jur. (N.S.) 833; 7 W. R. 557.

The application of the rule is not prevented by the fact that the transaction was a charge, and not a sale, nor that the expectant heir was a person of mature age, nor that he perfectly understood the nature and extent of the transaction, nor is it necessary for the heir to show that he was in pecuniary distress at the time. *Ib.*

—— **Costs.**]—Decree made to set aside the transaction without costs, except as to such parts of the bill as charged fraud and collusion and which were not proved, as to which the bill was dismissed with costs. *Ib.*

—— **Onus—Fair Price.**]—A person seeking the benefit of a dealing with an heir for his expectancies must show that he gave him an adequate consideration, which is the fair market price at the time of dealing, and not the value according to the calculations of actuaries on the

tables. *Aldborough (Earl)* v. *Trye*, West, 221 ; 7 Cl. & F. 436.

The rule that a fair price is to be given is a sufficient protection to heirs or reversioners, but the rule of fair value would not be any protection, as in that case they could not deal with their expectancies or sell their interest at all. *Ib.*

—— **Public Auction.**]—A sale by public auction is within the proper rule, on the plain principle that the sum which the thing will fetch is the sum which it is worth. *Ib.*

Relief.]—Relief against an unconscionable bargain with expectant heir. *Barney* v. *Tyson*, 2 Vent. 359.

Setting Aside.]—An unconscionable bargain got from an heir in the life of his father set aside. *Berny* v. *Pitt*, 2 Vern. 14. S. P., *Nott* v. *Johnson*, *id.* 27 ; *Lamplugh* v. *Smith*, *id.* 77.

Post-obit—Setting Aside.]—Bill to set aside an agreement for an annuity (which had been paid) during the uncle's life, in consideration for a sum payable at his death sans issue, dismissed. *Henly* v. *Axe*, 2 Bro. C. C. 18.

Conditions of Relief.]—The court will not relieve expectant heirs so as not to oblige them to refund what was actually advanced. *Bernal* v. *Donegal (Marquis)*, 3 Dow, 156 ; 1 Bligh (N.S.) 594.

Relief against an oppressive deed, though obtained from an heir apparent, is given only on payment of the consideration with interest. *Davis* v. *Marlborough (Duke)*, 2 Swanst. 166.

In rescinding contracts of expectant heirs, whether the payment of purchase money may, according to circumstances, be decreed with compound. and not merely simple interest, quære. *Scott* v. *Dunbar*, 1 Moll. 442.

Improvident heirs relieved from fraudulent bargains on repayment of bonâ fide advances. *Walter* v. *Dalt*, Dick. 8.

—— **Modification of Transaction.**]—Voluntary conveyances by one lately coming of age to an agent of a reversion of no great value for a nominal consideration of 180*l*., and containing covenants as in the case of a purchase, not absolutely rescinded, as not being a case of fraud ; but the transaction modified by decree that the agent should release the covenants at his own expense. and recite the impropriety of them as referable to a gift. *Cray* v. *Mansfield*, 1 Ves. 379.

—— **Costs.**]—A dealing with an expectant heir being set aside :—Held, that he must bear the costs paid for the securities. *Bromley* v. *Smith*, 26 Beav. 644 ; 29 L. J., Ch. 18 ; 5 Jur. (N.S.) 833 ; 7 W. R. 557.

Servant taking Bond from Infant Heir.]—See *Osmond* v. *Fitzroy*, 3 P. Wms. 129, ante, col. 219.

Parents Tenants for Life, inducing Children Reversioners to join in Conveyance.]—Where tenants for life, being the father and mother of children, induced them to join in a conveyance of their reversionary interests in property, but the children received none of the purchase money, and the trustee of the property refused to concur in the conveyance, a bill to complete the transaction by the purchaser against the trustee and the children after the death of the surviving parent, was dismissed, but without costs, except as to the trustee. *Hannah* v. *Hodson*, 30 Beav. 19 ; 5 L. T. 42 ; 9 W. R. 729.

Husband and Wife.]—The absolute interest in some freeholds belonging to a wife for life, with remainder to her husband in fee, was sold by the husband. The wife dissenting :—Held, that the contract could not stand as a sale of the reversion at an apportioned price. *Daly* v. *Wonham*, 33 Beav. 154.

Dealings with Tradesmen.]—Dealings between tradesmen and their customers may be subject of account in equity, especially in cases of securities obtained from extravagant young men on misrepresentation, &c. *Courteney (Lord)* v. *Godschall*, 9 Ves. 473.

Injunction to restrain a tradesman from suing on securities for the price of goods sold to an expectant heir, with the knowledge that the purchaser intended to sell them for the purpose of raising money, refused and bill dismissed. *King* v. *Hamlet*, 3 Cl. & F. 218 ; 9 Bligh (N.S.) 575. Affirming, 2 Myl. & K. 456 ; Coop. t. Brough. 281, which reversed 4 Sim. 223 ; 9 L. J. (O.S.) Ch. 243, on different evidence. And see *Portmore* v. *Taylor*, 4 Sim. 182.

Before Repeal of Usury Laws.]—*See* USURY.

ii. *What Interests Affected.*

Expectancy.]—Expectancy of an heir either presumptive or apparent, not an interest or possibility capable of being made the subject of contract. *Carleton* v. *Leighton*, 3 Mer. 667.

Tenant's Term.]—Grant of an extension of a tenant's term out of the reversion has no analogy to the contracts of expectant heirs. *Scott* v. *Dunbar*, 1 Moll. 442.

Lease.]—A contract for a lease, to take effect upon the expiration of an existing lease, is not a dealing for a reversion in the view of a court of equity. *Leslie* v. *Crommelin*, Ir. R. 2 Eq. 134.

Post-nuptial Settlement.]—The principle on which the court acts in discouraging mortgages, sales, and dealings by expectant heirs, has no application to the case of an expectant heir who has made a post-nuptial settlement upon his wife and children. *Shafto* v. *Adams*, 4 Giff. 492 ; 33 L. J., Ch. 287 ; 10 Jur. (N.S.) 121 ; 9 L. T. 676.

Expectations under Will.]—An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity. *Lyde* v. *Mynn*, 1 Myl. & K. 683 ; Coop. t. Brough. 123.

An agreement between two persons having expectations from a third, to divide equally whatever he might leave them, is valid. *Harwood* v. *Tooke*, 2 Sim. 192 ; 29 R. R. 81.

An agreement between two sons to divide equally whatever property they may receive from their father in his lifetime, or become entitled to under his will, or by descent or other-

wise from him, is not contrary to public policy, but will be enforced in equity. *Wethered* v. *Wethered*, 2 Sim. 183 ; 29 R. R. 77.

An agreement on marriage articles to convey to the husband a third part of what shall come to the father of the wife on the death of his father, enforced. *Hobson* v. *Trevor*, 2 P. Wms. 191 ; 10 Mod. 307.

Two persons article that whatever J. shall leave to either of them shall be equally divided between both ; such agreement good, and shall be carried into execution by this court ; also, if after this one of them contrives that J. shall leave part of his estate to a third person, in trust for him, this is within the articles. *Beckley* v. *Newland*, 2 P. Wms. 182.

iii. *Purchases.*

a. Inadequacy of Consideration.

Generally.]—Mere inadequacy of price will entitle an expectant heir to apply to a court of equity to set aside the sale of a reversion ; and the onus, of proving the transaction fair and the price sufficient, is on the purchaser. *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814 ; 26 W. R. 239.

Protection, in equity, to an expectant heir dealing for his expectancy, approaching nearly to an incapacity to contract. Relief against a very advantageous purchase from such a person without fraud ; though mere inadequacy (unless from its grossness of itself evidence of fraud), as between persons standing precisely equal, of no account. The relief on payment of principal, interest, and costs, the purchaser being considered as a mortgagee. His bill to establish the purchase dismissed with costs, except of depositions used by the other party. *Peacock* v. *Evans*, 16 Ves. 512 ; 10 R. R. 218.

—— **Acquiescence — Valuation — Interest.**]—The sale of a reversionary interest, in this court considered as the case of an expectant heir, forms an exception to the general rule, that, for mere inadequacy of value, a contract is not to be set aside. During the continuance of the same situation, acquiescence has no effect ; and the value is to be estimated at the time of the transaction, not according to the event. Interest at 5 per cent. upon the money advanced : compound interest refused. *Gowland* v. *De Faria*, 17 Ves. 20 ; 11 R. R. 9.

Setting Aside.]—The purchase of a reversion at an undervalue was set aside, and under the special circumstances was set aside with costs. *Bawtree* v. *Watson*, 3 Myl. & K. 339.

A purchase of a reversion from an heir, in the lifetime of his father, at an undervalue, set aside, though, if the heir had died before his father the purchaser would have lost all his money. *Nott* v. *Hill*, 1 Vern. 167.

Sale of a reversionary interest in real and personal property, set aside on the ground of inadequacy of price. *Edwards* v. *Browne*, 2 C. C. C. 100 ; 9 Jur. 421.

A son, who after his father's death is a remainderman in tail, sells this remainder at an under-rate ; court sets aside the coveyance. *Twisleton* v. *Griffith*, 1 P. Wms. 310.

The purchase of a reversion cannot stand in equity, unless the purchaser shows that he paid the full value for it. *Salter* v. *Bradshaw*, 26 Beav. 161 ; 28 L. J., Ch. 426 ; 5 Jur. (N.S.) 831.

Dealing with Expectant Heir, what.]—A., being entitled, in case of B.'s dying without issue, to the interest of 2,000*l.* for his life, sold his reversionary interest for 250*l.* The court gave effect to the contract, notwithstanding the allegations of inadequacy of price, it not being a dealing with an expectant heir. *Woodroffe* v. *Allen*, Hay. & J. 73.

Fiduciary Relation.]—A reversionary lease, voluntarily granted partly for past services, which had also been otherwise remunerated, and partly for an inadequate rent and a small fine, set aside, no confidential relation between the parties being proved. *Wyse* v. *Lambert*, 16 Ir. Ch. R. 378.

Property in Possession and Reversion.]—A sale at an undervalue is impeachable, although it comprises interests in possession as well as reversionary interests. *Nesbitt* v. *Berridge*, 32 Beav. 282 ; 9 Jur. (N.S.) 1044 ; 8 L. T. 76 ; 11 W. R. 446.

Without Fraud.]—Purchase of reversion not set aside merely for undervalue, there being no fraud. *Nicholls* v. *Gould*, 2 Ves. 422.

Purchase of a reversionary estate tail of a person without issue, set aside merely for inadequacy of consideration, there being no fraud or pressure, and with costs, the purchaser having resisted the relief ; but he was ordered to pay those occasioned by his unfounded allegations of fraud. *St. Albyn* v. *Harding*, 27 Beav. 11.

Ignorance of both Parties.]—A fund was held on trust for one for life, with remainder between B. and C. equally, if living with benefit of survivorship between them. B. sold his reversionary interest. At the time of the sale C. was dead, but the fact was neither known to the vendor nor to the purchaser :—Held, that the sale could not stand. *Colyer* v. *Clay*, 7 Beav. 188.

Particular Cases.]—The sale of a reversionary interest for 200*l.* which was proved to be worth 238*l.*, set aside, upon the ground of undervalue. *Jones* v. *Ricketts*, 31 Beav. 130 ; 31 L. J., Ch. 753 ; 8 Jur. (N.S.) 1198 ; 10 W. R. 576.

A reversionary interest was purchased bonâ fide for 370*l.*, it being worth 400*l.* The sale was set aside, after it had fallen into possession, on the simple ground of being a sale of a reversion at an undervalue. *Foster* v. *Roberts*, 29 Beav. 467 ; 30 L. J., Ch. 666 ; 7 Jur. (N.S.) 400 ; 4 L. T. 760 ; 9 W. R. 605.

Taking an annuity worth nine years' purchase, at five years, is an unconscionable bargain, and the court will give the taker no assistance in a bargain for a repurchase. *Vaughan* v. *Thomas*, 1 Bro. C. C. 556.

A., a son, aged 47, entitled to contingent interests in large estates on the death of his father, aged 69, subject to other incumbrances, granted an annuity of 3,545*l.* in consideration of an advance of 28,000*l.* ; he also, by another deed dated the following day, granted an annuity of 675*l.*, in consideration of an advance of 4,500*l.* on the same estates. There were the usual clauses of insurance of his life, payment of

premiums and interest on the advances from time to time, and a clause for redemption. The negotiations had been entered upon with the knowledge, in one of the instances by the immediate agency, of the family solicitor. The borrower had, at the time of granting the annuities, no certain income :—Held, that these prices were not inadequate, and the transaction in both cases was upheld. *Tynte* v. *Hodge*, 11 L. T. 490 ; 13 W. R. 172.

Purchase of a contingent reversionary interest set aside chiefly on the ground of inadequacy of value, the consideration being an annuity for the life of the vendor, whose life was a bad life, and was better known to the purchaser than to the vendor to be such. *Davies* v. *Cooper*, 5 Myl. & Cr. 270.

A. sold to B. a life interest in possession, subject to a mortgage for 800*l*., and a reversionary interest in two sums of money. The price paid for the whole was 75*l*., and within a month B. sold it for 125*l*. to C., who within three months afterwards sold it to D. for 550*l*. The value of the property in possession (free from the mortgage) was 1,331*l*., and of the property in reversion 312*l*. The purchase was set aside as against D. (who was held to have notice), on the ground of its being a purchase of a reversion at an undervalue. *Nesbitt* v. *Berridge*, 32 Beav. 282 ; 9 Jur. (N.S.) 1044 ; 8 L. T. 76 ; 11 W. R. 446.

B., for the purposes of a society of which he was the solicitor, borrowed 600*l*. on the security of a joint bond entered into by himself and C. The bond was conditioned to be void if the obligors, their heirs, executors, or administrators, should within one month after the death of such one as should first depart this life of three persons, named in the bond, pay to the obligee 2,000*l*. The bond also charged the interests to which the obligors might become entitled in any personal estate under the wills of the three persons, with payment of the 2,000*l*. On the death of the last survivor of the three persons the obligors sought to be relieved of their obligation under the bond, on the ground that it had been entered into under circumstances which were inequitable, and that the whole transaction amounted, in fact, to a sale of a reversionary interest for an insufficient consideration :—Held, that the bond was good. *Gardiner* v. *Cowper*, 18 L. T. 627.

A reversion was sold for 20*l*. On a reference the master found that it was worth 350*l*. The sale was set aside, but the purchaser had his costs of suit, except those of the inquiry before the master to ascertain the value. *Boothby* v. *Boothby*, 1 Mac. & G. 604 ; 2 Hall & Tw. 214 ; 15 Beav. 212.

Account on Re-sale.]—If A. buys from B., a minor, under circumstances of distress, the reversion of a house worth 40*l*. a year for 100*l*., and sells it again in a few days for 200*l*., equity will compel A. to account to B. for the difference. *Spencer* v. *Chase*, 9 Mod. 29.

Public Auction.]—Sale of reversion by public auction, held good and not within the general rule of sales of reversion, that purchaser is bound to show he gave full value. *Shelly* v. *Nash*, 3 Madd. 232 ; 18 R. R. 223.

Private Contract.]—A sale, by private contract, of a reversionary interest in a sum of stock set aside on account of inadequacy of price, and the unjust and oppressive conduct of the purchaser. *Newton* v. *Hunt*, 5 Sim. 511.

Specific performance of an agreement for the purchase of a reversionary interest refused, where the sale was by private contract, and the price inadequate. *Kendall* v. *Beckett*, 9 L. J. (O.S.) Ch. 24.

Private Sale.]—A private sale of a reversionary interest will not be set aside for mere inadequacy of price, as compared with arithmetical value determined by calculation of an actuary, exclusive of every other circumstance, the latter value not being possible to be obtained in fact. *Headen* v. *Rosher*, 1 M'Cle. & Y. 89.

Estimate.]—If, previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining, from persons of competent skill and having knowledge of the property and of all the circumstances likely to influence its value, a well-considered estimate of what the property would be likely to fetch at a sale, and act upon that opinion ; semble, that such a transaction would not be afterwards disturbed merely because other surveyors afterwards came to a different conclusion from that on which the parties acted. *Edwards* v. *Burt*, 2 De G. M. & G. 55.

It is not necessary, to give validity to such a sale, that it should be made by public auction. *Ib.*

But where, upon the sale by private contract of such an interest in leaseholds, nothing was done, except obtaining the opinion of an actuary unacquainted with the local circumstances likely to influence the value, and in a suit to impeach the sale the purchaser was unable to show that he had given the full value, the sale was set aside. *Ib.*

Bill to compel the transfer of certain stock, the reversionary interest in which had been formerly purchased by the plaintiff, and had now become vested in possession. The transfer was resisted by the vendor, and the trustees of the settlement under which he claimed, on two grounds ; first, fraud, or undue advantage ; and, secondly, inadequacy of the consideration. The first ground wholly failed in evidence. On the second point, the effect of the evidence was, that the price given was sufficient, according to the opinion of auctioneers, and persons of that description, but was about two-thirds of the value, calculated by actuaries from the tables :—Held, that the inadequacy of the consideration was not sufficiently proved. *Potts* v. *Curtis*, 1 Younge, 543.

The rule laid down in the case of *Gowland* v. *De Faria* (17 Ves. 20), as explained in *Headen* v. *Rosher* (1 M'Clel. & Y. 89), and *Potts* v. *Curtis* (1 Younge, 543), imposing upon the purchaser of an expectancy the burden of proving that he gave the proper value, does not import that the value is to be calculated according to the tables, but that it must be the fair market value, with reference to the circumstances of the case. Accordingly a reference to the master to inquire whether 6,000*l*. and 10,000*l*. were respectively, under all the circumstances, the fair market value for two sums of 12,000*l*. and 20,000*l*. respectively, to be paid in the event of the heir surviving his father, under which reference it was found that this was the fair market value, was held right on appeal. *Ald-*

borough (*Earl*) v. *Trye*, West, 221; 7 Cl. & F. 436.

In determining whether a fair price has been paid for a reversionary interest, the market value, and not an actuary's estimate, ought to be regarded. *Wardle* v. *Carter*, 7 Sim. 490.

The purchase of a reversionary interest supported, though the consideration given was less than the average of the estimated valuation of the witnesses, on the ground that the interest was subject to a chancery suit, which materially affected its value. *Perfect* v. *Lane*, 2 De G. F. & J. 369; 30 Beav. 197; 31 L. J., Ch. 489; 8 Jur. (N.S.) 547; 6 L. T. 8; 10 W. R. 197.

The purchasers bought, taking bank stock at 200*l.* per cent. The then market price was 215*l.*, and the average market price, for the last eleven years, 217*l.* These facts were held not to be conclusive evidence of a purchase at an undervalue, there being strong evidence to show that, in the opinion of actuaries, it was reasonable, in the purchase of a reversion, to treat bank stock as only worth 200*l.* *Ib.*

Costs of selling real estate are to be regarded in valuing a reversionary interest in the sale moneys. *Ib.*

A married woman sold her contingent reversionary interest in personalty for 76*l.*, with an agreement that the expenses of the assignment should be paid out of the purchase money. The interest was valued by an actuary employed by the assignors (but erroneously, without reference to the contingency of the wife surviving her husband before the interest was reduced into possession) as an absolute reversion, at 131*l.* 5*s.* The court refused to set aside the sale. *Sewell* v. *Walker*, 12 Jur. 1041.

A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age, and a bachelor, dying without issue, is not the subject of estimate or calculation. But, the purchaser of this reversion having in his treaty with the vendor proposed to deduct one-half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the court, as between the vendor and purchaser, will value the contingency accordingly. *Baker* v. *Bent*, 1 Russ. & M. 224; Tam. 368.

A reversion depending upon the contingency of a tenant for life dying without issue, he being fifty-six years of age and married, and his wife being in her fifty-fourth year, and the only issue of the marriage having been a still-born child eleven years previously, is the subject of estimate or calculation. *Boothby* v. *Boothby*, 1 Mac. & G. 604; 2 H. & Tw. 214; 15 Beav. 212.

—— **Test of Value.**]—In a suit to set aside a sale by private contract:—Held, that the highest price bid for it upon a previous attempt to sell it by auction was a fair test of its market value. *Lord* v. *Jeffkins*, 35 Beav. 7.

Onus of Proof—Estimate of Value.]—Purchasers of reversionary interests are bound to prove that they have given the fair value; which, in cases of estimated value, would in general be the market value of the interest purchased; the only question being whether the fair value was in fact given. *Perfect* v. *Lane*, 2 De G. F. & J. 369; 30 Beav. 197; 31 L. J., Ch. 489; 8 Jur. (N.S.) 547; 6 L. T. 8; 10 W. R. 197.

In ascertaining the market value of a reversion, the fact of its being the subject of a chancery suit, even though it does not affect the right to it, must be taken into consideration. *Lord* v. *Jeffkins*, 35 Beav. 7.

Estoppel.]—Where a vendor of a reversionary interest represented its value in the proposals for the sale of it, and the purchaser adopted that representation, the vendor was afterwards precluded from saying that it was sold at an undervalue. *Perfect* v. *Lane*, supra.

b. Burden of Proof.

Generally.]—The rule that the purchaser of a reversion must prove that he gave a full price, had been so long considered as settled that it can be altered only by the court of appeal. *Hinckswan* v. *Smith*, 3 Russ. 433.

Fairness.]—It is incumbent on a purchaser of reversionary interest from a person in the situation of an expectant heir, seeking specific performance of contract, to make out a case of adequacy of consideration. *Ryle* v. *Swindells*, M'Cle. 519; 13 Price, 758.

The burden of showing that a fair price has been given for the interest of an expectant heir lies upon the purchaser, and that burden is not displaced by showing that substantial value has been given. *Talbot* v. *Staniforth*, 31 L. J., Ch. 197; 10 W. R. 829.

It is the imperative duty of a purchaser of a reversion from an expectant heir to preserve evidence of the bonâ fides of the transaction, and that the sale was for full consideration. *Salter* v. *Bradshaw*, 26 Beav. 161; 28 L. J., Ch. 426; 5 Jur. (N.S.) 831.

The repeal of the usury laws, and the alteration of the law as to reversionary interests (effected by 31 Vict., c. 4) have not altered the onus imposed upon all who deal with expectant heirs and reversioners of proving that their dealings have been fair and reasonable, and of thus rebutting the presumption of fraud which may arise from the nature of a bargain, and the circumstances and conditions of the contracting parties. *Aylesford* (*Earl*) v. *Morris*, 42 L. J., Ch. 546; L. R. 8 Ch. 484; 28 L. T. 541; 21 W. R. 424. And see *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; 26 W. R. 239; *Tyler* v. *Yates*, 40 L. J., Ch. 768; L. R. 6 Ch. 665; 25 L. T. 284; 19 W. R. 909.

Public Auction.]—Sale of reversion by public auction, held good and not within the general rules of sales of reversions, that purchaser must prove he gave full value. *Shelly* v. *Nash*, 3 Madd. 232; 18 R. R. 223.

c. Delay and Confirmation.

Generally.]—Long delay in filing a bill to set aside the sale of a reversion is not to be disregarded. *Lord* v. *Jeffkins*, 35 Beav. 7.

Particular Cases.]—The sale of a reversion set aside after forty years, the vendor having instituted proceedings for that purpose a year after it fell into possession, A., the purchaser, having failed to prove that he had paid full value for it. *Salter* v. *Bradshaw*, 26 Beav. 161; 28 L. J., Ch. 426; 5 Jur. (N.S.) 831.

Reversionary grant from a person in the situation of expectant heir, made thirty-four years, and confirmed by a subsequent deed, set aside,

being obtained by fraud and imposition, the party confirming being ignorant of his rights, and the length of time satisfactorily accounted for. *Roche* v. *O'Brien*, 1 Ball & B. 330.

An estate stood limited under a settlement to A. B. for life, with remainder to C. D., his son, in fee. Father and son made three successive mortgages of the property to E. F., G. H., and I. K. In 1822 C. D. sold his reversion to I. K. In 1823, in consideration of a release of the mortgage debts due to I. K., and the payment by I. K. of the mortgage debts due to E. F. and G. H., and of a sum of money to A. B., A. B., C. D., E. F., and G. H. joined in conveying the estate to I. K. in fee simple. At the time of the sale of the reversion in 1822, C. D. was in distressed circumstances. In 1825, I. K., the purchaser, died, having devised the estate to L. M. In 1830, A. B., the tenant for life, died. In 1846 C. D., the remainderman, filed his bill against L. M. to set aside the sale, praying a reconveyance on payment of the consideration given in 1822, and interest, and for an account of the rents since 1830, when the tenant for life died. No evidence was given by the plaintiff to explain or account for the delay, nor of the state of his circumstances in the interval between 1823 and 1846, when the bill was filed:—Held, that the plaintiff was, under the circumstances, barred by the lapse of time; and the bill was dismissed, with costs. *Sibbering* v. *Balcarras* (*Earl*), 3 De G. & Sm. 735; 19 L. J., Ch. 252; 14 Jur. 753.

But quære, whether the transaction of 1823 did not prevent the plaintiff from having the benefit of the rule of equity concerning the sale of reversions at an undervalue. *Ib.*

—— **Undervalue.**]—Bill to set aside the sale of a reversion, dismissed with costs, the only ground on the evidence being inadequacy of price, and no fraud, &c., and the bill filed twelve years after the sale. *Moth* v. *Atwood*, 5 Ves. 845.

—— **Purchase by Brother from Sister.**]—A purchase of a reversionary interest by a brother from a sister at an undervalue, set aside twenty years after the purchase, and ten years and a half after the reversionary interest fell into possession, the influence of the brother continuing until a year before bill filed. *Sharp* v. *Leach*, 31 Beav. 491.

d. Mode and Conditions of Relief.

Payment.]—Protection in equity to an expectant heir, dealing for his expectancy, approaching nearly to an incapacity to contract. Relief against a very advantageous purchase from such a person, without fraud; though mere inadequacy, unless, from its grossness of itself evidence of fraud, is, between persons standing precisely equal, of no account. The relief on payment of principal, interest, and costs, the purchaser being considered as a mortgagee; his bill to establish the purchase dismissed with costs, except of depositions used by the other party. *Peacock* v. *Evans*, 16 Ves. 512; 10 R. R. 218.

When sales of reversionary interests are set aside for mere inadequacy of consideration, it is upon the repayment of the consideration with interest at the rate of 5*l.* per cent. *St. Albyn* v. *Harding*, 27 Beav. 11.

Instrument to stand as Security.]—Grant of a reversionary rent charge, after the death of plaintiff's father (who was old and infirm) upon unreasonable terms, set aside; but to remain as a security for the money really advanced, and costs to be paid as in redeeming a mortgage. *Gwynne* v. *Heaton*, 1 Bro. C. C. 1.

On setting aside the purchase of a reversion for inadequacy, the deed stands as a security for the money actually due, and, if not paid, the bill stands dismissed, which is equivalent to a foreclosure. *Benyon* v. *Fitch*, 35 Beav. 570.

Sub-purchase to Stand as Security for Original Purchase-Money.]—A sold a reversion to B., at a gross undervalue, though it appeared he was not ignorant at the time of the real value, but the circumstances were such on the whole as to make the transaction void. C., ten years afterwards, being at the same time aware of the circumstances of the original sale, purchases the property from B. at a full value, A. joining in and confirming the sale. But, it appearing that C. had not taken any care to see that A.'s concurrence was obtained by a proper means, but left it to be obtained, as it was in fact obtained, without proper consideration, through B., the author of the original fraud, the decree was, that C.'s representative should hold the property only as a security for the money paid by B. on the original transaction. *Addis* v. *Campbell*, 4 Beav. 401; 10 L. J., Ch. 284.

Allowance.]—On setting aside the sale of a reversion for inadequacy after four years, the purchaser is not entitled to any allowance for the risk he has run in the meantime. *Benyon* v. *Fitch*, 35 Beav. 570

Limit of Time.]—Upon sale of a reversion, part of the terms was that purchase-money be paid by a certain time; not being so by default of the vendee, vendor discharged from his contract. *Newman* v. *Rogers*, 4 Bro. C. C. 391.

Repayment of Premiums, and Right to Policy-Moneys.]—Policies on the life of A., which were of no value, were, upon the sale by A. of a reversionary interest, assigned to the purchaser who kept them up at his own risk and expense. The sale was set aside after A.'s death:—Held, that, as the vendor's representatives would not have been bound to repay the premiums on setting aside the transaction, if they had exceeded the value of the policies, so, on the other hand, they were not entitled to the moneys received by the purchaser on such policies on the death of A. *Foster* v. *Roberts*, 29 Beav. 467; 30 L. J., Ch. 666; 7 Jur. (N.S.) 400; 4 L. T. 760; 9 W. R. 605.

Right to Policy.]—In 1856 A., being in embarrassed circumstances, but entitled to the equity of redemption of consols, and of two policies on his life, and to a life interest in reversion in other funds, agreed to sell the property to B. at an undervalue. Before the agreement was completed, B. assigned his interest in the contract to C. for a larger sum than he had agreed to pay for it, and A. and B. afterwards assigned it to C. accordingly. C. afterwards assigned it to D. for a still larger sum than he had paid to A. and B. D. had notice of the sums previously agreed to be paid, and paid for the property:—Held, that the transaction, as a sale, was invalid as respected D., but an account was directed as to what was really due to her, and

she was, under all the circumstances, allowed to retain a policy which she had redeemed, and on which she had paid the premiums. *Nesbitt* v. *Berridge*, 32 Beav. 282; 9 Jur. (N.S.) 1044; 8 L. T. 76; 11 W. R. 446.

Decreeing Specific Performance by Heir.]—If an heir sells a reversion in the life of his father at an undervalue, a court of equity will not, in favour of such a purchase, decree the heir specifically to perform a covenant for further assurance. *Johnson* v. *Nott*, 1 Vern. 271.

Purchaser evicted, Recovering Purchase-Money.]—A man buys at an underrate, and has a covenant and collateral security for quiet enjoyment, and is evicted, he shall recover back only the consideration money, and not the full value of the estate. *Zouch* v. *Swaine*, 1 Vern. 320.

e. Costs.

Rule.]—Rule as to costs on setting aside the sale of a reversion. *Foster* v. *Roberts*, 29 Beav. 467; 30 L. J., Ch. 666; 7 Jur. (N.S.) 400; 4 L. T. 760; 9 W. R. 605.

Where Offer Refused.]—Before instituting a suit to set aside the sale of a reversion, the plaintiff offered very nearly the same terms that were afterwards imposed by the decree:—Held, that the defendants, who had refused these terms, must pay the costs properly incurred up to the hearing. *Nesbitt* v. *Berridge*, 1 N. R. 345.

iv. *Mortgages.*

Generally.]—The same principles apply to mortgages, as to sales, by expectant heirs. *Tottenham* v. *Emmet*, 12 L. T. 838; 14 W. R. 3. Affirming 10 Jur. (N.S.) 1090.

Inadequacy of Consideration.]—A mortgage of a reversionary interest, depending on a gentleman dying without issue male, set aside for inadequacy of consideration, although the risk was such as not to be susceptible of accurate valuation. *Benyon* v. *Fitch*, 35 Beav. 570.

Onus.]—A mortgage of a reversionary interest stands in the same position as a sale, and therefore to support the transaction the mortgagee must show that he gave full value. *Benyon* v. *Fitch*, 35 Beav. 570.

—— **Fair Price.**]—In dealing with expectant heirs, persons advancing money must be able to show that they gave an adequate consideration for their reversionary interests. What was a fair market price must depend upon the relative circumstances attending the transaction at the time. *Tynte* v. *Hodge*, 11 L. T. 490; 13 W. R. 172.

Setting Aside—Revival of Prior Mortgage.]—An expectant heir charged his reversion in 1853, and afterwards in 1855, to the same parties. The second transaction cancelled the first. The second being set aside by the court:—Held, that the first was not revived. *Bromley* v. *Smith*, 26 Beav. 644; 29 L. J., Ch. 18; 5 Jur. (N.S.) 833; 7 W. R. 557.

Solicitor taking Mortgage from Young and Poor Client—Conditions of Relief.]—J., a young man in very poor circumstances, was defendant in a probate action in which he claimed a share of certain real estate as co-heir of the deceased. To enable him to conduct his defence he borrowed money from K., a solicitor, to whom he executed a mortgage whereby he, J., covenanted to employ a particular person as his solicitor in the action, and, if he should be successful in the action, to pay K. 225*l.* "by way of bonus"; and it was provided that K. should make such further advances to J. as and when K. should think fit to meet any further necessities of J., or to be applied in or towards the costs of the action. The deed then charged J.'s interest in the real estate in question with present and future advances and interest at 5 per cent., and the 225*l.* bonus. J. received a further advance from K., making a total of 100*l.* for advances and was ultimately successful in establishing his claim in the probate action:—Held, in an action by J. to redeem, that the transaction was voidable as an undue advantage obtained from J., when under the pressure of distress and in a position analogous to that of an expectant heir; and, accordingly, redemption was decreed on payment only of the sums actually advanced to J., with interest. *James* v. *Kerr*, 58 L. J., Ch. 355; 40 Ch. D. 449; 60 L. T. 212; 37 W. R. 279; 53 J. P. 628.

Conditions of Relief—Mortgage to Stand as Security—Base Fee.]—A plaintiff was entitled to a base fee in real estates in Ireland, subject to the life interest of, and the exercise of a power of appointment by, his father, who was upwards of seventy and a lunatic. He applied to the defendant for a loan of 500*l.*, and agreed to include in the security certain costs, to cover which he was not properly liable, and amounting, with the 500*l.*, to 1,064*l.* The defendant consented to advance the money on these terms; accordingly the plaintiff, who had an independent solicitor, mortgaged his reversion to the defendant, to secure 2,000*l.* in case the plaintiff's father should die within three years after the date of the mortgage, and 4,000*l.* if he should outlive that period, with interest on the respective sums. The father died four years afterwards, and the plaintiff filed a bill to set aside the mortgage:—Held, that the mortgage must stand for a security only for the sum actually advanced, and the costs which the plaintiff was liable to pay with interest. *Tottenham* v. *Emmet*, 12 L. T. 838; 14 W. R. 3. Affirming 10 Jur. (N.S.) 1090.

—— **Six Years' Interest.**]—A married woman and her brothers, persons in a humble position, being entitled in reversion expectant on the death of a tenant for life, to a sum of 1,500*l.* charged on land, purported to mortgage this interest to B. as security for 500*l.*, though 250*l.* only was actually advanced. B. subsequently advanced 150*l.* more, for which a further charge for 300*l.* on the same reversionary interest was taken as security. This deed of further charge contained recitals and clauses to the effect that the nature of the transaction was perfectly understood by the borrowers, and that the difference between the sums actually advanced and the sums expressed to be secured, was considered reasonable remuneration for the delay that must occur before repayment, on account of the age of the tenant for life. The

securities were prepared by B.'s solicitor, acting for all parties, and the borrowers had no independent advice. Only one year's interest was ever paid. On the death of the tenant for life the 1,500*l.* was paid into court, and upon a petition by the reversioners to set aside these securities on the ground of fraud, and for payment out of the fund :—Held, that the mortgage and further charge could stand as security only for the sums actually advanced, with six years' arrears of interest only. *Slater's Trusts, In re*, 48 L. J., Ch. 473 ; 11 Ch. D. 227 ; 40 L. T. 184 ; 27 W. R. 448.

—— **Practice—Petition.**]—Semble, the court will, upon petition for payment out of court, hear and decide questions of this nature without directing the issue of a writ. *Ib.*

—— **Premiums on Policy.**]—A young nobleman, on attaining twenty-one, for a small consideration, conveyed his reversion in real estates, and assigned policies which had been effected on his life in his name, for securing 20,000*l.*, with a proviso for redemption and reconveyance of the estates and policies, on payment. After a delay of fourteen years the transaction was set aside, and in the meantime the policies had been sold under a power of sale :—Held, that the mortgage must stand as a security for the moneys actually advanced, but not for the premiums which the mortgagee had paid for keeping up the policies. *Pennell* v. *Millar*, 23 Beav. 172 ; 26 L. J., Ch. 699 ; 3 Jur. (N.S.) 850 ; 5 W. R. 215.

—— **Rectification of Decree.**]—The bill especially asked for the reassignment of the policies, and the payment of the produce of those sold under the powers of sale. The same relief was asked at the hearing, and was given by the decree. After the decree had been passed, the plaintiffs, finding the account in respect of receipts and payments of the policies would be onerous to them, obtained a hearing, and then asked that this part of the decree might be omitted. The court held them entitled, and rectified the decree accordingly, and without costs. *Ib.*

—— **Repayment of Premiums.**]—An expectant heir mortgaged his reversionary estate, and as a further security, he covenanted to keep up policies on his life, which on his default, the mortgagees were empowered to do, and he covenanted to pay the amount, and charged it on his reversion. On setting aside the transaction for inadequacy of consideration, the mortgagees were not allowed the premiums paid by them under the security. *Bromley* v. *Smith*, 26 Beav. 644 ; 29 L. J., Ch. 18 ; 5 Jur. (N.S.) 833 ; 7 W. R. 557.

Practice—Jurisdiction.]—A sum of 500*l.* was advanced, by way of loan, upon the security of the reversion of real estates (the subject matter of the suit), expectant upon the death of a tenant for life, aged sixty-one at the date of the advance, upon the terms that, if the tenant for life died in five years, the lender should receive back 500*l.* and as much more—viz. 1,000*l.* ; but if the tenant for life died after the expiration of five years, the lender was to receive back 500*l.*, and twice as much more—viz. 1,500*l.* The owner of an incumbrance on the estate prior in point of date to that of the lender of the 500*l.*, and holding also an incumbrance posterior to it in date, filed his bill of foreclosure against such lender and several other parties holding subsequent incumbrances, alleging simply that they claimed some interest in the estates, but without further particularising such interest. By his answer, the lender of the 500*l.* set out his mortgage deed, and insisted upon it. The answer was replied to, and a decree was made in the cause, directing an inquiry what charges or incumbrances there were upon the estate, and directing the master to state the priorities thereof. The lender of the 500*l.* claimed before the master, under this reference, to establish his mortgage, but the master reported against it on the ground of usury, an objection to that effect having been taken before him by a subsequent incumbrancer, not the plaintiff :—Held, upon appeal from the decision of the vice-chancellor, allowing an exception to the master's report, first, that it was competent to the master and to the court, in a suit so framed, to enter into the question of usury. Secondly, that the master was right in reporting against the security on that ground. *Mansfield (Earl)* v. *Ogle*, 7 De G. M. & G. 181 ; 24 L. J., Ch. 450 ; 1 Jur. (N.S.) 603 ; 3 W. R. 557.

v. *Post Obits.*

Public Policy.]—Post obit security, though not on reasonable terms, may be valid, but on grounds of public policy strictly examined. *Curling* v. *Townshend*, 19 Ves. 628.

Usury.]—Post obit bonds, though upon terms of gross inequality, established ; such securities not being liable to impeachment on the ground of usury. *Wharton* v. *May*, 5 Ves. 27.

Rights of Assignee of.]—The assignee of a post obit security takes it with notice of all its legal incidents, including the right of the reversioner to open settled accounts between himself and the original mortgagor. *Tottenham* v. *Green*, 32 L. J., Ch. 201 ; 1 N. R. 466.

Recitals in a mortgage deed of an account settled are not binding on the reversioner, even as against sub-mortgagees. *Ib.*

Sale of Bonds.]—Post obit bonds by a young man put up to sale by him without reserve, relieved against. *Fox* v. *Wright*, 6 Madd. 111 ; 22 R. R. 324.

Relief.]—One lent an heir 1,000*l.* to pay 2,500*l.* if he survived his father, else nothing ; equity relieved. *Twistleton* v. *Griffith*, 1 P. Wms. 310.

One entitled to an estate after the death of two old lives, takes 350*l.* to pay 700*l.* when the lives fall, and mortgages the estate as a security. No relief against this bargain, though both the lives died within two years. *Batty* v. *Lloyd*, 1 Vern. 141.

Post obit security bond by A. in 1720, for payment in six months after his father's death, if he survived ; otherwise to be void. The father, then seventy, dies in 1731 ; A. in 1734. No relief against the penalty, there being no proof of imposition, although suspicious circumstances in it. *Hill* v. *Caillovel*, 1 Ves. 122.

A., aged thirty, borrows 5,000*l.* on bond, to pay 10,000*l.* if he survives B., aged seventy-eight. A. survives a year and eight months, having, on death of B., confirmed the bargain by a new bond, &c., freely and paying part. No relief

given in this case, except as to the penalty. *Chesterfield (Earl)* v. *Janssen*, 2 Ves. 125; 1 Atk. 352.

—— **Payment.**]—A., tenant for life, remainder to first, &c., son in tail, remainder to his nephew B. B. enters into several statutes to C. for payment of ten to one upon the death of A. in case he died without issue male in the life of B. C. in the life of A. brings a bill to compel B. either to pay principal and interest, or to be foreclosed of any relief against the bargain. B., by answer, declares the bargain fairly made, and intends to abide by it, and that he would seek no relief against it. A. dies. B. brings a bill against the executor of C., and, notwithstanding B.'s former answer, he is relieved against the bargain on payment of principal and interest without costs. *Wiseman* v. *Beake*, 2 Vern. 121; Free. C. C. 111.

Conditions of Relief—Bond to Stand for Sum Advanced.]—Under circumstances post obit bonds from an expectant heir set aside, and allowed only to stand for sum actually advanced, with interest. *Bernal* v. *Donegal (Marquis)*, 3 Dow, 133; 1 Bligh (N.S.) 524.

—— **Price of Goods Sold—Joint Mortgagors.**]—Agreement obtained from young heirs, and securities taken for the payment of great sums of money on the death of their ancestors for goods sold at extravagant prices, set aside on payment of the true value which each person respectively received; and, though the security was joint, yet one not to answer for what the other received. *Bill* v. *Price*, 1 Vern. 467.

Practice—Payment into Court.]—In a suit to set aside post obit securities, an injunction being granted, the principal and interest will be ordered into court, and will not be paid to the defendant. *Marsack* v. *Farlow*, Jacob, 572.

—— **Account Settled—Re-opening.**]—An account settled and signed by an expectant heir for the purpose of a post obit security is not conclusive as between him and the person dealing with him; but the right of such heir to reopen the accounts does not extend to transactions not of a post obit character forming items in the account. *Tottenham* v. *Green*, 32 L. J., Ch. 201; 1 N. R. 466.

—— **Injunction—Motion to Set Aside—Costs.**]—An action on a post obit, as contrary to the principles of this court, was restrained, and subsequent motion to set aside the injunction was refused with costs, such case being against general rule, that costs of motion for injunction, or to dissolve injunction, refused, are costs in the cause. *Marsack* v. *Reeves*, 6 Madd. 108.

vi. *Unconscionable Bargains.*

Jurisdiction.]—Although by 17 & 18 Vict. c. 60, the usury laws are repealed, and by 31 & 32 Vict. c. 4, dealings with reversionary interests can no longer be set aside for inadequacy of consideration, a court has still jurisdiction to protect the unwary from unconscionable bargains. *Tyler* v. *Yates*, 40 L. J., Ch. 768; L. R. 6 Ch. 665; 25 L. T. 284; 19 W. R. 909. S. P., *Aylesford (Earl)* v. *Morris*, 42 L. J., Ch. 546; L. R. 8 Ch. 484; 28 L. T. 541; 21 W. R. 424. S. P., *Miller* v. *Cook*, 40 L. J., Ch. 11; L. R. 10 Eq. 641; 22 L. T. 740; 18 W. R. 1061.

Principles of Relief.]—The principle on which a court of equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money, applies also to the case of money being lent, on unconscionable terms (not fully understood by the borrower and known not to be fully understood by him by the lender), to a young man, being a minor at the time of the first transaction, the son of a father possessing large property; who has no property of his own and no expectation of any, except such general expectations as are founded on his father's position in life; the money being lent without any thought of repayment by the borrower, but on the credit of such general expectations and in the hope of extorting payment from the father to avoid the exposure attendant on his son's being made a bankrupt. *Nevill* v. *Snelling*, 49 L. J., Ch. 777; 15 Ch. D. 679; 43 L. T. 244; 29 W. R. 375. S. P. *Bennett* v. *Bennett*, 43 L. T. 246, n.

Absence of Fraud.]—The mere absence of fraud does not necessarily decide upon the validity of an unconscionable bargain. *Bowes* v. *Heaps*, 3 V. & B. 117; 13 R. R. 162.

Covenant.]—A. lends money to B. on a mortgage, and takes a covenant from B. by another deed that, if A. should think fit, B. should convey to A. so much of the mortgaged estate as should be of the value of the money lent at two years' purchase. Covenant decreed to be set aside as unconscionable. *Jennings* v. *Ward*, 2 Vern. 520.

Grant of Annuity, with Stipulation.]—Grant of annuity by reversioner which would repay the principal in six years, with a stipulation to employ a dependant of the grantee as receiver, and other circumstances:—Held, not to be impeachable as unconscionable. *Whalley* v. *Foude*, 1 Jur. 257.

Setting Aside.]—An unconscionable bargain got from an heir in the life of his father set aside. *Berny* v. *Pitt*, 2 Vern. 14. S. P., *Nott* v. *Johnson*, *id.* 27. *Lamplugh* v. *Smith*, *id.* 77.

Conditions of Relief.]—Loans were made to a young man on his bills at exorbitant interest, and when they were about to become due he mortgaged his reversionary interest to secure the amount and a further advance. The mortgage being set aside for inadequacy, the mortgagee is entitled to the full amount of the bills, and not simply to the money actually advanced on them. *Benyon* v. *Fitch*, 35 Beav. 570.

A. borrows 200*l.* of B., and gives B. a mortgage defeasanced to be void on B.'s paying A. 40*l.* per annum for eight years by quarterly payments. Court relieved on payment of the 200*l.* and simple interest. *James* v. *Oades*, 2 Vern. 402.

Where a young man, entitled in reversion to an estate, and very much pressed for money shortly after attaining his majority, had given a money-lender securities and promissory notes, bearing an exorbitant rate of interest; they were ordered to be delivered up on repayment of the sums actually advanced, with interest thereon at 5

per cent. per annum. *Wyatt* v. *Cook*, 18 L. T. 12; 16 W. R. 502.

A young nobleman in his twenty-second year, entitled to large property in the event of his surviving his father, was largely indebted. The creditor pressed for payment, and recommended the young nobleman to apply to a certain money-lender. The money-lender advanced enough money to in part pay off the creditor, and made a further advance to the young nobleman, taking by way of security his acceptances at three months for the sum advanced, with interest and discount together exceeding the rate of 60 per cent. The acceptances became due and the process was repeated, the young nobleman receiving a small advance. The young nobleman had no professional assistance in these matters, and no application was made to his father or to the solicitors of the father. The father died before the second set of bills became due, and the money-lender commenced actions upon them:—Held, that the actions would be restrained, and a decree made for delivery up of the bills on payment of the sums actually advanced, and interest at 5 per cent. *Aylesford (Earl)* v. *Morris*, 42 L. J., Ch. 546; 8 L. R. Ch. 484; 28 L. T. 541; 21 W. R. 424.

—— **Redemption on Payment of Sum Advanced.**]—A younger son, twenty-six years of age, and in great pecuniary distress, in July, 1861, borrowed 85*l.* of a money-lender, on his promissory note for 100*l.* at six months, and as a collateral security mortgaged a bond for 600*l.* payable on the death of his father, then aged fifty-four, which he had taken from his eldest brother as consideration for his releasing his portion of 600*l.* charged on the family estate. The interest reserved by the mortgage, in the event (which happened) of the note not being paid when due, was 5 per cent. per month. He died in October, 1872. The bond became payable in October, 1873, by the death of his father, and in February, 1874, his legal personal representative filed a bill to redeem:—Held, that he was an expectant heir, and that the bargain was unconscionable, and redemption was decreed on payment to the money-lender of the amount actually advanced, with interest at 5 per cent. per annum. *Beynnon* v. *Cook*, 23 W. R. 413. Affirmed, L. R. 10 Ch. 389; 32 L. T. 353; 23 W. R. 531.

—— **Deed to Stand as Security for Sum Advanced.**]—In 1819 W. O. borrowed of E. C. 1,500*l.*, and of H. W. 500*l.*, on condition that the same sums and as much more should be paid to them on the death of his father A. B., provided he died within five years; but, if he should survive that period, then the same sums and twice as much more were to be paid to E. C. and H. W. The manor of C., and other estates to which W. O. was then absolutely entitled in remainder expectant on the death of A. B., were granted to D. to secure the payment of these sums and interest. In August, 1844, A. B. died, and in November D. gave notice to the tenants in possession, that, as trustee, he required them to pay the rent to him until the sums of 4,500*l.* and 1,500*l.*, with interest, had been paid. On bill filed against F. C. and others, praying that they might be ordered to redeem or be foreclosed, a reference was, on the hearing, made to the master to ascertain what incumbrances there were affecting the estates. F. C., as the representative of E. C., claimed that he was, under the indenture of 1819, entitled to receive the sum of 1,500*l.*, and interest from the 14th August, 1844. The master disallowed the claim, on the ground that the indenture was void for usury:—Held, allowing the exception, that, as the nullity of the deed had not been established, it must stand as a security for the money actually advanced, and interest at 5 per cent. *Baker* v. *Bradley*, 1 Jur. (N.S.) 489; 3 W. R. 361.

—— **Securities to Stand for Money Advanced.**]—Unconscionable bargain, to pay four times the money advanced, subject to the contingency of the borrower, young and in good health, surviving a young but very bad life, and a very improbable chance of issue. The securities to stand only for the principal advanced, interest, and costs, under the circumstances; no fraud; terms proposed by the borrower to several others being merely acceded to. *Bowes* v. *Heaps*, 3 V. & B. 117; 13 R. R. 162.

—— **31 & 32 Vict. c. 4, s. 1.**]—The plaintiff was entitled to a reversionary interest in a sum of 2,100*l.* invested on mortgages subject to a life estate of a lady, aged sixty-three. The plaintiff was married in 1888, and, except the reversion, was without means. Her husband, who had been in the army, had no means, and was without employment. In 1889 the plaintiff had mortgaged her reversion to M. for 400*l.*, at 7 per cent., and had borrowed two other sums of 50*l.* and 52*l.* 10*s.*, for which she had given equitable charges on the fund. In January, 1890, the plaintiff and her husband were living in an hotel in Dublin. She was in delicate health, and was expecting her confinement in a few weeks. They had been trying to sell the reversion through M., a solicitor in Dublin. They had no money and would be obliged to pay a week's hotel bill on the 16th January. On that day she executed a mortgage of the reversionary interest to the defendant, a Dublin money-lender, to secure 100*l.* of an advance, repayable in six months, at 60 per cent. There was a sum of 7*l.* charged for costs, which also bore interest at 60 per cent. This mortgage was the result of several interviews between the plaintiff and her husband and the defendant. The deed was approved of by M. on behalf of the plaintiff, and acknowledged before a commissioner:—Held, that the mortgage was under the circumstances, a hard and unconscionable bargain, and should stand security for all sums advanced only with interest at 5 per cent. *Rae* v. *Joyce*, 29 L. R., Ir. 500—C. A.

—— **Costs.**]—A money-lender advanced to a young man, aged twenty-two, in distress for money and in fear of arrest, 123*l.*; taking from him a promissory note for 150*l.*, and two mortgages of his reversionary interest in a legacy of 500*l.*, and in a share of residuary estate worth about 500*l.* more. One of such mortgages secured the repayment of 50*l.*, with interest at the rate of 20 per cent. for the first month and 5 per cent. per month afterwards, and the other secured 150*l.*, with interest at 20 per cent. per annum, reducible to 10 per cent. on punctual quarterly payments, and both these mortgages contained an absolute power of sale without notice. Upon a bill by the borrower against the money-lender to set aside the securities:—Held, that the bargain was an unconscionable one, and amounted to unfair dealing within 31 & 32 Vict. c. 4; and it was declared that the deeds should

stand as a security only for the sums actually advanced, with interest at 5*l.* per cent., but the court directed that the defendant should have his costs of suit added to the amount to be found due on his securities. *Miller* v. *Cook*, 40 L. J., Ch. 11; L. R. 10 Eq. 641; 22 L. T. 740; 18 W. R. 1061.

S., a man of intemperate habits, aged thirty, in order to pay tradesmen's bills and other debts, for 5,000*l.* in hand, bound himself in the penalty of 20,000*l.* to pay 10,000*l.* upon the death of M., a lady aged seventy-eight, if he survived her. M. died aged eighty-four, and S. survived her two years. At M.'s death a new bond was entered into, with the same penalty for the payment of 10,000*l.* and interest, and S. executed a warrant of attorney to empower judgment to be recorded against him in King's Bench, which was done accordingly. 2,000*l.* were paid by S. in about five months from the death of M. Before his death S. devised the residue of his personal estate after paying debts, &c. to his son, a minor. The plaintiffs, the son's guardians and executors in trust, brought a bill to be relieved against defendant's demand as an unconscionable bargain and usurious contract. The court relieved plaintiffs against the penalty and judgment, by directing defendant to deliver up the second bond to be cancelled, and to acknowledge satisfaction on the judgment upon being paid by plaintiffs what should be due at law, but would not give him costs, as there was probabilis causa litigandi, and defendant's case far from favourable. *Chesterfield* (*Earl*) v. *Janssen*, 1 Atk. 301.

Practice—Demurrer.]—A very young man in necessitous circumstances received advances from money-lenders on unconscionable terms, and charged them on his reversionary interest in certain real estate. A foreclosure suit was subsequently instituted by one of the incumbrancers, the young man was then made a bankrupt, and an assignee fraudulently appointed, who, in concert with the incumbrancers, procured part of the property to be sold in the suit, and the greater part of the proceeds to be paid to some of the incumbrancers. To a bill by the bankrupt, containing these statements, and also stating that the defendants, who were the incumbrancers, and the assignee had fraudulently colluded together to deprive him of his property, and also averring generally, that there would be a large surplus after satisfying all claims against him, and that the assignee had refused to sue or to lend his name for that purpose, and praying that the securities might stand as a security only for the moneys actually advanced to him, and for an account of such moneys, and for repayment to him by the incumbrancers of the moneys overpaid to them out of the proceeds of sale, a demurrer was allowed without costs, and with liberty to amend. *Payne* v. *Dicker*, 19 W. R. 695.

Other Cases—Relief.]—One just come of age entitled to an estate of 300*l.* per annum, being drawn into a statute for 1,000*l.*, upon which he received only 330*l.*, is relieved upon the circumstances of fraud. *Smith* v. *Burroughs*, 2 Vern. 346; Pre. Ch. 80.

A bill discounter obtained from a young man at college bills of exchange, I O U's, &c., for moneys advanced at high rates of interest; and subsequently a document, purporting to be an account of the advances, but being only a list of such bills of exchange, &c., was sent to the young man. A letter, signed by him, acknowledging that the account between himself and the money-lender had been settled:—Held, not to be binding on the young man; and the court ordered an account to be taken of the moneys actually advanced, with interest at 5*l.* per cent. and that, when the amount found to be due should be paid, the securities should be delivered up and cancelled. *Croft* v. *Graham*, 9 Jur. (N.S.) 1032. Affirmed, 2 De G. J. & S. 155; 9 L. T. 589.

Money-lenders discounted accommodation bills drawn by an infant upon, and accepted by, his elder brother, and took security from time to time for the sums so advanced, and for interest and commission, by way of charge upon the reversionary interest of the elder brother. The charges amounted to 4,650*l.*, of which the brother whose interest was charged had only received 210*l.*, the balance consisting of sums advanced to the infant (with the consent of the elder brother) and of exorbitant charges for interest and commission:—Held, that the charges were only good for such sums as had been actually advanced (as well to the infant as to the elder brother), together with interest at 5 per cent., and that the fact of the debt having been incurred before the creation of the security was immaterial. *Tyler* v. *Yates*, 40 L. J., Ch. 768; L. R. 6 Ch. 665; 25 L. T. 284; 19 W. R. 909.

b. Persons Ignorant of Rights.

Generally.]—Equity relieves against bargains made under a misconception of rights. *Bingham* v. *Bingham*, 1 Ves. 126.

A mere voluntary deed of gift, the nature of which is not fully understood by the donor, may be set aside after the donor's death, either by the heir-at-law of the donor, or by persons claiming under a will of the donor. *Anderson* v. *Elsworth*, 3 Giff. 154; 30 L. J., Ch. 922; 7 Jur. (N.S.) 1047; 4 L. T. 822; 9 W. R. 888.

Conveyance obtained from a woman in ignorance of her rights, and upon misrepresentation of the circumstances of the property, set aside, although she was of full age, and acquiesced in the sale, and received the interest of the purchase money for twelve years, and although she consulted her friends, and had their assent, they being in equal ignorance with herself. *Murray* v. *Palmer*, 2 Sch. & Lef. 474.

Where a person agrees to give up his claim to property in favour of another, such agreement is void, if he was ignorant of his rights, and of the value of the property, especially if the party with whom he dealt possessed better information on the subject. *M'Carthy* v. *Decaix*, 2 Russ. & M. 614.

If party, ignorant of plain and settled principle of law, is induced to yield portion of his indisputable right, equity will relieve; but where title is disputable, and he enters into a compromise, no relief is given, nor will consideration be inquired into, if taken upon due deliberation. *Naylor* v. *Wynch*, 1 Sim. & S. 564; 2 L. J. (O.S.) Ch. 132; 7 id. 6; 24 R. R. 227.

Voluntary gift of property, immediate and irrevocable, sought to be set aside, on the ground of want of independent advice and ignorance of the donor of the full effect of his act; but upheld. *Long* v. *Donegan*, 21 W. R. 830.

—— **Presumption.**]—Dislike and fear of one relation raises a strong presumption that the donor had a real intention to make such a gift in favour of another relation. *Ib.*

Both parties in Ignorance.]—A plaintiff may be entitled to relief from a contract or conveyance on the ground of ignorance and mistake, although the defendant, with whom he dealt and against whom relief is sought, was also in ignorance and under mistake, the contract or conveyance not being made upon the principle of compromising doubtful rights. *Reynell* v. *Sprye*, 8 Hare, 222. Affirmed, 21 L. J., Ch. 633.

Misrepresentation — Specific Performance.]—Where a person having a clear title of 12*l.* for rent, and claiming the property of the land, is induced by the representations of two professional persons that he had no right to either rent or land, to agree to accept 10*l.* in full for rent and land, the court will not entertain a bill for the specific performance of the agreement. *Stanley* v. *Robinson*, 1 Russ. & M. 527.

Husband and Wife.]—A man already married performed the ceremony of marriage with G. N., and joined with her in executing an assignment of her life interest in a trust fund to a purchaser. The fraud practised upon G. N. by the person acting in the character of her husband did not affect the validity of the assignment, nor was it necessary to make the supposed husband a party to a suit instituted by the purchaser to obtain the benefit of the assignment. *Sturge* v. *Starr*, 2 Myl. & K. 195.

A wife who had been deserted by her husband became entitled to a share of an intestate's property amounting to 3,609*l.* The husband, whilst he was ignorant of the amount of the share, assigned it in trust for his wife and children, subject to the payment of 10*s.* a week to himself for his life. Although the deed recited that the intestate's estate was very considerable, yet, as the administrators, who were the wife's brothers and parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside. *Groves* v. *Perkins*, 6 Sim. 576.

Apportionment of Rent.]—A deed apportioning rent between A. and B., executed without any consideration or intention of bounty, by A.'s agent, without authority, and in ignorance that the rent had been conclusively apportioned by a former deed, not enforced against A. But A., when afterwards apprised of his rights, obtaining from B. a settlement according to the apportionment, and for several years after, during the life of B., paying the whole rent, without demanding contribution, not entitled after the death of B., to an account against his assets: as, from A. being in active litigation with B. during his whole life, it was not to be presumed that the forbearance arose from kindness, but that A. knew, if he stirred his demand during B.'s life, he might have started some countervailing demand, which B.'s representative has no means of setting up. A., entitled to contribution according to the former apportionment, against C., the remainderman, from the death of B., when he went into possession: also from a purchaser of parts of the lands from the time of the purchase. *Stratford* v. *Aldborough* (*Lord*), Beat. 228.

Setting aside Conveyance obtained for Inadequate Consideration from Markswoman.]—A markswoman was heiress-at-law to a person who died seised of or entitled to real estate. One of the defendants set up a will of the deceased, which will was, as regarded the personalty of the deceased, pronounced a forgery, but which, as regarded the realty, was never impeached at law. She was afterwards persuaded to execute deeds conveying away all her interest in the deceased's realty for an inadequate consideration. She subsequently filed a bill, praying that the deeds might be set aside on the grounds that they were obtained by fraud, that they were never explained or read over to her, and that she was, at the time she executed them, in ignorance of her title to any portion of the estate:—Held, that the court could order the deeds to be set aside, this case not being at all analogous to the cases of heirs coming to the court under circumstances of this kind, and asking that mere terms of years, or dry legal estates, should be set aside in order to allow the heirs to proceed at law. *Cartledge* v. *Radbourn*, 14 L. T. 187; 14 W. R. 603.

Conveyance for Charitable Purposes—Untrue Recitals.]—A. conveyed certain property to trustees in 1842, upon trust for charitable purposes, with the intention, and in the belief, from the representations made to her, that the charity would not take effect till after her death, and that during her lifetime the enjoyment of the property would be preserved to her. The deed was enrolled within six months, and retained in the possession of A., who continued to receive the rents of the property till 1850. In that year, believing herself to be dying, she was persuaded to add certain other property to what was already comprised in the deed of 1842. Deeds were executed declaring the trusts, and reciting that A. had received the rents from 1842 as the agent of the trustees, and that she was desirous of providing for the payment to them of all sums owing in respect thereof. The plaintiff stated that these recitals were untrue, and introduced without her knowledge. Before executing these deeds, in August, 1850, she stipulated with the trustees for the receipt of the rent up to the Christmas following:—Held, that A. was entitled to have the deeds set aside, on the ground of the misrepresentation made as to the effect, and her want of knowledge with reference to the deed of 1842, and from the untrue recital and tacit reservation of benefit upon the deeds of 1850. *Howard* v. *Fingall* (*Earl*), 1 W. R. 515.

Purchase Clandestinely Obtained.]—Where A. has refused to sell to B. except for ready money, and C. clandestinely attempts to purchase for B., and money is not ready, court will not enforce agreement. *Popham* v. *Eyre*, Lofft, 786.

Release of Orphanage part.] — Where a daughter of a freeman of London accepts of a legacy of 10,000*l.* left her by her father, who recommended it to her to release her right to her orphanage part, which she does release accordingly, if the orphanage part be much more than her legacy, though she were told she might elect which she pleased, yet, if she did not know she had first a right to inquire into the value of the personal estate, and the quantum of her orphanage part, before she made her election, this is so material that it may avoid her release. *Pusey* v. *Desbouvrie*, 3 P. Wms. 316.

Conveyance by Heir to Devisee, under misapprehension.]—If a man devises land in fee to B., who dies in the lifetime of the testator, and the testator's heir, taking it that the heir of B. is entitled, for a trifling consideration, conveys and confirms the estate to him, equity will relieve. *Ib.*

Lapse of Time.]—Deeds set aside, as absolute securities and conveyances, and ordered to stand as security only for what should appear due upon a general account after a considerable lapse of time, seventeen years, upon the nature of the deeds themselves, the circumstances under which, and the confidential relation of the person by whom they were obtained, and no confirmation: the other parties being throughout under the same influence, control, and ignorance of their rights. *Purcell* v. *M'Namara*, 14 Ves. 91.

See also COMPROMISE.

c. Aged and Infirm Persons.

Presumption of Imposition.]—Old age alone not sufficient ground to presume imposition. *Lewis* v. *Pead*, 1 Ves. J. 19.

Suspicious Circumstances.]—An agreement for a purchase obtained from a woman of ninety years of age, and several suspicious circumstances; the court would neither decree it to be carried into execution against the heir-at-law, nor to be delivered up. *Green* v. *Wood*, 2 Vern. 632.

Relief.]—A sale by an old woman of eighty-eight of an estate in possession, for one-fourth of its value, was set aside, she being in distress and without legal assistance, and being also under the impression that she could not make out a good title, while the purchaser, knowing that she could, concealed the fact from her. *Summers* v. *Griffiths*, 35 Beav. 27.

Deed of gift ordered to be delivered up as obtained by undue influence over the donor, who was eighty-four years old, and nearly blind, and placed confidence in donee. *Griffiths* v. *Robins*, 3 Madd. 191.

—— **Consideration.**]—A conveyance by a weak man, for a small consideration, set aside. *Clarkson* v. *Hanway*, 2 P. Wms. 203.

Compos Mentis.]—A weak man gives a bond; if it be attended with no fraud or breach of trust, equity will not set aside the bond only for the weakness of the obligor, if he be compos mentis; equity will not measure people's understandings or capacities. No such thing as an equitable non compos if compos at law. *Osmond* v. *Fitzroy*, 3 P. Wms. 130.

Inadequate Consideration — Relief—Deed to Stand as Security.]—Where an aged, illiterate, and a weak-minded man, not absolutely incapable of managing his own affairs, but in such a state of mental incapacity as to make it necessary that he should have protection and advice, executed a deed of conveyance of his property for a grossly inadequate consideration, the court, on a bill filed by the heiress and her husband, declared that the deed must be set aside as an absolute conveyance, and stand as a security only for money advanced by the purchaser, and properly expended by him on the property. *Longmate* v. *Ledger*, 2 Giff. 157; 6 Jur. (N.S.) 481; 8 W. R. 386.

Improvident Bargain obtained from Illiterate Persons by Unfair Advantage—Ratification.]—A. died intestate having considerable real estate, and leaving B. and C. his co-heiresses-at-law, both of whom were advanced in years, illiterate, and of a very humble rank in life. D., having ascertained the heirship of B. and C., induced them to sign an agreement whereby, in consideration of his revealing to them the existence of the property and their title to it (of both which circumstances they were wholly unaware), they agreed to give him one half of the net amount of the property. At the same time D. verbally arranged to recover the property for them, and induced them to employ his solicitor to act for them in the matter. The property was in the hands of the public trustee in New Zealand, and the title of B. and C. was clear, and no litigation was contemplated. A portion of the proceeds of the property was received and divided on the terms of the agreement. On the death of B. and C. their executors brought an action against D. to have the documents set aside and cancelled:—Held, that the agreement must be set aside as an improvident bargain which D. had obtained by taking an unfair advantage of his position:—Held, also, that there had been no ratification of the contract by B. and C., as they never knew of their right to rescind it. *Rees* v. *De Bernardy*, 65 L. J., Ch. 656; [1896] 2 Ch. 437; 74 L. T. 585.

Father induced to sell Advowson—No fraud.]—Where father is possessed of advowson, which he apparently intended for his son, and is prevailed on, when in an infirm state, to enter into articles for sale of it. Specific performance was refused, though no fraud was imputed to purchaser. *Bell* v. *Howard*, 9 Mod. 302.

Voluntary Deed by aged Aunt under a Misconception of Effect.]—Where a voluntary deed, containing no power of revocation, was executed by a lady of upwards of seventy years of age, who had been in a very infirm state of body and mind, but from which she had recovered at the date of the deed, depriving herself of all her property in favour of a niece with whom she was living when she executed the deed, and to whom the donor had a clear intention of leaving all her property, to the exclusion of her other relations, but such deed was not either explained to the donor, or understood by her, and it appeared that she understood that under the deed she would be left in the enjoyment of an estate for her life in the property, the subject of the deed, such deed was set aside after the death of the donor at the suit of persons claiming under a will prior in date to the deed. *Anderson* v. *Elsworth*, 3 Giff. 154; 30 L. J., Ch. 922; 7 Jur. (N.S.) 1047; 4 L. T. 822; 9 W. R. 888.

Purchase by Nephew from Aged Uncle for inadequate Price.]—Purchase of reversion by nephew from uncle very old for price grossly inadequate, the deed of conveyance in the operative part, but not in the recitals, expressing that the grant was made partly in consideration of natural love, &c., not impeached on ground of fraud under the circumstances. *Whalley* v. *Whalley*,

3 Bligh, 1. See also *Hudson* v. *Beauchamp*, id., 18, n.

Deed of Gift to Medical Adviser—Untrue Consideration stated.]—A deed of gift of real estate from an aged and infirm person to his intimate friend and medical attendant, set aside for fraud, one of the circumstances in proof of fraud being, that the deed stated, contrary to the truth, a money consideration. *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; 7 Jur. 875.

II. FRAUDULENT CONVEYANCES.

A. AS AGAINST CREDITORS (13 Eliz. c. 5).

1. Property Within the Statute.

Generally—Copyholds.] — An assignment of personal property for a consideration clearly inadequate is fraudulent as against creditors under 13 Eliz., but copyholds not being naturally subject to the debts, a conveyance of them cannot be fraudulent against creditors. *Hobbs* v. *Hull*, 1 Cox, 445.

Money—Realty.]—A., being much indebted, gave 600*l.* to his children only six hours before his decease. This is good against creditors, but it would have been otherwise in the case of a real estate, or chattel real. *Duffin* v. *Furness*, Sel. Ch. Ca. 77.

Bonds.]—A bond is not goods or chattels, within 13 Eliz. c. 5, as to fraudulent alienations. *Sims* v. *Thomas*, 4 P. & D. 233; 12 A. & E. 536; 9 L. J., Q. B. 399.

Policy of Assurance.]—Policies of assurance are, since 1 & 2 Vict. c. 110, s. 12, within the 13 Eliz. c. 5. *Stokoe* v. *Cowan*, 29 Beav. 637; 7 Jur. (N.S.) 901; 4 L. T. 695; 9 W. R. 801.

Investments.]—Since 1 & 2 Vict. c. 110, an investment of money in the purchase of stock, in the names of trustees, upon trust for the children of the settlor, he not having at the time sufficient property, besides the money so invested, to pay the debts which he then owes, is void under 13 Eliz. c. 5, because, by 1 & 2 Vict. c. 110, s. 12, money or stock may be taken in execution; and therefore the effect of such a settlement would be to delay, hinder, or defraud the creditors of the settlor. *Barrack* v. *M'Culloch*, 3 K. & J. 110; 26 L. J., Ch. 105; 3 Jur. (N.S.) 180; 5 W. R. 38.

Purchase of Property.]—For the same reason, any purchase of property by a settlor so indebted, in the name of a child or other person, would be void under 13 Eliz. c. 5. *Ib.*

Purchased Estate — Furniture.] — A debtor, having contracted to purchase an estate, caused the conveyance to be made to trustees, and trusts to be declared by deeds dated in March, 1850, which recited the agreement of the debtor for the purchase, and that the conveyance to the trustees was by his direction, and declared the trusts to be for the sale of the property and retaining the proceeds for the benefit of the wife and children of the debtor. By one of the deeds of March, 1850, the debtor also assigned to the same trustees all the furniture in certain houses (one of which was on the purchased estate), upon the same trusts, for his wife and children. The debtor was, at the date of these deeds, indebted to an extent which would render a voluntary disposition of his estate fraudulent under the stat. 13 Eliz. c. 5, as against creditors. The trustees were not informed of the assignment of the furniture to them, and it continued in the possession of the debtor until the subsequent assignment next mentioned. By a mortgage deed, dated in November, 1851, the debtor conveyed and assigned all his real and personal estate to a creditor to whom he had, after the date of the voluntary deeds of March, 1850, become largely indebted, to secure, so far as it would go, the debt owing to such creditor; and the creditor thereupon took possession of the furniture:—Held, that although the purchased estate was never vested at law in the debtor, yet, as he had by the contract acquired an equitable interest in it, which interest was conveyed to the trustees under the voluntary deeds of March, 1850, such conveyance was fraudulent as against creditors under the stat. 13 Eliz. c. 5; that the assignment of the furniture by the voluntary deed of March, 1850, was also fraudulent as against creditors. *Barton* or *Stone* v. *Van Heythuysen*, 11 Hare, 126; 18 Jur. 344; 1 W. R. 429.

Power of Appointment.]—A general power of appointment given over an estate in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was held to be assets in favour of creditors. *Townshend* v. *Windham*, 2 Ves. 1.

Trader—Purchase of Property.]—Purchase in joint names of husband and wife, by trader, afterwards a bankrupt, is void against creditors. *Glaister* v. *Hewer*, 9 Ves. 12; 11 id. 377.

So if purchase was made with wife's money, if previously received and disposable by him as his own, not bound by any agreement with a trustee, and the receipt not connected with the purchase. *S. C.*, 8 Ves. 195.

2. Creditors Within the Statute.

Who are—Wife Covenantee.]—Under a covenant on marriage by husband with trustees, in case wife should survive him, to pay her a sum of money, she is a creditor within the statute against fraudulent conveyances, 13 Eliz. c. 5. *Rider* v. *Kidder*, 10 Ves. 360.

—— **Creditors having Equal Rights.**]—Court will not favour creditors where others have equal rights to them. *Brown* v. *Jones*, 1 Atk. 188.

—— **Creditor under voluntary Post-obit Bond.**]—A creditor under a voluntary post-obit bond is as much entitled to the benefit of the 13 Eliz. c. 5, as any other creditor. *Adames* v. *Hallet*, L. R. 6 Eq. 468; 18 L. T. 789.

—— **Creditor without Lien or Charging Order.**] — In order to entitle a creditor of a living debtor to set aside a fraudulent conveyance under 13 Eliz. c. 5, it is not necessary that the creditor should have any lien or charging order on the property comprised in the conveyance; but in the absence of such lien the court will not apply the property in satisfaction of the creditor's claim. *Reese River Silver Mining Co.*

v. *Atwell*, L. R. 7 Eq. 347; 20 L. T. 163; 17 W. R. 601.

—— **Creditor by Elegit.**]—Bill lies for creditor by elegit to set aside a fraudulent conveyance, whether he could recover at law or not. *Bennet* v. *Musgrove*, 2 Ves. 51.

—— **Subsequent Bond Creditors.**]—The father makes a settlement on trustees in trust to pay debts therein mentioned, reserving 50*l.* a year to himself for life, remainder to his son, &c. Father continues in possession, and twelve years after contracts debts by bond: whether the settlement is fraudulent as to the bond creditors, quære. *Hungerford* v. *Earle*, 2 Vern. 261.

A suit to set aside a settlement as fraudulent against creditors, entertained where the plaintiff subsequently became a creditor by breach of a covenant previously entered into by the settlor. Where a deed is set aside as fraudulent against creditors, the property becomes assets, and subsequent creditors are let in. *Richardson* v. *Smallwood*, Jacob, 552.

The 13 Eliz. c. 5, extends as well to future as to existing debts, and a deed having for its object to defraud future creditors is therefore void. *Barling* v. *Bishopp*, 29 Beav. 417; 6 Jur. (N.S.) 812; 8 W. R. 631.

Voluntary Bond set aside in favour of Portioners.]—One executes a voluntary bond of 5,000*l.* to one of his daughters, without any consideration, and payable immediately, but always kept it by him, and it was proved to be made to screen himself from taxes, and so esteemed by that daughter; and he by will gives portions to all his daughters, and dies: this bond decreed to be set aside. *Ward* v. *Lant*, Pre. Ch. 182.

Voluntary Trust set aside as against Order for Permanent Alimony.]—Pending a suit which was instituted by a wife against her husband for a divorce, the husband conveyed his freehold and personal estates to trustees, upon trust, to pay out of the income certain mortgages affecting the real estates, and certain scheduled bond-creditors, and an annuity to himself, another annuity to his sons, and an annuity of 100*l.* to his wife, if she withdrew the proceedings which were then pending against him, and should not institute any others. The wife prosecuted the suit, and succeeded both in the courts below, and ultimately before the judicial committee on appeal. A sentence of divorce was pronounced and a permanent alimony ordered for her support. Writs of sequestration were issued to enforce payment not only of that, but of arrears of interim alimony which had been allowed the wife, and of her costs of suit. The sequestrators being unable, by reason of the deed of conveyance, to seize the property of the husband, the wife filed her bill to set aside the deed as fraudulent and void as against her. The court declared the deed of conveyance fraudulent and void, and affirmed the order of the court below so far as it gave the plaintiff relief for arrears of alimony and the costs of the several proceedings, but reserved the question as to whether the decree was right in giving the plaintiff a charge on the estates for further alimony. *Blenkinsopp* v. *Blenkinsopp*, 1 De G. M. & G. 495; 21 L. J., Ch. 401; 16 Jur. 787.

Voluntary Assignment set aside in favour of Creditor on Running Account.] — A. made a voluntary assignment of a sum of money, being, at the time, indebted to B. on balance of running account. A. afterwards made payments to B., exceeding in amount the balance due at the date of the assignment; but the balance continually increased. The assignment was set aside at the suit of B. *Whittington* v. *Jennings*, 6 Sim. 493; 3 L. J., Ch. 157.

Voluntary Assignment, Effect of, as against Creditor Privy thereto.]—A father executed a voluntary deed, assigning a considerable portion of his property to his sons, with the concurrence and by the advice of his brother, to whom he was largely indebted. He also made his will appointing his sons and his brother executors and trustees. The brother acted under the will until his death, which took place seven years after that of the testator. He never took any step to impeach the voluntary deed, but was a party with the donees under it to instruments and transactions proceeding on the assumption of its validity:—Held, that after his decease his representatives could not impeach the deed, as being void against creditors under the 13 Eliz. c. 5. *Ollivet* v. *King*, 8 De G. M. & G. 110; 25 L. J., Ch. 427; 2 Jur. (N.S.) 312; 4 W. R. 382.

Quære, whether, supposing him to have had a right to impeach the deed, his executors could have impeached it after he had lived seven years without doing so. *Ib.*

Settlement reserving Power to Mortgage.]—A. makes a voluntary settlement reserving to himself a power to mortgage what part he pleased. This amounts in effect to a power of revocation, and therefore fraudulent as against creditors by judgment. *Tarback* v. *Marbury*, 2 Vern. 510.

Voluntary Bond—Subsequent Assignment.]—A., before the marriage of his niece, verbally promised her and her intended husband that he would make a suitable provision for her. He also wrote a letter to his niece, which was not communicated to the intended husband, in which, referring to the assignment of a policy of assurance which he had effected on his life, he said: "J. urged me to make over the insurance, and get it done by an attorney, which would soon be published, but I will not, though I will do it in another way without publishing it, which is the only way it could be done safely, and I say that in confidence. Do not mention it to any one." The husband swore that the marriage was had on the faith of the promise. After the marriage a bond was given by A. to the husband, in pursuance of the promise, conditioned to pay a sum of money at the death of A., who afterwards assigned the policy by a voluntary deed, being at the time of the assignment and at the time of his death in solvent circumstances, save as to the bond:—Held, that, as neither the verbal promise nor the letter could have been enforced against A., the bond was voluntary, and gave no equity to set aside the assignment of the policy. *M'Askie* v. *M'Cay*, Ir. R. 2 Eq. 447; 16 W. R. 1187.

Purchaser for Value of Interest under Settlement, without Notice of Fraud.]—Section 5 of 13 Eliz. c. 5, protects a purchaser for value of any interest, legal or equitable, derived under a

settlement which is fraudulent and void under the statute as against creditors, provided such purchaser had no notice of its fraudulent nature. *Halifax Banking Co.* v. *Gledhill*, 60 L. J., Ch. 181; [1891] 1 Ch. 31; 63 L. T. 623; 39 W. R. 104.

Practice.]—Upon bill by son, committee of his father, a lunatic, to set aside a voluntary settlement by him, motion for the defendant to let the house, sell the furniture, &c., and bring the whole into court, refused; plaintiff not consenting. *Colman* v. *Croker*, 1 Ves. 160.

—— **Obtaining judgment at law.**]—Quære, whether, after the bankruptcy or insolvency of a debtor, any creditor (other than the assignees) can in ordinary cases sustain a suit to set aside a conveyance made by the debtor prior to the bankruptcy or insolvency on the grounds that such conveyance is fraudulent within the statute 13 Eliz. c. 5, or whether it is necessary that any creditor seeking to set aside such fraudulent conveyance must previously recover judgment at law for his debt. *Lister* v. *Turner*, 5 Hare, 281; 15 L. J., Ch. 336; 10 Jur. 751.

To impeach a settlement for fraud, there must be a creditor to complain of it, and he must be enabled to sue, by having obtained judgment at law for his debt, and must state that he is defrauded by it. *Colman* v. *Croker*, 1 Ves. 161.

—— **Onus of Proof.**]—In 1842 A. executed a voluntary bond, payable after his death, and, in 850, he made a voluntary settlement in favour of other parties. His assets proved insufficient to pay the bond:—Held, that there was not sufficient ground for holding that the deed was fraudulent as against the bond creditors, and that the onus of proving the deed to be fraudulent attached to the obligees of the bond. *Dening* v. *Ware*, 22 Beav. 184.

—— **Inquiry.**]—A creditor has a right to impeach a fraudulent conveyance of the estate of his debtor, and, though it be alleged that sufficient remains to pay his debt, he shall not be delayed by an inquiry to that effect. *Chamley* v. *Dunsany* (*Lord*), 2 Sch. & Lef. 714.

—— **Interpleader—Withdrawal from Suit.**]—A. seized B.'s furniture under a fi. fa., and disputed the validity of a voluntary settlement of the furniture, notice of which was served on the sheriff by the trustees. The sheriff accordingly filed a bill of interpleader. A. and B. were partners in business; and the partnership having been dissolved, A. elected to take B.'s share at a valuation, and continued in possession of B.'s share from the date of the dissolution, which was subsequent to the seizure but prior to the institution of the interpleader's suit. The value of B.'s share was afterwards found to exceed, by a very large amount, the sum in respect of which the fi. fa. had been issued:—Held, that under these circumstances A. ought to have withdrawn from the suit, and could not be allowed to show that the settlement was invalid. *White* v. *Witt*, 24 W. R. 727.

—— **Bill to set aside Voluntary Settlement—Staying Suit — Costs.**]—After a bill filed on behalf of creditors to set aside as fraudulent and void a voluntary settlement by their debtor, and a composition signed by the creditors in ignorance of such prior voluntary settlement, the debtor was adjudicated bankrupt, and an order was made by the court of bankruptcy, setting aside the voluntary settlement. The plaintiffs, whose claim to prove under the bankruptcy had been admitted notwithstanding the opposition of the trustees of the settlement, wrote to them proposing to dismiss the bill without costs as against them, and that plaintiff's costs should come out of the estate. The trustees declined this proposal, but offered to consent to an order staying all proceedings in the suit without costs, or dismissing the bill without costs:—Held, that upon the bankruptcy of the debtor the trustee in bankruptcy should have applied to the court to have stopped the suit, which, though rightly instituted in the first instance, could no longer be prosecuted with benefit to the creditors, and that the plaintiffs were entitled to the costs of suit up to the date of their letter to the trustees of the settlement, out of the estate realised in bankruptcy, and the trustee in bankrupty to the costs only of realising the estate. *Tanqueray* v. *Bowles*, L. R. 14 Eq. 151.

Held, also, that the trustees of the settlement, by their refusal of plaintiffs' offer having compelled them to bring the suit to a hearing, must pay all plaintiffs' costs incurred since the date of that offer. *Ib.*

3. Consideration.

a. General Principles.

Generally.]—Construction of deed and impeachment of, as voluntary as against creditors. *Myers* v. *Leinster* (*Duke*), 7 Ir. Eq. R. 146.

Discussion of the doctrine of fraudulent deeds as against creditors under the 13 Eliz. c. 5. *Jenkyn* v. *Vaughan*, 3 Drew. 419; 25 L. J., Ch. 338; 2 Jur. (N.S.) 109; 4 W. R. 214.

If a settlement be made by a person who, if he had not made the settlement, would have had property upon which his creditors might immediately fasten and pay themselves, but which by the settlement is withdrawn, that is, primâ facie, "delaying his creditors" within the meaning of the 13 Eliz. c. 5. *French* v. *French*, 6 De G. M. & G. 95; 25 L. J., Ch. 612; 2 Jur. (N.S.) 169; 4 W. R. 139.

If the creditors are delayed by a voluntary settlement, the case is within the 13 Eliz. c. 5, even though the settlor may have debts owing to him, or other contingent or reversionary interests, which, if realised or fallen in, would be sufficient to meet all claims upon him. *Ib.*

Conveyance without Delivery.]—Conveyance fraudulent, if without delivery of possession, though part was a real consideration. *Bennet* v. *Musgrove*, 2 Ves. 51.

Retaining Possession.]—Making gift of goods, and retaining possession of them, evidence of fraud upon creditors, and they may pursue them into hands of executor. *Anon.*, Cary, 18.

A. having received moneys belonging to B., privately, and without any communication with B., prepared and executed a mortgage to him for the amount. A. retained the deed in his custody for twelve years, and then died insolvent. After his death the deed was discovered in a chest containing his title deeds:—Held, that the deed was

good against A.'s creditors. *Exton* v. *Scott*, 6 Sim. 31.

A. executes to B. a bill of sale, dated the 11th of May, 1822, by which, in consideration of 350*l.*, he grants all his goods, chattels, and effects to B.; and in it there are a clause stating that symbolical possession had been delivered, and a proviso, that the instrument shall be void, if A. pays the 350*l.* to B. on or before the 29th of September following: A. remains in the visible possession of the property till his death on the 30th of September:—Held, that the bill of sale was void as against the creditors of A. —— v. *Cramphorne*, 3 L. J. (O.S.) Ch. 223. Affirmed, 6 *id.* 91.

Subsequent Creditors.]—A voluntary settlement, by which a settlor gives to the trustees of his property an absolute discretion to apply it in the maintenance and support of himself, his wife, and children, or any of them, in such manner as they shall think fit, is not fraudulent against subsequent creditors. A fortiori, such a settlement is valid if for valuable consideration. *Holmes* v. *Penney*, 3 K. & J. 90; 26 L. J., Ch. 179; 3 Jur. (N.S.) 80; 5 W. R. 132.

Intention to Defraud.]—A settlement, for valuable consideration, made with the intention of defrauding creditors, is void under the 13 Eliz. c. 5. *Holmes* v. *Penney*, 3 K. & J. 90; 26 L. J., Ch. 179; 3 Jur. (N.S.) 80; 5 W. R. 132.

The mere fact of a settlement being voluntary is not sufficient to render it void against creditors. *Ib.*

To make void a voluntary conveyance it must clearly appear to have been executed for the purpose of defrauding creditors. *Wrixon* v. *Cotter*, 1 Ridgw. P. C. 305.

To render a deed void as against creditors, it is not sufficient that it is merely voluntary, but it must be proved that the party making it intended to delay, hinder, or defraud his creditors. *Thompson* v. *Webster*, 28 L. J., Ch. 700; 7 W. R. 648—L.JJ. Affirming 5 Jur. (N.S.) 668.

In order to make void a deed as fraudulent against creditors, it is not necessary to prove that the party was insolvent at the time, if it appear that the intention was to delay creditors. *Richardson* v. *Smallwood*, Jacob, 552.

—— **Notice, Effect of.**]—The grantee of a deed made to defeat creditors is not liable to penalties under the statute 10 Car. 1 sess. 2, c. 3 (I) (13 Eliz. c. 5, Eng.), although he have notice of the grantor's intention to defeat creditors, if the conveyance is taken bonâ fide, for a good consideration, and is intended absolutely to pass the estate. *Lynch* v. *Copinger* (14 W. R. 863), *Wood* v. *Dixie* (7 Q. B. 892), commented on. *Moroney, In re*, 21 L. R. Ir. 27—C. A.

Intention to defeat Particular Creditor.]—It is a fraud, within 10 Chas. 1 (Ir.) sess. 2, c. 3, s. 10, for a debtor without consideration, and with intent to defraud or delay a particular creditor, to part with any portion of his property. *Wood* v. *Dixie* (7 Q. B. 892) explained and distinguished. [10 Chas. 1 (Ir.) sess. 2, c. 3, s. 10, is equivalent to 13 Eliz. c. 5.] *Ib.*

Evidence of Consideration.]—To support a deed, voluntary on the face of it, against creditors, the proof of a valuable consideration must be clear and free from suspicion. *Graham* v. *O'Keefe*, 16 Ir. Ch. R. 1.

Surrounding Circumstances.]—On the question of a voluntary deed being void under the 13 Eliz. c. 5, all the surrounding circumstances must be looked at, and each particular case must depend upon those circumstances. *Thompson* v. *Webster*, 28½ L. J., Ch. 700; 7 W. R. 648—L.JJ. Affirming 5 Jur. (N.S.) 668.

Evidence of surrounding circumstances on which the court held a settlement, that standing alone would have been fraudulent against creditors, to be connected with and part of the same transaction with several purchase deeds of even date, to which some only of the same persons were parties. *Harman* v. *Richards*, 10 Hare, 81; 22 L. J., Ch. 1066.

b. Prior Voluntary Deed.

Generally.]—A person gave a bond for 5,000*l.* to his sister, but failing to pay the interest due on that bond, gave her another bond to secure the arrears of interest. He afterwards deposited with his sister the title deeds of his real estates "as a collateral security for the bond debts." Subsequently, in contemplation of the marriage of the sister, the two bonds were, with the consent and privity of the obligor, settled upon trusts for the benefit of the intended husband and wife, no reference, however, being made in the settlement to the deposit of title deeds. The marriage took effect, and about four years after the obligor became bankrupt:—Held, that, assuming the consideration for the first bond to have been voluntary, yet there being no fraud suggested against any party, or insolvency proved against the obligor, the settlement was a valuable security, and that by virtue of the bonds, the instrument of deposit, and the settlement, the trustee of the settlement was equitable mortgagee of the real estate for the moneys due on the bonds. *Meggison* v. *Foster*, 2 Y. & C. C. C. 336; 12 L. J., Ch. 415; 7 Jur. 546.

Surrender of.]—Voluntary deed, though void against creditors, being valid as between the parties, its surrender is a consideration that will sustain a substituted bond against creditors, unless with a fraudulent design, as by an insolvent to substitute a valid for an invalid security against creditors. *Berry, Ex parte*, 19 Ves. 218.

c. Good Consideration.

Generally.]—Agreement for a mortgagee, a specific lien against creditors. *Burn* v. *Burn*, 3 Ves. 582.

A purchase of an estate of tenant for life, who was outlawed and absconded, set aside in favour of creditors, the purchase being made at an under-value, and pending the prosecution at law against him, and with notice thereof. *Herne* v. *Meeres*, 1 Vern. 465.

Deed and will executed on the same day; the deed held a testamentary act; and, as voluntary, void against the creditors under the 13 Eliz., though services were alleged as a consideration. *Peacock* v. *Monk*, 1 Ves. 127.

A devisee of certain estates in trust to sell for payment of debts assigned to B., who wasted the property; B. was devisee in fee of other estates, under the same will, and conveyed part of them to A., to secure a debt due by him from the

devisor; the specialty creditors shall take not subject to A.'s incumbrance, as the whole is a fraud on the creditors. *Hardwick* v. *Mynd*, 1 Anst. 113; 3 R. R. 562.

Purchase for valuable consideration (the adequacy of price being disputed), by nephew from uncle, who (unknown to nephew) was insolvent, and died soon after the purchase:—Held, not impeachable by uncle's creditors. *Copis* v. *Middleton*, 2 Madd. 410; 17 R. R. 226.

A deed of settlement, in form voluntary, but appearing from intrinsic evidence to have been made for valuable consideration, supported against creditors. *Pott* v. *Todhunter*, 2 Coll. 76; 9 Jur. 589.

Where a bond shall be deemed voluntary and fraudulent against creditors. *Loeffes* v. *Lewen*, Pre. Ch. 370; Gilb. Eq. R. 32.

—— **What is Sufficient.**]—If one aliens land for good consideration, though at the time merely on an agreement to pay money, this is a good conveyance against creditors and purchasers. *Parslowe* v. *Weedon*, 1 Eq. Abr. 149.

Semble, advances made by a parent to a child, which formed a debt, but had ceased by lapse of time to be a legal obligation, are yet a sufficient consideration to support a deed by way of family arrangement, but not against creditor. *Penhall* v. *Elwin*, 1 Sm. & G. 258.

A son, taking beneficially under his father's will, promises to pay his sisters' portions; this is a good consideration for a bond. *Blount* v. *Doughty*, 3 Atk. 484.

So a promise under age may be a consideration for a promise when of age. *Ib.*

—— **Who are Within the Consideration.**]—The wife joins the husband in letting in an incumbrance on her jointure lands, and barring the estate tail, and then limits the uses to the husband for life, remainder to the wife for life, remainder to their daughters: the daughters are not purchasers, so as to shut out a judgment creditor of the husband's antecedent to the barring of the estate tail; but the limitations to them are voluntary unless the consideration of the wife's parting with her jointure extended also to the limitations to the daughter. *Ball* v. *Burnford*, Pre. Ch. 113.

—— **Nature of Consideration.**]—Where the court sees a consideration is made up with a view to defraud creditors, they will reduce it to what is equitable; but they will not determine bonds to be voluntary, if fairly entered into, merely because they do not exactly tally with the sum given for them. *Blount* v. *Blount*, 3 Atk. 481.

—— **Extent.**]—Consideration for a settlement being found to exist, it was held to extend to the whole, and not to a part only of the property which was the subject of it. *Harman* v. *Richards*, 10 Hare, 81; 22 L. J., Ch. 1066.

—— **Effect and Intention to Defeat Creditors.**]—A deed may be void as against creditors, though full consideration is given for it, if it be in such a form as to defeat the creditors, and be executed with that intention. *Bott* v. *Smith*, 21 Beav. 511.

A deed, though made for valuable consideration, may be affected by mala fides. *Harman* v. *Richards*, 10 Hare, 81; 22 L. J., Ch. 1066.

—— **Money Entrusted for Investment.**]—E. placed in the hands of her solicitor a sum of money for investment. He died insolvent without investing the money, and after his death there was found in the safe at his office a memorandum dated a fortnight before his death, the contents of which had not been communicated to E. By this memorandum, the solicitor declared himself trustee of certain leaseholds then in mortgage to himself, and of a bill of exchange, which he had indorsed to E., to secure the repayment of the sum placed in his hands. In a creditor's suit for the administration of the solicitor's estate:—Held, that, even if the solicitor executed the memorandum with the knowledge of his insolvency, still E. was entitled to the benefit of the security as against the other creditors; for, as the solicitor retained no benefit for himself, the gift was bonâ fide within 13 Eliz. c. 5. *Middleton* v. *Pollock*, 45 L. J., Ch. 293; 2 Ch. D. 104.

—— **Family Arrangement.**] — Complicated family arrangements between a father, who afterwards became insolvent, and his son, were refused to be set aside in favour of the father's creditors, so far as they secured an annuity to the father's wife in case she survived him; it not being shown that any available property of the father was thereby dedicated to the purchase of the annuity, and it appearing that by certain benefits which had accrued to the father at the expense of the son, the latter had acquired a right to stipulate as creditor for all the provisions of the deeds of arrangement. *Wakefield* v. *Gibbon*, 26 L. J., Ch. 505; 3 Jur. (N.S.) 363; 5 W. R. 479.

A., having purchased a freehold estate and paid part of the purchase-money, died intestate, leaving two daughters, his co-heiresses, and next of kin. After his decease, on payment of the remainder of the purchase-money by the two daughters and their husbands, the estate was conveyed to the two daughters as tenants in common. By an arrangement between the two daughters and their husbands, the freehold estate and certain personal property were agreed to be taken by B., the husband of one of the daughters (by whom the remainder of the purchase-money for the estate was recited to have been paid), as his share of the property, and a fine was covenanted to be levied to the use of B. in fee. The fine was neglected to be levied, but B. remained in possession till his death, acting as absolute owner of the estate. Shortly before his death, and seventeen years after the covenant to levy the fine, a deed was executed and fine levied, by which the estate was settled to the use of B. and his wife for their lives successively, with remainder to their children. A bill by the creditors of B. to set aside this settlement as voluntary and fraudulent within the statute of 13 Eliz. c. 5, was dismissed. *Houghton* v. *Tate*, 3 Y. & J. 486.

Where a father, by deed, assigned to his son, in consideration of natural love and affection, his dwelling-house and all his personal estate:—Held, in an action by the son against the sheriff, for levying on goods, part of such estate, under a fi. fa. against the father, that it was competent to the son to prove, that, by a bond, bearing even date with the deed of assignment, he bound himself to maintain his father's wife and children; and that, the jury having found that it was a part of the same transaction, and that the

assignment was bonâ fide, it was not void against creditors under 13 Eliz. c. 5. *Gale* v. *Williamson*, 8 M. & W. 405 ; 10 L. J., Ex. 446.

Where a person, owing 102*l.* on a bond, wrote to the obligee that he and his wife were bound down by pecuniary embarrassments, and that the obligee's proceeding to extremities would render the debtor's wife after his death perfectly destitute, and a month afterwards, for a nominal sum of 10*s.*, and in consideration of natural love and affection, assigned a lease (of the value of 206*l.*) to A. in trust for his own benefit for life, and after his death for that of one of his daughters-in-law ; and he soon afterwards died, having by will made the assignee of his lease his executor ; by which assignment of the lease the residue of his property became insufficient to discharge the bond debt :—Held, that the assignment was within 13 Eliz. c. 5, and utterly void against creditors, and that the lease was assets in the hands of the executor. *Shears* v. *Rogers*, 3 B. & Ad. 363 ; 1 L. J., K. B. 89.

By a deed of gift, J. granted farming property n trust for her daughters, in consideration of which they covenanted to pay the debts "incurred by J. up to the date of the deed in connection with the working arrangements of the farm," and to maintain J. J. had no other property than that comprised in the deed, and the plaintiff's debt not having been incurred by J. in connection with the farm, was defeated by the deed. The court found that the deed was an honestly intended family arrangement, and was not executed with the object of defeating creditors :—Held, that the deed was valid under stat. 13 Eliz. c. 5. *Golden* v. *Gillam*, *Johnson, In re*, 51 L. J., Ch. 503—C. A. Affirming 51 L. J., Ch. 154 ; 20 Ch. D. 389 ; 46 L. T. 222.

—— **Setting Aside—General Principles.**]—The question for the court is whether it can or ought to infer an intent to defraud creditors in the parties to the deed. The word parties is used, because it is plain that, whatever fraudulent intent there may have been in the mind of party A., it would not avoid the deed unless it was known to have been concurred in by party B. *Ib.*

—— **Bond.**]—A claim for arrears accrued under a voluntary bond :—Held, a valuable consideration against creditors. *Gilham* v. *Locke*, 9 Ves. 612.

Where a father having provided amply for his son, requested him to give his sisters 1,000*l.* each on marriage, and the son gave them his bonds accordingly. The son died indebted. Per curiam, it would be dangerous to determine such bonds voluntary, or that the consideration should be commensurate to the value of the estate ; where there is no fraud, they should be held as made for a valuable consideration. *Blount* v. *Blount*, 3 Atk. 481.

The owner of an embarrassed estate executed a bond and warrant of attorney to confess judgment thereon to his sister, with the intention of having judgment for a large sum entered in her name, and proceedings taken so as to secure to himself a portion of the rents of his estate, and protect them from creditors, who were proceeding to get into possession. A judgment was afterwards entered by the attorney of the obligor, the latter retaining the bond in his possession. No further proceedings were taken on the judgment, as the creditors succeeded in extending the portion of the property sought to be protected from their demands. The judgment was assigned, and the assignee proceeded at law against the conusor. A bill having been filed by the obligor, and an injunction for want of answer having been obtained ; on a motion after answer to continue it :—Held, that, although the attempt was ineffectual, the transaction was such a fraudulent contrivance to delay creditors as to prevent the court from interfering, and any further injunction was refused. Entering judgment on a bond puts the security wholly out of the control of the obligor. *Bateman* v. *Ramsay*, Sau. & Sc. 459.

Bond entered into with East India Company—Subsequent trust of Portion.]—A. agrees with the E. I. Company to go as president to Bengal, and enters into a bond of 2,000*l.* penalty for performance of articles ; but, before he set out, he made a settlement of his estate, and among other things he declared the trust of a term of 1,000 years to be for the raising of 5,000*l.* as a portion for his daughter, who afterwards married J., a gentleman of 700*l.* per annum, who before the marriage was advised by counsel that the portion was sufficiently secured, and who, afterwards, on her death, had, on her request, expended 400*l.* on her funeral, but never made any settlement on her : after A. embezzles the goods and stock of the company to a considerable value ; yet they cannot break through the provision, so as to make it voluntary and fraudulent as to them. *East India Co.* v. *Clavell*, Pre. Ch. 377.

Husband and Wife.]—Deed of separation conveying estate to wife, in consideration of indemnity against wife's debts, held good against creditors. *Worrall* v. *Jacob*, 3 Mer. 256. S. P., *Stephens* v. *Olive*, 2 Bro. C. C. 90.

A husband having lived in a state of adultery, a separation took place between him and his wife, and upon that occasion the husband settled real estates, to the amount of 300*l.* per annum, on the wife, for her separate maintenance, and on the children of the marriage ; under these circumstances the settlement is not fraudulent as against creditors, under the stat. of 13 Eliz. *Hobbs* v. *Hull*, 1 Cox, 445.

A. and his wife, joint tenants in fee, conveyed an estate by fine to a mortgagee, with a proviso for redemption, and reconveyance to A. and his wife, or unto such person or persons as they, or the survivor of them, should appoint. The mortgage having been paid off, A. and his wife appointed, and the mortgagee conveyed the estate, by way of settlement, to B., from whom no consideration passed. After the death of his wife A. sold the estate. On a bill filed by the purchaser to set aside the conveyance to B. as voluntary :—Held, that the conveyance was not voluntary ; that there was a manifest intention to create the power contained in the proviso ; and that, the wife having exercised it and thereby parted with her interest for the settlement, that was quite sufficient to prevent the deed from being voluntary within the meaning of the 13 Eliz. c. 5. *Atkinson* v. *Smith*, 28 L. J., Ch. 2 ; 4 Jur. (N.S.) 1160 ; 7 W. R. 42—L.JJ.

—— **Wife giving up Equity to a Settlement.**]—H. was married to his wife in 1864, and she subsequently became entitled to certain moneys under the wills of her father and grandfather. These moneys she lent to her husband for the

purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon the bankruptcy of H. a proof was tendered upon the settlement and rejected on the ground that this deed was voluntary within the terms of the stat. 13 Eliz. c. 5. :—Held, that the settlement was not covinous or fraudulent within the 13 Eliz. c. 5, and that there had been a good consideration by reason of the fact that the wife had waived her equity to a settlement. Semble, that the transaction was upheld on the ground of bona fides, and that, if the court had found that the intention of the parties had been that the settlement should make the husband absolute owner, and at the same time secure the moneys to the wife, it would have declared the settlement void as a fraud on the bankruptcy law. *Home, In re, Home, Ex parte*, 54 L. T. 301.

—— Wife joining to Mortgage her Freeholds and Leaseholds.]—A settlement made on the wife by the husband, in consideration of her joining in a mortgage of her freehold and leasehold property, the money so raised being applied in payment of the husband's debts, and the settlement being made with the intervention of third parties on behalf of the wife—not considered fraudulent. *Carter* v. *Hind*, 2 W. R. 27.

Purchase by Father of Son's Reversionary Interest for full Consideration.]—By an indenture dated the 14th May, 1880, after reciting that A. had contracted with B., his son, for the absolute sale to him of B.'s reversionary interests in certain property, amounting to about 18,000*l.*, for the sum of 2,500*l.* cash, and an annuity of 300*l.*, and also reciting that, in consideration of natural love and affection, A. had agreed to settle the reversions in manner thereinafter expressed, it was witnessed that, in pursuance of the agreement, an annuity of 300*l.* was settled by A. upon B., until he should become bankrupt or attempt to alienate the same, with trusts in either of such events in favour of B.'s wife and children, if any. For these considerations B., by the same deed, assigned to trustees all his said reversionary interest, which was resettled by A. upon B. and his wife and children, in a similar manner to the annuity of 300*l.* The consideration money of 2,500*l.* for the payment of B.'s debts proved insufficient for that purpose, and upon the application of a creditor, whose debt was unprovided for, B. was adjudicated a bankrupt. The trustee in bankruptcy having applied to the county court, the deed was declared void under the stat. 13 Eliz. c. 5 :—Held, that, the transaction being a purchase by the father of his son's reversionary interest for full consideration, it was reasonable and lawful that the father should prescribe the terms when consenting to resettle it upon the son, and that the deed having been entered into on good faith, and for valuable consideration, was not impeachable under the statute of Elizabeth or the Bankruptcy Act. *Eyre, Ex parte* and *In re*, 44 L. T. 922.

Call on Testator's Shares—Assignment in consideration of Covenant to Indemnify.]—The administratrix, with the will annexed, who was also residuary legatee of a testator, whose estate comprised shares not fully paid up in a company, after receiving notice of a call assigned all the estate except the shares to a friend in consideration of covenants to indemnify and provide for her :—Held, that the assignment was void as against the company, and that they were entitled to payment of the call out of the estate. *Troughton, In re, Rent and General Collecting and Estate Management Society* v. *Troughton*, 13 R. 140 ; 71 L. T. 427.

Bill of Sale for Past Debt and Future Advances.]—A bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage to secure an existing debt and future advances, is not necessarily void under 13 Eliz. c. 5. It will only be void if not made bonâ fide, i.e. if it is a mere cloak for retaining a benefit to the grantor. *Games, Ex parte, Bamford, In re*, 12 Ch. D. 314 ; 40 L. T. 789 ; 27 W. R. 744.

Conveyance for Creditors.]—Debtors in insolvent circumstances conveyed by deed all their estate to trustees on trust to sell in such manner as they might think proper, and to divide the residue of the proceeds after paying expenses ratably among the creditors parties to the deed, and, if the trustees thought fit, creditors who refused or neglected to execute, and, if the trustees thought proper but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors. The deed provided for the payment of maintenance to the debtors if the trustees thought fit, and the executing creditors respectively indemnified the debtors and the trustees in respect of the bills of exchange and promissory notes made or indorsed to them respectively by the debtors in respect of the scheduled debts :—Held, that the deed was not void under 13 Eliz. c. 5. *Spencer* v. *Slater* (4 Q. B. D. 13) distinguished. *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 47 ; 42 L. T. 56 ; 28 W. R. 154.

A debtor in insolvent circumstances executed a deed by which he conveyed all his estate to trustees on trust to carry on his business, or get in and realise his estate in the manner they might deem expedient, and to apportion the residue of the proceeds after payment of expenses, &c., according to an equal pound rate among his creditors. It was provided by the deed that a dividend should only be payable to a creditor on his executing or assenting to the deed ; and that, if within a certain time any creditor did not execute or assent, his dividend should be paid by the trustees to the debtor. The deed also provided that the executing and assenting creditors should indemnify the trustees against any personal loss or risk they might sustain, otherwise than by their own wilful negligence or default, by reason of their proceedings under the deed :—Held, that the deed was fraudulent and void under 13 Eliz. c. 5, as tending to defeat or delay creditors. *Spencer* v. *Slater*, 48 L. J., Q. B. 204 ; 4 Q. B. D. 13 ; 39 L. T. 424 ; 27 W. R. 134.

Assignment for Creditors.]—A trader insured his stock-in-trade and other effects. These were destroyed by fire. He assigned the policies to trustees on trust, to pay and divide the moneys raised thereunder among all his creditors rateably, and to pay the balance (if any) to himself :—Held, that the assignment was not void under 13 Eliz. c. 5, at the suit of a creditor whose debt was under 50*l.* *Green* v. *Brand*, 1 Cab. & E. 410.

The appellant by deed agreed to purchase G.'s business, and further agreed on having assigned

to him all the other assets of G. to pay to such of G.'s creditors as would accept it a composition of 10*s.* in the pound on their debts. No further assignment was executed, and G. subsequently became bankrupt:—Held, that the deed was not void, as being given with the intention of defrauding, hindering, or delaying creditors within 13 Eliz. c. 5. *Dollar, Ex parte, Gillo, In re*, 8 Morrell, 157.

Where A. assigned all his effects at W. to trustees, for the benefit of certain creditors for four years; and the trustees were empowered to sell at the expiration of two years, or sooner, if A. should direct, and apply the proceeds of the sale in discharge of the debts of such creditors; who covenanted that A. might continue at home or abroad, and that they would not molest him for two years from the date of the deed:—Held, that such assignment was valid, and not within 13 Eliz. c. 5; and that the property was protected against a judgment creditor, who sued out execution against A. after the deed was executed. *Goss* v. *Neale*, 5 Moore, 19.

Conveyance in Trust to pay Debts, with Remainder for Wife and Children.]—Where a debtor conveyed all his real estate upon trust to sell and pay off his debts, and as to any ultimate surplus to pay the same to trustees to be held by them in trust for the separate use of his wife for life, and after her decease in trust for their children in equal shares as tenants in common:—Held, in a suit by a subsequent purchaser for value (at a sale in execution) of the grantor's interest in some lands comprised in the conveyance, that the deed of conveyance was not void as intended to delay or defeat creditors; and that, not being fraudulent in fact, it was not fraudulent in law and void against creditors under 13 Eliz. c. 5, no intention to delay or defeat creditors being shown. *Godfrey* v. *Poole*, 57 L. J., P. C. 78; 13 App. Cas. 497; 58 L. T. 685; 37 W. R. 357.

Assignment for Creditors—Creation of Relation of Trustee and Cestui que trust.]—A. executed bonâ fide a deed of assignment of all his property to B., in trust for such of A.'s creditors as should come in and execute the deed. B. (who was not a creditor of A.) took possession. C., a creditor of A., applied to B. for an explanation, and having received one said he was satisfied, and took no step to obtain payment:—Held, that enough had taken place to create the relation of trustee and cestui que trust between B. and C., and consequently that the deed was not void against an execution creditor as being voluntary. *Harland* v. *Binks*, 15 Q. B. 713; 20 L. J., Q. B. 126; 14 Jur. 979.

—— Allowing Employment of Insolvent by Trustee.]—An assignment by a debtor of all his estate and effects to a trustee, upon trust for sale for the benefit of creditors, contained a proviso enabling the trustee to employ the debtor, or any other person, in winding up the affairs of the debtor, and in collecting and getting in his estate and effects, and in carrying on his trade, if thought expedient by the trustee, and to allow the person so employed, out of the trust estate, such sum as the trustee should deem proper:—Held, that the carrying on the trade being only ancillary to winding up the affairs of the debtor, the deed was not void. *Janes* v. *Whitbread*, 11 C. B. 406; 20 L. J., C. P. 217; 15 Jur. 612.

But it must appear from the instrument that the main object of the parties to it was to wind up the debtor's business for the benefit of the creditors, and not to carry on the business with a view to future profits. *Coate* v. *Williams*, 7 Ex. 205; 21 L. J., Ex. 116.

Mortgage in Favour of Creditors in Anticipation of Writ.]—A person being indebted to five persons, as well as many others, and being aware that a writ of execution was about to be executed by one of the other creditors, executed a mortgage, substantially comprising the whole of his property, in favour of the five creditors. Under the mortgage deed the debtor was to remain in possession until default should be made in payment of the five debts at the expiration of six months, or until execution should be issued against his property:—Held, that the deed was not void within 13 Eliz. c. 5. *Alton* v. *Harrison*, 38 L. J., Ch. 669; L. R. 4 Ch. 622; 21 L. T. 282; 17 W. R. 1034.

It makes no difference as regards the 13 Eliz. c. 5, whether or not a deed executed in circumstances such as the above comprises all the property of the debtor. *Ib.*

Assignment for benefit of Creditors in Anticipation of Fieri Facias—Question for Jury.]—If a person, expecting a fieri facias will be sued out against him, makes an assignment of his goods to trustees for the benefit of his creditors, and the goods are afterwards taken under the writ, and trover for them is brought against the sheriff by the assignees, it will be a question for the jury under all the circumstances, whether the deed was fraudulent or not, that is, whether it was bonâ fide meant to convey the goods to the trustees for the benefit of the creditors generally, or whether it was a pretext only, and the goods were, notwithstanding the deed, really to belong to the assignor; and this is a question of fact, and not a question of law. *Riches* v. *Evans*, 9 Car. & P. 640.

Confessing Judgment to one, after Judgment and Execution sued by another, Creditor.]—If A. being indebted to B. and C., after being sued to judgment and execution by B., goes to C., and voluntarily gives him a warrant of attorney to confess judgment, on which judgment was immediately entered and execution levied the same day on which B. would have been entitled to execution, and had threatened to sue it out, the preference so given by A. to C. is not unlawful nor fraudulent within 13 Eliz. c. 5. *Holbird* v. *Anderson*, 5 Term Rep. 235.

Confessing Judgment to one, after Distress by another, Creditor.]—After a creditor had distrained for rent the goods of his debtor, who was also under engagement with the creditor's agent for the sale of his goods, for the purpose of discharging the rent, and also certain book-debts due to such creditor and his agent, the debtor confessed judgment to the defendant, another creditor, for a large nominal sum, with a defeasance that execution should only issue for such an amount as would cover the debt of the defendant and all the other creditors, amongst whom a ratable distribution was to be made:—Held, that such judgment confessed, being in fact made bonâ fide, and upon good consideration, was not covinous or fraudulent within 13 Eliz. c. 5, although its effect might be to delay or hinder such first-mentioned creditor from recovering the whole

amount of his demands. *Meux* v. *Howell*, 4 East, 1.

Infirmity of Debtor—Knowledge of Assignee.]—A distribution by a debtor, when in a weak state of mind and of body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts, is void as against creditors under 13 Eliz. c. 5, the children being aware at the time that the creditors' claims would be defeated, though the debtor had no such intention. *Cornish* v. *Clark*, 42 L. J., Ch. 14; L. R. 14 Eq. 184; 26 L. T. 494; 20 W. R. 897.

Assignment by Judgment Debtor of Stock-in-Trade.]—An assignment by a judgment debtor to his father-in-law of his stock-in-trade, as security for the purchase-money of the business, and for money advanced to pay debts, supported. *Sladden* v. *Sergeant*, 1 F. & F. 322.

Transfer by Judgment Debtor of Farm Stock—Rent.]—A transfer by a judgment debtor of the stock on his farm, the price being paid to third parties for rent, is valid. *Bunyard* v. *Seabrook*, 1 F. & F. 321.

Sale for good Consideration.]—A sale of property for good consideration is not, either at common law or under 13 Eliz. c. 5, fraudulent and void, merely because it is made with the intention to defeat an expected execution of a judgment creditor. *Wood* v. *Dixie*, 7 Q. B. 892; 9 Jur. 796.

Bill of Sale—For Money Lent.]—A bill of sale by way of mortgage of personal chattels, if executed as a security for money actually lent, is not fraudulent and void within 13 Eliz. c. 5, though its object is to defeat an expected execution of a judgment creditor. *Darvill* v. *Terry*, 6 H. & N. 807; 30 L. J., Ex. 355.

—— **To Creditor.**]—A bill of sale of goods executed by a debtor to his creditor is not void by reason of preference given over other creditors. If intended by the parties really to operate, and to give the creditor the power of taking possession, it is good, although not acted on by taking possession. *Eveleigh* v. *Purssord*, 2 M. & Rob. 539.

Interpleader—Transfer by Debtor to Claimant—Intention to Operate.]—On an interpleader issue, there being strong evidence that the claimant had been privy to a scheme to defeat and defraud the execution creditor, not only after, but before the judgment; and that, in pursuance of this scheme, he had taken a transfer of the property of the debtor, his partner:—Held, nevertheless, that, though if it was merely meant as a trick and a device by way of a pretended transfer, it was invalid; yet, if as between the parties it was intended to take effect, then, whatever its object, it was valid. *Luff* v. *Horner*, 3 F. & F. 480.

Trader.]—A trader, by a voluntary settlement, settled all his property, present and future (reserving to himself a control over the settled property), upon his wife, for her separate use for life, with remainder to himself for life, with remainder to his children. Five years afterwards he became bankrupt. In a suit by his assignees to set aside the settlement, although some evidence was adduced to prove that the trader was in solvent circumstances at the date of the execution of the settlement:—Held, that it was void as against his creditors, under 13 Eliz. c. 5. *Ware* v. *Gardner*, 38 L. J., Ch. 348; L. R. 7 Eq. 317; 20 L. T. 79; 17 W. R. 439.

Seventeen months before his bankruptcy, a trader assigned by deed all his estate and effects by way of security for the repayment of a sum due, and a further advance of a moderate amount:—Held, that, under the circumstances, the deed was not void under 13 Eliz. c. 5, or as an act of bankruptcy. *Allen* v. *Bonnett*, L. R. 5 Ch. 577; 23 L. T. 437.

Semble, also, that even if there had not been a further advance, the lapse of twelve months before the bankruptcy prevented the deed from being invalidated as an act of bankruptcy. *Ib.*

A trader, being in insolvent circumstances, assigned his business and stock-in-trade, part of the consideration consisting of two annuities, one payable to himself for life, the other payable to his wife during her life, in case she survived him. The trader died, having appointed his wife executrix. Upon a creditor's suit being instituted, it was decided that the annuity to the wife was void as against creditors; and afterwards, in an administration suit:—Held, that the annuity was legal, and not equitable, assets in the hands of the wife. *Hue* v. *French*, 26 L. J., Ch. 317; 5 W. R. 386.

A trader in embarrassed circumstances, possessed of freehold property subject to a mortgage, sold the same on the 17th of March to his brother, in consideration of the money paid to the mortgagee, and in consideration of a further sum then due from the vendor to the purchaser, the conveyance stating the whole consideration as money paid at the time. The purchaser, on the 15th of April, mortgaged the property to a third party. On the 11th of September the trader became bankrupt. On a bill filed by his assignees to set aside the sale, on the ground of fraudulent preference with a view to defeat the creditors, and against the mortgagee, on the ground of notice to the mortgagee of the state of embarrassment of the vendor at the time of the sale, the court considered that the question as to the validity of the sale was more than strong enough for further inquiry, and directed an issue to try whether the deed of the 17th of March was fraudulent; but, as to the mortgagee, that the plaintiff had failed in making any case against him. *Follett* v. *Wesley*, 10 Jur. 327.

A., a trader, being in difficulties, and having five executions against him, all his goods were conveyed to the defendant by bill of sale from the sheriff, with an understanding that they should remain on A.'s premises, to enable him to repurchase them. The jury having found that the object of the transaction was not merely to relieve A. from a forced sale of his goods, but also to protect them from the demands of other creditors:—Held, that the transaction was void under 13 Eliz. c. 5, s. 1. *Graham* v. *Furber*, 14 C. B. 410; 2 C. L. R. 10, 452; 23 L. J., C. P. 51; 18 Jur. 226; 2 W. R. 163.

S., a retail trader, being in difficulties, by deeds, dated July, 1882, assigned to C., wholesale manufacturers, to whom he was indebted, all his stock-in-trade, effects, &c., together with the premises on which the business was carried on—such assignment comprising substantially the whole of his property; and by an agreement of the same date S. agreed to carry on the business

in his own name as servant of C., and he continued to carry it on as the apparent owner, although really acting under the directions of C., until March, 1883, when he was adjudicated a bankrupt. The assignment was expressed to be made in consideration of a debt of 3,271*l.* then due from S. to C., which C. thereby released. There was a contemporaneous verbal agreement between S. and C. that C. should undertake the payment of S.'s other creditors, but whether all or only his trade creditors did not appear. At the date of the assignment the only debt due from S. to C. was 1,370*l.*, but all S.'s debts, so far as they could be ascertained, amounted to 3,271*l.* C., either immediately before or after the execution of the assignment, paid out some executions for S., and also some arrears of rent due from him to his landlord, and subsequently made advances and supplied goods for the purposes of the business. C., however, notwithstanding the verbal agreement, did not pay or give any security to a creditor of S. who was pressing him, but induced S. himself to give a promissory note in his own name for his debt :—Held, that the deed was clearly void under the statute of Elizabeth. *Chaplin, Ex parte, Sinclair, In re*, 53 L. J., Ch. 732 ; 26 Ch. D. 319 ; 51 L. T. 345—C. A. See also *Godfrey* v. *Poole*, ante, col. 309.

Indebtedness.]—In a settlement, executed by a person in embarrassed circumstances, being in part merely meritorious, but untruly recited as valuable, where the operation of the deed was to withdraw property from the creditors of the settlor, the court declared the deed invalid as against creditors, and set it aside. *Penhall* v. *Elwin*, 1 Sm. & G. 258.

A solicitor, in straitened circumstances, assigned the goodwill of his business, his credits, and all chattels, in his office, in consideration of a sum of cash and of an annuity secured by bond, and payable to his wife for life, and, after her decease, to him for life, with option to each of them, when in possession, to accept a sum down in lieu and discharge of the annuity :—Held, that this settlement of the annuity was void as against creditors. *Neale* v. *Day*, 28 L. J., Ch. 45 ; 4 Jur. (N.S.) 1225 ; 7 W. R. 45.

An insolvent debtor, within a month of his death, and while suffering from illness, from which there was no probability of his recovering, assigned policies of insurance on his own life for 800*l.* in consideration of the release of a debt of 174*l.* In a creditors' suit for the administration of his estate, the assignment was held to be voluntary and void under 13 Eliz. c. 5. The assignment was ordered to stand as a security for the debt due at the time of the assignment. *Stokoe* v. *Cowan*, 29 Beav. 637 ; 7 Jur. (N.S.) 901 ; 4 L. T. 695 ; 9 W. R. 801.

A person being indebted to five persons, as well as many others, and being aware that a writ of execution was about to be executed by one of the other creditors, executed a mortgage, substantially comprising the whole of his property, in favour of the five creditors. Under the mortgage deed the debtor was to remain in possession until default should be made in payment of the five debts at the expiration of six months, or until execution should be issued against his property :—Held, that the deed was not void within 13 Eliz. c. 5. *Alton* v. *Harrison*, 38 L. J., Ch. 669 ; L. R. 4 Ch. 622 ; 21 L. T. 282 ; 17 W. R. 1034.

It makes no difference as regards the 13 Eliz. c. 5, whether or not a deed executed in circumstances such as the above comprises all the property of the debtor. *Ib.*

C. being indebted, but not to the extent of insolvency, applied to his mother for a loan, who consented to make an advance to him upon the terms of his making a settlement of property to which he was entitled upon himself for life, and, after his death, upon his children. A mortgage deed was accordingly prepared and executed for securing the loan made to C. by his mother, and contemporaneously with such mortgage a settlement of the property in mortgage to C.'s mother was also executed by C. ; but neither the mortgage nor the settlement contained any reference to the other of them. C. became insolvent, and afterwards died. Subsequently to his death, his assignee in insolvency instituted a suit for the purpose of setting aside the settlement :—Held, that the settlement was not void under 13 Eliz. c. 5. *Thompson* v. *Webster*, 7 Jur. (N.S.) 531 ; 4 L. T. 750 ; 9 W. R. 641—H. L. Affirming 4 De G. & J. 600 ; 28 L. J., Ch. 700.

—— **Liability for Breach of Trust.**]—A., being liable to the plaintiffs for a breach of trust, conveyed his property to his son, in consideration of a life annuity of 60*l.* The consideration for the conveyance was greatly inadequate. The father was in a dangerous state of health, and died seven days after, leaving no property. The conveyance was set aside as fraudulent, for the benefit not only of the plaintiffs, but of all the other creditors of A. *Strong* v. *Strong*, 18 Beav. 408.

—— **Executor.**]—An executor indebted to his testator's estate creates a charge on his (the executor's) own freehold estate in favour of his wife and children, to the amount specified in the testator's will, as part of their share of his residuary estate :—Held, that the wife and children were entitled to the benefit of the charge, although the debt due to the testator's estate remained unpaid. *Stilwell* v. *Mellersh*, 20 L. J., Ch. 356.

Practice.]—A. seized B.'s furniture under a fi. fa., and disputed the validity of a voluntary settlement of the furniture, notice of which was served on the sheriff by the trustees. The sheriff accordingly filed a bill of interpleader. A. and B. were partners in business ; and, the partnership having been dissolved, A. elected to take B.'s share at a valuation, and continued in possession of B.'s share from the date of the dissolution, which was subsequent to the seizure but prior to the institution of the interpleader suit. The value of B.'s share was afterwards found to exceed, by a very large amount, the sum in respect of which the fi. fa. had been issued :—Held, that under these circumstances A. ought to have withdrawn from the suit, and could not be allowed to show that the settlement was invalid. *White* v. *Witt*, 24 W. R. 727.

—— **Sale by Sheriff.**]—Where goods seized under a fi. fa. founded on a judgment fraudulent against creditors remain in the sheriff's hands, or are capable of being seized by him, he is compellable, under 13 Eliz. c. 5, to sell or seize such goods under a subsequent writ, founded on a bonâ fide writ ; and if he neglects to do so,

having notice of the fraud at the time that he ought to have executed the writ, or if he could then have discovered it by reasonable inquiry, he is responsible for neglecting to seize and sell them; nor is it necessary, in order to render the judgment void quoad the sheriff on the ground of fraud, that he himself should have been a party to it; and the fact that the sheriff himself assigned the goods, under the prior execution, to a bonâ fide purchaser, innocently and in ignorance of the fraud, does not excuse him from such liability. *Christopherson* v. *Burton*, 3 Ex. 160; 18 L. J., Ex. 60.

d. Settlement on Marriage.

General Principles.]—Although a woman may know that a man is in embarrassed circumstances and that her marrying him at the time may be of service to him and preserve his property, if nevertheless her object in marrying him is not solely for the purpose of preserving his property, but for the ordinary reasons which lead men and women to take that position with regard to each other, an ante-nuptial settlement executed by the husband will not be void. But where the marriage is not an honest marriage, and is entered into solely for the purpose of attempting to make a settlement valid which otherwise would be void, and where, but for a desire to defraud the creditors, no marriage between the two parties would have taken place, the ante-nuptial settlement will be set aside. Thus where a man executed an ante-nuptial settlement and married a woman with whom he had had an immoral intimacy, and the evidence showed that such marriage was entered into solely with intent to defraud his creditors, the wife being implicated in the transaction:—Held, that the settlement was fraudulent and void as against the creditors. *Cooper, Ex parte, Pennington, In re*, 59 L. T. 774; 5 Morrell, 216. Affirmed, 5 Morrell, 268—C. A.

Generally.]—Unless the court finds that the ceremony of marriage has been resorted to as a pretence and cloak for fraud, and finds clear evidence that it is a fraudulent marriage, there is no case in which a settlement executed in consideration of marriage has been set aside on the ground of insolvency or embarrassed circumstances, or as being a fraud against creditors. *Fraser* v. *Thompson*, 1 Giff. 49; 5 Jur. (N.S.) 669; 7 W. R. 607.

—— **Chattels.**]—The consideration of marriage will support a settlement even of movable effects, and neither the joint possession of furniture nor the want of an inventory, nor the fact that the settlor was indebted at the time, and that his wife knew it, will affect the settlement. *Campion* v. *Cotton*, 17 Ves. 271.

—— **Solvency of Debtor.**]—The debtor shortly before his marriage executed an agreement by which, after reciting his intended marriage, he conveyed and assigned to the claimant, as trustee, all the personal chattels and effects he then possessed upon certain trusts for the benefit of his wife. At the time of his marriage the debtor had sufficient money to pay his creditors in full, but shortly afterwards judgment was recovered against him, and his furniture was seized:—Held, that the expression "personal chattels and effects" used in the agreement included the furniture of the debtor, and that, as the debtor was solvent at the time of executing the agreement, and had no intention of defrauding his creditors, the agreement was not void as a fraud upon his creditors. *Wenman* v. *Lyon*, 64 L. T. 88; 39 W. R. 301. See *S. C.*, in C. A., 60 L. J., Q. B. 663; [1892] 2 Q. B. 192; 65 L. T. 136; 39 W. R. 519.

Appointment, under power to charge, valid against General Creditors.]—A., on the marriage of his son B., settled, among other estates, one of which he had been, but was not then, in possession, and as to which he was then engaged in litigation, and to which he was ultimately declared not to be entitled: by the settlement, he covenanted generally with F., the lady's father, for title to all the lands, and he and B. entered into, with the trustees, covenants for title and quiet possession, notwithstanding any acts done by A. or B.; by the settlement it was provided, that if A. should purchase the head rents and inheritance of any of the settled estate which were held for lives, that his purchase should be subject to the trusts of the settlement, but that he should have power to charge with the purchase money the estate so purchased; A. did so purchase, and charged the estate with the purchase money in favour of his daughter D., without consideration:—Held, that this appointment was as valid against general creditors as the settlement of any other part of his property would have been, and would, therefore, prevail against them, unless A. had been indebted to the extent of insolvency at the time; and that the parties claiming under the settlement, in respect of the breach of the covenants therein contained, were general creditors. *Martyn* v. *Macnamara*, 2 Con. & L. 541; Dr. & War. 411.

Settlement by Heir, valid against Ancestor's Specialty Creditors.]—Settlement by the heir, upon his marriage, of the ancestor's estates supported against the claims of the specialty creditors of such ancestor. Sir W. H. died indebted in specialty. After his death, on the marriage of his heiress, a settlement was executed whereby (after reciting the insufficiency of the personal estate to pay the debts, and that a considerable sum was due on that account) a part of the estates was conveyed to provide a fund to pay the debts, and the remainder was settled on the heiress, her intended husband, and their issue. Many years after, the produce of the estates appropriated to the payment of the debts was found insufficient:—Held, that the circumstances did not afford any proof of fraud, or any want of bona fides in the execution of the settlement; that the settled estates were not liable to the specialty debts; and that, even if a want of bona fides had appeared, relief could only be obtained in a suit putting the mala fides properly in issue. *Richardson* v. *Horton*, 7 Beav. 112; 13 L. J., Ch. 186; 7 Jur. 1144.

Surrender and Settlement of Copyhold.]—A. surrenders the reversion in fee of copyhold lands to his son, to lessen the fine he must have paid in case it had come to him by descent; after the son's treaty of marriage, the father tells the wife's friends that this copyhold was so settled; in consideration of which, and of some leasehold lands, a marriage was had, and 2,000*l.* portion paid:—Held, this surrender of the copyhold not to be

voluntary or fraudulent. *Kirk* v. *Clarke*, Pre. Ch. 276.

On Second Marriage.]—Husband on second marriage contracts to pay money in trust for the wife for life, and afterwards for the issue of that marriage and a son by a former wife; his creditors cannot come upon this against the son, as being a voluntary disposition as to him. *Ithell* v. *Beane*, 1 Ves. 216; Dick. 132.

A widow, before marriage with A., her second husband, conveys her estate to trustees, in order to make settlement upon the issue of her first marriage. Afterwards A. and his wife mortgaged the settled estates to persons who had notice of the settlement. Here it was declared that the settlement is no voluntary agreement, but a binding one; and no instance where such a limitation has been held fraudulent and void against subsequent purchasers or creditors; for if it should, no widow on her subsequent marriage could make any certain provision for the issue of a former. *Newstead* v. *Searles*, 1 Atk. 265; *Cotton* v. *King*, 2 P. Wms. 358, 374.

Voluntary Settlement in case of ever Marrying.]—Where a party, whilst unmarried, made a voluntary settlement, upon trust, in case of her ever marrying, for her husband and children, and she afterwards became insolvent, the court dismissed a bill by the assignee to have the fund transferred. *Kirk* v. *Cureton*, C. P. Cooper, 191.

Voluntary Bond to Wife's Father.]—A voluntary bond, though given as a provision which a man may consider it his duty to make, shall, as against creditors, be deemed fraudulent and void; as where A., intending to marry B., gave her father a bond for 500*l*., payable on a day certain, with an agreement that it should not be sued, but remain as a security in case of misfortune, to be paid before other creditors. *Wise's Case*, Sel. Ch. Cas. 46.

Family Arrangement.]—On the treaty of marriage between A. and B., the father and mother of B., in consideration of the settlement to be made by A., join in conveying a small estate (out of which the mother was dowable) to A. in fee (but no fine was levied); and they also joined in settling another estate, of which the father was seised in fee, on the father for life, remainder to the mother for life, remainder to the uses of the marriage. At the time of the settlement the father was indebted by specialty. This being a fair and reasonable family settlement, and not made with any view to defeat creditors, the limitation to the mother for life is not fraudulent as against creditors, within the stat. 13 Eliz., more especially as she had joined in conveying the small estate in fee to the husband. *Jones* v. *Boulter*, 1 Cox, 288.

Of Wife's Property.]—Limitation of wife's property until the bankruptcy of her husband, or a lease determinable on the bankruptcy of the lessee, good. *Higginbotham* v. *Holme*, 19 Ves. 88.

—— **By Bond.**]—Settlement on marriage of wife's fortune in case of bankruptcy of the husband, though in form of bond by him; but as his bond, affecting his property, it is void as against the creditors. *Hodgson, Ex parte*, 19 Ves. 206; 12 R. R. 171.

—— **False Recitals.**]—Settlement sustained by the consideration of marriage against creditors, notwithstanding false recitals that the property was the wife's, protecting also voluntary expenditure by the husband after the marriage, in improvement by building and enfranchising copyholds, but not jewels and furniture purchased by him after the marriage and given to her. *Campion* v. *Cotton*, 17 Ves. 264.

C., who carried on the business of a flax spinner at the Shepley mills in partnership with R., by a settlement made in contemplation of his marriage, after reciting that he was indebted to his intended wife in 20,000*l*., covenanted to pay the 20,000*l*. to the trustees of the settlement, upon trust that as soon as he should become owner in fee simple of the Shepley mills estate, which he had agreed to purchase, they should advance the 20,000*l*. to him on the security of the same estate; and it was declared that the trustees should stand possessed of the 20,000*l*. and the securities for the same upon trust to pay the income to his intended wife for life for her separate use, and after her death to C. during his life or until he should become bankrupt, with remainder in trust for the children of the marriage, and in default of children for his wife absolutely. The recital that C. was indebted to his intended wife was entirely false, and C. was at the time of the marriage in insolvent circumstances; but the wife had no knowledge of the insolvency of her husband, and understood nothing about the recitals or the arrangement as to the 20,000*l*., except that that sum was to be settled. C. subsequently purchased the Shepley mills estate, and mortgaged it to the trustees of the settlement for securing 20,000*l*., but no money actually passed between the parties. C., and also his firm, afterwards became bankrupt, and a bill was filed by the trustee in C.'s bankruptcy against C. and his wife, the trustees of the settlement, and the trustee in the bankruptcy of the firm, praying that the settlement and the mortgage might be set aside as fraudulent against the creditors; and that the rights of all parties might be declared:—Held, that, notwithstanding the falsity of the recitals, the settlement and the mortgage deed were valid against the creditors so far as concerned the interests of the wife and the children. *Kevan* v. *Crawford*, 46 L. J., Ch. 729; 6 Ch. D. 29; 37 L. T. 322; 25 W. R. 49.

Trader.]—A trader cannot on marriage secure a provision out of his property for his wife in the event of bankruptcy in prejudice to his creditors. But marriage settlement of a trader securing a provision in case of bankruptcy for the wife, good to the extent of her property. *Higginson* v. *Kelly*, 1 Ball & B. 252, 255; 12 R. R. 28.

A trader, on his marriage, received a fortune of 5,000*l*. with his wife, and settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife and children in the event of his becoming bankrupt or insolvent; and it was provided that if he should survive his wife, and the issue of the marriage should fail, and he should then be or should have been a bankrupt, fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the 5,000*l*. was settled, but the whole of the settled fund was the husband's property, and it did not appear from any of the expressions in the settlement what was the consideration for the provision as to the fifteen sixty-sixths of the stock:—Held, that the limitations over in the

event of the bankruptcy of the husband were good as to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder. *Lester* v. *Garland*, 5 Sim. 205.

In an ante-nuptial settlement, conferring considerable benefits upon the husband in the property of the wife, to which it chiefly related, which settlement contained a recital that it was made by the wife in consideration of the marriage, and of the provision thereinafter made and provided for her by the husband, he covenanted that whatever estates and property, whether real and personal, and wherever situate, or either or both, should, in the event of his decease, if the wife should survive him, be charged and chargeable with and subject to the payment of an annuity or yearly rent-charge of 250*l.*, to be paid and payable to her and her assigns during so many years as she should live, besides and in addition to the provision thereby made and intended for her, with the exception of a contingent reversionary interest in a policy of assurance for 3,000*l.* on the life of the husband, which policy was subject to a debt of 2,000*l.* and interest thereon at 4 per cent. There was not any provision made out of his property for her beside the annuity of 250*l.* At the period of the marriage he was engaged in trade, and was seised of real estate. Subsequently he acquired other real estate, and afterwards became a bankrupt: —Held, that the annuity of 250*l.* was well charged both upon the real estate of which he was seised at the marriage, and upon the real estate which he subsequently acquired. *White* v. *Anderson*, 1 Ir. Ch. R. 419.

—— **Covenant to Settle.**]—Under a will the testator's widow had a power to appoint among her children, and in default of appointment the property was to be held in trust for all the children equally. One of the children, being then a trader within the meaning of the Bankruptcy Act, 1869, executed an ante-nuptial settlement whereby he covenanted to settle his share whether appointed or not. His mother appointed the property equally amongst A. and the other children. He subsequently became bankrupt:—Held, that his covenant was not void under s. 91 of the Bankruptcy Act, 1869. *Andrews*, *In re*, 7 Ch. D. 635; 38 L. T. 137; 26 W. R. 572.

Cohabitation.]—A. makes a bill of sale of his goods to a trustee for one who lived with him as his wife, and so reputed. Bill of sale set aside as fraudulent against creditors. *Fletcher* v. *Sidley*, 2 Vern. 490.

Voluntary bond, though given under a strong moral obligation (as a marriage contracted and property received as husband by a man having a wife living at the time) is void against creditors. *Gilham* v. *Locke*, 9 Ves. 612.

—— **Past.**]—Where a man executed an ante-nuptial settlement, and married a woman with whom he had previously cohabited, with intent to defraud his creditors, the wife being implicated in the transaction:—Held, that the settlement was fraudulent, and void as against creditors. *Bulmer* v. *Hunter*, 38 L. J., Ch. 543; L. R. 8 Eq. 46; 20 L. T. 942.

A man in insolvent circumstances, upon his marriage with a woman with whom he had previously cohabited, by a deed of settlement and articles of agreement executed prior to the marriage, conveyed and assigned all his estate to trustees upon trust for his wife, with a power of appointment among the children of the marriage, reserving no interest to himself; immediately after the marriage the power was exercised in favour of an illegitimate daughter. The property remained under the control of the husband till his bankruptcy, two months after the marriage: —Held, that the settlement was void. *Colombine* v. *Penhall*, 1 Sm. & G. 228.

Evidence.]—To avoid an ante-nuptial marriage settlement as a fraud upon creditors it must be shown that both husband and wife were parties to the fraud. *Parnell* v. *Stedman*, 1 Cab. & E. 153.

e. Settlement after Articles or Agreement.

Variation from Articles.]—A settlement made after marriage on the wife and children, pursuant to articles entered into previous to the marriage, though not exactly agreeing with them, not voluntary nor fraudulent against bond creditors. *Brunsden* v. *Stratton*, Pre. Ch. 520.

In excess of Articles.] — By marriage articles, reciting the lady's fortune to be 1,000*l.*, the husband agreed to settle 4,000*l.*, secured by his bond and judgment, with a proviso that it should be void if he should afterwards settle lands to the value of 100*l.* a year. He did subsequently settle lands to a value considerably beyond 100*l.* a year. The lady's friends had given her an additional sum of 1,000*l.* On a bill filed under the former Bankrupt Act (in pari materiâ with the Statute of Fraudulent Conveyances):—Held, that the settlement could not be impeached as voluntary as to the excess beyond 100*l.* a year. *Maguire* v. *Nicholson*, Beat. 592.

Parol Promise.]—A parol promise before marriage will not support a deed executed after marriage, as against creditors. *L'Estrange* v. *Robinson*, 1 Hog. 202.

—— **Wife's Property.**] — Settlement after marriage of the wife's property, reciting a parol agreement before marriage for such settlement; the creditors of the husband cannot set aside such settlement. *Dundas* v. *Dutens*, 2 Cox, 235; 1 Ves. J. 196; 1 R. R. 112. S. P., *Stuckey*, *Ex parte*, 2 Cox, 284.

A husband executed a post-nuptial settlement of railway stock, the property of the wife, in pursuance of a parol ante-nuptial agreement. The wife had been induced by the husband to marry before the execution of the settlement, on the representation that the settlement would be as good after as before marriage. The husband was insolvent at the time of the marriage, although he had assured the wife and her family that he was solvent. On a bill filed by a creditor to set aside the settlement:—Held, that the subsequent execution of the settlement was not such a part performance of the parol agreement as would avoid the Statute of Frauds, and that the settlement was void, as against creditors, under 13 Eliz. c. 5. *Warden* v. *Jones*, 2 De G. & J. 76; 27 L. J., Ch. 190; 4 Jur. (N.S.) 269; 6 W. R. 180.

Evidence.]—It seems that a recital in a settle-

ment after marriage is not evidence, against creditors, of articles before marriage. *Battersbee* v. *Farrington*, 1 Swanst. 106; 1 Wils. Ch. 88; 18 R. R. 32.

f. Post-nuptial Settlements.

Generally.]—A settlement after marriage is good when husband was not indebted at the time, and the wife, when married, an infant. *Middlecomb* v. *Marlow*, 2 Atk. 579.

Settlement after marriage voluntary and void against creditors. *Beaumont* v. *Thorpe*, 1 Ves. 27.

A settlement made in consideration of marriage is good against everybody if made before marriage; if made after, is voluntary against creditors. *Wheeler* v. *Caryl*, Amb. 121.

A. conveyed part of his lands in trust to pay his debts, and other part to maintain his children. This last conveyance is voluntary, and void as against creditors, though good against A. himself. *Sneed* v. *Cullpepper*, 7 Vin. Abr. 52 pl. 7.

Every conveyance that is voluntary, is fraudulent against creditors; and, though a man is bound by law to maintain his wife and children, yet the funds out of which the maintenance is to arise are liable to creditors. *Fitzer* v. *Fitzer*, 2 Atk. 511.

A husband may make a settlement on his wife when he is solvent, and pecuniarily in a condition to make such a gift, if it is not unreasonable in amount, and if after making it he still has abundant assets to pay those debts which he owed at that time. *Sedgwick* v. *Place*, 5 Bankr. Reg. 168; 25 L. T. 307.

A voluntary settlement without fraud by a husband, not indebted, in favour of his wife and children is valid against subsequent creditors. On a bill by the wife, the court established the settlement, no creditor attempting to impeach it, and there being no allegation that the husband was indebted at the time, without directing an inquiry on that subject. *Battersbee* v. *Farrington*, 1 Swanst. 106; 1 Wils. Ch. 88; 18 R. R. 32.

Stock was bequeathed to A. after his marriage, which he vested in trustees for the benefit of himself and wife for life, and then to their children. This settlement is void as against the husband's creditors, both before and after the marriage. *Taylor* v. *Jones*, 2 Atk. 600.

Such a settlement good as against a father after marriage, and against a voluntary conveyance. *Ib.*

—— **Wife's Property.**]—A trust created by the husband of the wife's estate, not being deemed fraudulent against creditors, or a subsequent purchaser, equity will not carry it further, though voluntary conveyances are generally held fraudulent against purchasers. *White* v. *Sansam*, 3 Atk. 410.

A husband who had made no provision for his wife, agrees that her fortune, which was in trustees' hands, should be laid out in a purchase of lands: this agreement, though after marriage, not to be considered as voluntary, so as to be set aside in favour of a creditor of the husband. *Moore* v. *Rycault*, Pre. Ch. 22.

Bill to impeach a post-nuptial settlement, whereby the husband, who was indebted to the plaintiffs and other persons, conveyed and assigned real estate and funds in court accruing in right of his wife, upon trust to pay a part to the husband, and as to the rest, upon trust for her children, was dismissed with costs. *Turnley* v. *Hooper*, 3 Sm. & G. 349.

A person, who was in loco parentis to a married woman, devised to her a rent-charge for her life, and bequeathed certain personal property to her for her separate use. The will being inoperative both as to the real and personal estate, the heir-at-law and next of kin of the testator made a partial sacrifice of their interests in order to carry the testator's intentions into effect, the property given up by them being invested in the funds, and afterwards settled upon the woman and her children. At the time of the investment, the husband of the woman was insolvent in his circumstances, and about three months after the date of the settlement he became bankrupt:—Held, that the settlement was for valuable consideration, and was good against husband's creditors. *Pott* v. *Todhunter*, 2 Coll. C. C. 76; 9 Jur. 589.

—— **Equity to a Settlement.**]—Previously to a contemplated marriage the intended husband and wife went to a solicitor to have a settlement prepared of some railway stock, of which the intended wife was the registered proprietor, but which was subject to a mortgage, and the certificates of which were in the hands of the mortgagee. The solicitor not being able to prepare the settlement before the time fixed for the marriage, the husband told the wife that it would be equally good if made afterwards, and no settlement or agreement for a settlement was made in writing before the marriage. Shortly after the marriage a settlement was executed, whereby the husband covenanted to invest part of the proceeds of the stock upon trust, for the benefit of his wife and children. He sold the stock, paid off the mortgage, and invested the stipulated amount according to his covenant:—Held, that the settlement was voluntary, fraudulent, and therefore void as against creditors, and that the wife had no equity to settlement. *Warden* v. *Jones*, 2 De G. & J. 76; 27 L. J., Ch. 190; 4 Jur. (N.S.) 269; 6 W. R. 180.

By Person not Indebted.]—A settlement after marriage by a person not indebted is not within the Statute of Fraudulent Conveyances. *Stephens* v. *Olive*, 2 Bro. C. C. 90.

Subsequent Creditors.]—A post-nuptial settlement executed when the assignor was perfectly solvent is not invalid as against subsequent creditors. *Gugen* v. *Sampson*, 4 F. & F. 974.

Existing Creditors.]—Settlement after marriage, fraudulent only as against creditors at that time. *Kidney* v. *Coussmaker*, 12 Ves. 136; 2 R. R. 118.

Purchase by Wife from Husband.]—Purchase by wife from husband, through the medium of trustees, for her separate use and appointment, may be sustained against creditors, if bonâ fide, though the husband is indebted at the time, and even though the object is to preserve from his creditors, for the family, the subject of the purchase. *Arundell (Lady)* v. *Phipps*, 10 Ves. 139.

In Bar of Dower.]—Where settlement was made on wife after marriage, in bar of dower, &c., and, by wife's waiving it, lands would go to heir to prejudice of creditors, she was decreed to have the estate for life according to settlement,

but that she should assign it over in trust for creditors, who should convey to her a third for dower. *Miller* v. *Eden*, 10 Mod. 487.

In Consideration of Portion.]—Settlement after marriage, in consideration of portion given to wife, is good against husband's creditors. *Russell* v. *Hammond*, 1 Atk. 13. S. P., *Anon.*, Pre. Ch. 101; *Jones* v. *Marsh*, Ca. t. Talb. 64; *Brown* v. *Jones*, 1 Atk. 190; *Lanoy* v. *Athol*, 2 Atk. 444; *Ward* v. *Shallet*, 2 Ves. 16; *Wheeler* v. *Caryl*, Amb. 121.

A settlement made in 1694, in consideration of a portion then paid, though after marriage, cannot be impeached by subsequent creditors. *Stileman* v. *Ashdown*, 2 Atk. 477; Amb. 13.

Of Property Purchased under Prior Settlement.]—A settlement of property purchased by money raised by a wife joining with her husband in appointing property settled on the husband in fee, subject to a joint power reserved to the husband and wife, is not voluntary. *Acraman* v. *Corbett*, 1 J. & H. 410: 30 L. J., Ch. 642; 7 Jur. (N.S.) 624; 4 L. T. 203; 9 W. R. 409.

For Spendthrift Settlor's own Protection.]—A post-nuptial settlement for value by a solvent spendthrift is not fraudulent under 13 Eliz. c. 5, as defeating and delaying creditors, because the object is to tie up the settled property for the benefit of the settlor and his wife and children, and so prevent its being squandered by any future extravagance of the settlor. *Tetley, In re, Jeffery, Ex parte*, 66 L. J., Q. B. 111; 75 L. T. 166; 3 Manson, 226.—Affirmed in C. A. on the facts.

Marriage in Scotland.]—A settlement after a marriage in Scotland, not supported against creditors in bankruptcy, as upon valuable consideration, by a recelebration of the marriage in England, but it was sustained as the consideration of an agreement to settle by the parent of the other party. *Hall, Ex parte*, 1 Ves. & B. 112; 1 Rose, 30.

Practice—Evidence.]—To impeach a settlement after marriage, under the statute 13 Eliz. the husband must be proved to have been indebted at the time, and to the extent of insolvency. The creditor not producing any evidence, his bill was dismissed, with liberty to file another. *Lush* v. *Wilkinson*, 5 Ves. 384.

g. Leaseholds.

Generally.]—When a lease is held at a full or substantial rent, and contains onerous covenants on the part of the lessee, an assignment (free from actual fraud) to an assignee, who subjects himself to the performance of the covenants, is not voluntary. *Greer, In re*, Ir. R. 11 Eq. 502.

In 1872 R. R. gave to the W. bank a guarantee to secure the balance due from his son R. H. R. on his banking account to the extent of 1,000*l.* On the 25th of May, 1877, R. H. R.'s account was overdrawn by 1,515*l.* On that day R. R. made a voluntary settlement of a leasehold property worth 200*l.* a year, which he held at a rent of 3*l.* 10*s.* His only other property was furniture worth less than 200*l.*, and a debt of 1,500*l.* due to him from R. H. R. In 1880 R. H. R., whose account was then overdrawn by 1,313*l.*, went into liquidation and paid a dividend of 3*s.* in the pound. There was some general evidence that R. H. R. was solvent at the date of the settlement. R. R. having died, the bank took proceedings to set aside the settlement and to have the leasehold treated as assets of R. R. in a suit for administration of his estate in which the bank had been admitted creditors for 1,000*l.* on the guarantee:—Held, by the court of appeal, that the settlement was not a settlement for value within the meaning of 13 Eliz. c. 5, the doctrine of *Price* v. *Jenkins* (5 Ch. D. 619) not being applicable to cases under that statute. *Ridler* v. *Ridler, Ridler, In re*, 52 L. J., Ch. 343; 22 Ch. D. 74; 48 L. T. 396; 31 W. R. 93—C. A.

Held also, that the settlement was invalid as against creditors, for that under the circumstances the liability under the guarantee ought to have been regarded as a substantial one: that R. R. had no right to treat the 1,500*l.* due from R. H. R. as a good debt; that the settlement must therefore be looked upon as a settlement of all his property, leaving him nothing out of which he could meet his liability under the guarantee, and that an intention to defeat or delay creditors must be inferred. *Ib.*

—— **Bankruptcy Act, 1869.**]—A settlement of leasehold property, to which liability is attached, is of necessity a settlement for valuable consideration, and cannot therefore be avoided as a voluntary settlement under s. 91 of the Bankruptcy Act, 1869, even though no other consideration be given. *Doble, Ex parte* and *In re*, 38 L. T. 183; 26 W. R. 407.

See also II. B. 3. d. post, col. 357.

4. Indebtedness.

a. At Date of Conveyance.

Generally.]—A person being indebted at the time of making a voluntary conveyance is an argument of fraud. *Grogan* v. *Cooke*, 2 Ball & B. 234.

In order to make void a deed as fraudulent against creditors, it is not necessary to prove that the party was insolvent at the time, if it appear that the intention was to delay creditors. *Richardson* v. *Smallwood*, Jacob, 553.

Assignments by a person much in debt of policies of insurance effected by him on his life to relatives to whom he was indebted, not fraudulent as against his other creditors. *Grogan* v. *Cooke*, 2 Ball & B. 230.

The solvency or insolvency of the debtor affords no certain test whether a deed is void under stat. 10, Car. 1, c. 6, s. 10 (13 Eliz. c. 5, Eng.), but each case must be judged by its own circumstances. *Clements* v. *Eccles*, 11 Ir. Eq. R. 229.

If the settlor was at the time of a voluntary settlement not necessarily insolvent, but so largely indebted as to induce the court to believe that the intention of the settlement was to defraud his creditors, and some of those debts are still unpaid, the settlement may be set aside. *Holmes* v. *Penney*, 3 K. & J. 90; 26 L. J., Ch. 179; 3 Jur. (N.S.) 80; 5 W. R. 132.

In order to set aside a voluntary settlement as fraudulent against creditors, it is not necessary to prove an actual intention to delay creditors present to the mind of the settlor at the time. If the necessary consequence of the settlement is to hinder or delay creditors, the intention will be presumed. *Freeman* v. *Pope*, 39 L. J., Ch.

689; L. R. 5 Ch. 538; 21 L. T. 816; 18 W. R. 906.

In the absence of an actual intent to defeat, delay, or hinder creditors, a voluntary settlement, made by a settlor in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid. *Kent* v. *Riley*, 41 L. J., Ch. 569; L. R. 14 Eq. 190; 27 L. T. 263; 20 W. R. 852.

Under the 13 Eliz. c. 5, the question is one of fact whether the transaction was bonâ fide or a contrivance to defraud creditors. A deed is void as against creditors when the debtor is in a state of insolvency, or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor, or the consequence of his act, it is not sufficient to render a deed valid, that it should be made upon good consideration. *Corbett* v. *Radcliffe*, 14 Moore, P. C. 121; 4 L. T. 1.

If the debt of a creditor, by whom a voluntary settlement is impeached under 13 Eliz. c. 5, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is not necessary for him to show insolvency on the part of the debtor at the date of or occasioned by the settlement. *Spirett* v. *Willows*, 3 De G. J. & S. 293; 34 L. J., Ch. 365; 11 Jur. (N.S.) 70; 12 L. T. 614; 13 W. R. 329.

A settlement was set aside as against creditors generally in a suit instituted by a person who had recovered judgment against the settlor in an action commenced after the date of the settlement for a tort committed before it. *Crossley* v. *Elworthy*, 40 L. J., Ch. 480; L. R. 12 Eq. 158; 24 L. T. 607; 19 W. R. 842.

A. made a voluntary assignment of a sum of money, being, at the time, indebted to B., on balance of running account. A. afterwards made payments to B., exceeding in amount the balance due at the date of the assignment; but the balance continually increased. The assignment was set aside at the suit of B. *Whittington* v. *Jennings*, 6 Sim. 493: 3 L. J., Ch. 157.

A party largely indebted makes a voluntary settlement, and becomes insolvent within three years:—Held, sufficient to avoid the settlement under 13 Eliz. c. 5; and held also, that in order to set it aside, it was not necessary to prove that the settlor was in a state amounting to insolvency. *Townsend* v. *Westacott*, 2 Beav. 240; 4 *id.* 58; 9 L. J., Ch. 241; 4 Jur. 187.

A settlement executed by a man in a state of insolvency, his wife, who gave up nothing, joining therein, and by which a power of revocation, in case any children should be born after the date of its execution, was reserved:—Held, fraudulent and void as against creditors. *Acraman* v. *Corbett*, 1 J. & H. 410; 30 L. J., Ch. 642; 7 Jur. (N.S.) 624; 4 L. T. 203; 9 W. R. 409.

E. placed a sum of money in the hands of her solicitor for investment. He died insolvent without investing the money, and after his death a declaration of trust was found among his papers, addressed to E., by which he declared himself trustee of some leasehold property whereof he was mortgagee, and of a bill indorsed by himself to E., to secure the repayment of this sum:—Held, as between E. and the general creditors of the solicitor's estate, that the transaction was bonâ fide within 13 Eliz. c. 5. *Middleton* v. *Pollock, Elliott, Ex parte*, 45 L. J., Ch. 293; 2 Ch. D. 104.

A person being in debt to the extent of 300*l.*, and having some other debts, applied to his mother for advances to pay the debts other than the 300*l.* She, not knowing of the debt of 300*l.*, refused, unless he would make a settlement of his property on his wife and children. Ultimately, he acceded and did so, reserving to himself a life interest, with about 1,700*l.*, and he afterwards died insolvent, not having paid the 300*l.*:—Held, that the settlement was not, under the circumstances, made with intent to defraud creditors, and was good against the assignees of the insolvent. *Thompson* v. *Webster*, 4 Drew. 628; 28 L. J., Ch. 700; 5 Jur. (N.S.) 668; 7 W. R. 596. See *S. C.*, 7 W. R. 648—L.JJ.

A., having previously borrowed 1,000*l.* of B., executed to him a bond for that sum, and B., two days afterwards, executes a deed, whereby he covenants that the bond shall not be enforced. Some years afterwards B., having become bankrupt, his assignees bring an action on the bond, and file a bill to have the deed of covenant declared fraudulent:—Held, that the court will not interfere against the legal operation of the deed, there being nothing to show that B. was insolvent when he executed it, and there being evidence that A. had also at that time pecuniary claims on B., and that the execution of the bond was accompanied by an agreement that payment of it should not be enforced. *Slack* v. *Tolson*, 1 Russ. 553.

A debtor, being possessed of a policy of assurance on his life for 500*l.*, in October, 1837, assigned the policy and sum assured to one of his creditors as a security for 100*l.*, with a declaration constituting the creditor, after securing his own debt, a trustee for M. At this time the debtor was indebted to other persons, and continued so indebted to some of them up to the time of his death, and died intestate and insolvent in December, 1837. The assignee of the policy received the 500*l.*, and, after retaining the amount due to himself, paid the balance into court under the Trustee Relief Act, 1850:—Held, that the trust in favour of M. was void as against the creditors of the debtor at the time, and who continued so up to the debtor's death: but that, subject thereto, it was a good declaration of trust in favour of M. *Magawley's Trust, In re*, 5 De G. & Sm. 1; 15 Jur. 1005.

Bill by creditors against the representative of a settlor (deceased), and against a volunteer assignee of two policies of insurance on the life of the settlor, alleging that at the date of the assignment the settlor was in insolvent circumstances, and that his assets were now insufficient to pay his creditors, and praying to have the assignment set aside. All that appeared in evidence was that the testator was, at the date of the assignment, indebted to one of the plaintiffs in a sum of 200*l.*, which debt still was due:—Held, that the mere fact of the settlor having been indebted at the date of the settlement was not sufficient to vitiate it as fraudulent, under the statute of Elizabeth; but, on the other hand, that it was not necessary to prove that the settlor was in a state of insolvency at that time. Reference to the master to inquire what debts were owing by the settlor at the date of the settlement and at his death, and what was the

amount of the settlor's property, at the date of the settlement, not included in the settlement. *Skarff* v. *Soulby*, 1 Mac. & G. 364; 1 Hall & Tw. 426; 19 L. J., Ch. 30; 13 Jur. 1109.

—— **Administration.**]—In the administration of the estate of a deceased person, a security given by him to a particular creditor will not be set aside on the ground of preference, if the object was payment, although the deceased person was at the time of giving the security insolvent to his own knowledge. *Middleton* v. *Pollock, Elliott, Ex parte*, 45 L. J., Ch. 293; 2 Ch. D. 104.

—— **Extent of Application of Act.**]—Stat. 10, Car. 1, c. 6, s. 10 (13 Eliz. c. 5, Eng), avoids only deeds which would deprive creditors of such property as they could make available without their debtor's aid, and does not apply to the case of a tenant in tail opening his estate and re-settling it on himself for life, remainder over. *Clements* v. *Eccles*, 11 Ir. Eq. R. 229.

Consideration, moving from whom.]—A. being entitled to a life interest in the dividends of 9,000*l.* consols, and being largely indebted, his brother agreed to pay all debts not charged on A.'s life interest, upon condition that such life interest should be settled so as to be applicable for the maintenance of A., his wife, and children, or any of them, at the absolute discretion of the trustees. This transaction having been carried into effect:—Held, that such settlement was valid against subsequent creditors, and also against a person who was a creditor of A. at the time of the settlement, and whose debt was concealed by A. from his brother, and was the only one not paid by him. *Holmes* v. *Penney*, 3 K. & J. 90; 26 L. J., Ch. 179; 3 Jur. (N.S.) 80; 5 W. R. 132.

The bonâ fides to be established in order to support such a transaction is bonâ fides in the party from whom the consideration moves. *Ib.*

—— **Secret Trust.**]—During the negotiation which preceded this arrangement, the solicitor of A.'s brother wrote to A.: "The only object of your brother is to save your life interest, in case anything happens to you, and, to effect this, he was willing to pay your debts." And again he wrote to A.'s solicitor: "The income will of course be paid to A. as long as this can safely be done; but our conveyancer states, that it will be quite impossible to give A. any interest, however slight, without such interest passing to creditors in the case of bankruptcy or insolvency":—Held, that these letters did not amount to a secret trust for A.'s benefit, and that, therefore, they could not affect the validity of the settlement. *Ib.*

—— **Apportionment.**]—The discretion of the trustees being absolute:—Held, that the court could not apportion the income between A., his wife, and children, so as to make A.'s part of it available for his creditors. *Ib.*

—— **Right to Sue.**]—The settlor having subsequently become insolvent:—Held, that the assignee in insolvency might institute a suit to impeach the deed. *Ib.*

Post Nuptial Settlement.]—Settlement after marriage, fraudulent only as against creditors at that time. *Kidney* v. *Coussmaker*, 12 Ves. 136; 2 R. R. 118.

Settlement after marriage is good against creditors, when husband was not indebted at the time, and wife when married an infant. *Middlecomb* v. *Marlow*, 2 Atk. 519.

A settlement after marriage, by a person not indebted, is not within the statute of fraudulent conveyances. *Stephens* v. *Olive*, 2 Bro. C. C. 90.

To impeach a settlement after marriage under the statute 13 Eliz., the husband must be proved to have been indebted at the time, and to the extent of insolvency; the creditor not producing any evidence, his bill was dismissed, with liberty to file another. *Lush* v. *Wilkinson*, 5 Ves. 384.

A post-nuptial settlement, executed in pursuance of an ante-nuptial agreement, set aside at the instance of creditors of the husband, he being insolvent at the time of its execution. *Warden* v. *Jones*, 2 De G. & J. 76; 27 L. J., Ch. 190; 4 Jur. (N.S.) 269; 6 W. R. 180.

Purchase by Wife from Husband.]—Purchase by wife from husband, through the medium of trustees, for her separate use and appointment may be sustained against creditors if bonâ fide, though the husband is indebted at the time, and even though the object is to preserve from his creditors for the family the subject of the purchase. *Arundell (Lady)* v. *Phipps*, 10 Ves. 139.

Leaseholds.]—A voluntary gift of leaseholds by a father to his son, in 1835 and 1841, was set aside, it being ascertained in a reference that at those periods the settlor's debts exceeded his assets. *Christy* v. *Courtenay*, 26 Beav. 140.

Partnership.]—C. having competent private means, and being engaged as a member of a partnership, which was indebted to the extent of 375*l.*, made a voluntary settlement of property amounting to 5,000*l.* odd in favour of his wife and married daughter, reserving no benefit to himself. One year and a half afterwards (he having become of unsound mind), the other partners were made bankrupts on their own declaration, and no dividend had been paid:—Held, that the settlement was void under 13 Eliz. c. 5, but an inquiry granted at the peril of the defendants. *Denison* v. *Tattersall*, 18 L. T. 303.

Trader.]—Where a trader conveys his real estate to trustees in consideration of 5*s.* and other valuable considerations, in trust to himself for life, remainder to his wife for life, then to his eldest son, if he survive his father and mother, and so to the next son, the conveyance was holden as falling within 1 Jac. 1, c. 15, and trustees ordered to convey to assignees; but it is necessary to prove that party was indebted at the time. *Walker* v. *Burrows*, 1 Atk. 93.

A trader, being in insolvent circumstances, agreed to sell his business and stock-in-trade in consideration of a money payment, and that the purchaser should, during the joint lives of the trader and his wife, pay the former an annuity equal to one-fourth of the profits, and a contingent annuity to the wife, if she survived her husband, equal to one-sixth of the profits. The trader having died, and a creditor's suit having been instituted for the administration of his assets:—Held (reversing a decision of Stuart,

V.-C.), that the annuity to the wife was void as against creditors, under the 13 Eliz. c. 5, and that it was quite competent for the creditor to impeach the annuity, without seeking to set aside the whole transaction of which it was a part; and there was a provision in the decree that it was to be without prejudice to any claim of the widow upon the estate of her husband, if there should ultimately be a surplus after payment of creditors. *French* v. *French*, 6 De G. M. & G. 95; 25 L. J., Ch. 612; 2 Jur. (N.S.) 169; 4 W. R. 139.

Isle of Man.]—According to the general law prevailing as well in the Isle of Man as in England, a deed is void against creditors when the debtor is in a state of insolvency, or when the effect of the deed is to leave the debtor without the means of paying his present debts. *Corbett* v. *Radcliffe*, 14 Moore, P. C. 121; 4 L. T. 1.

A deed of settlement and a conveyance in favour of the son of the grantor, upon certain beneficial considerations for his wife and younger children, made by the grantor when in insolvent circumstances, set aside as being fraudulent and void against the creditors of the grantor. *Ib.*

Where Effect of Assignment is to render Assignor Insolvent.]—Where a testator assigned his property, and the plaintiff, in an action against the executor, set up fraud in the assignment, and suggested, to prove the fraud, that the testator was insolvent at the time of the assignment, it is sufficient for the purposes of the plaintiff in the action, if, by the very act of assignment, the testator made himself insolvent—that is, if the property left after the conveyance was not enough to pay his debts. *Jackson* v. *Bowley*, Car. & M. 97.

But where the sum realised after the death of the testator very nearly equalled the amount of his debts, the judge still left it to the jury to say whether there had been fraud in the assignment. *Ib.*

Onus of Proof.]—Nine months after a voluntary settlement had been made the settlor became insolvent:—Held, that the onus lay on him to prove that he was solvent at the date of the settlement. *Crossley* v. *Elworthy*, 40 L. J., Ch. 480; L. R. 12 Eq. 158; 24 L. T. 607; 19 W. R. 842.

Practice—Primâ facie case—Inquiry.]—If the evidence raises a primâ facie case that the effect of a voluntary settlement will be injurious to settlor's creditors, a creditor may file a bill and have an inquiry into the state of the settlor's property and debts at the date of the execution of the settlement. *Crabbe* v. *Moxey*, 1 W. R. 226.

b. Subsequent Creditors.

Generally.]—13 Eliz. c. 5 renders void conveyances made to defeat future as well as existing creditors. *Barling* v. *Bishopp*, 29 Beav. 417; 6 Jur. (N.S.) 812; 8 W. R. 631.

Voluntary conveyance by person not indebted, not set aside afterwards. *Russell* v. *Hammond*, 1 Atk. 15.

Not necessary that a man should be actually indebted at the time of voluntary settlement to make it fraudulent; if he does it with a view to his being indebted at a future time, it is equally so, and ought to be set aside. *Stileman* v. *Ashdown*, 2 Atk. 481.

The result of the authorities decided upon 13 Eliz. c. 5 is that, where a debt contracted antecedently to the settlement exists, a subsequent creditor has the same rights as an antecedent creditor would have against the settlor. *Freeman* v. *Pope*, 39 L. J., Ch. 148. Affirmed, 39 L. J., Ch. 689; L. R. 5 Ch. 538; 21 L. T. 816; 18 W. R. 906.

Where a clergyman, with an annual income of nearly 1,000*l.*, made in 1863 a voluntary settlement in favour of his god-daughter, and died in 1868 in insolvent circumstances, owing to his bankers the balance of a debt which had been contracted prior to the date of the settlement, a creditor, whose debt was contracted subsequently to the settlement, obtained a decree to set aside the settlement as fraudulent, within 13 Eliz. c. 5, although, having regard to the income and means of the settlor, the court was of opinion that in executing the settlement he had no intention whatever to cheat his creditors at that time. *Ib.*

Bond Debts.]—Voluntary conveyance is bad against bond debts contracted since. *St. Arnaud* v. *Jersey*, 1 Comyns, 255.

Judgment Creditors.]—A. conveys lands to the use of himself for life, with power to mortgage such part as he shall think fit, remainder to trustees to sell to pay all debts, and afterwards becomes indebted by judgment bonds and simple contract. This is fraudulent as against the judgment creditors, and they shall not be compelled to take a satisfaction in average with the other creditors, having no notice of the settlement. *Tarback* v. *Marbury*, 2 Vern. 510.

Creditor on Running Account.]—A. made a voluntary assignment of a sum of money, being at the time indebted to B., on balance of running account. A. afterwards made payments to B., exceeding in amount the balance due at the date of the assignment, but the balance continually increased. The assignment was set aside at the suit of B. *Whittington* v. *Jennings*, 6 Sim. 493; 3 L. J., Ch. 157.

Provision for Debts.]—Provision for debts in a voluntary settlement will support it against all future creditors. *George* v. *Milbanke*, 9 Ves. 194; 7 R. R. 157.

Post-nuptial Settlement.]—Stock was bequeathed to A. after his marriage, which he vested in trustees for the benefit of himself and his wife for life, and then to their children. This settlement is void as against the husband's creditors, both before and after the marriage. *Taylor* v. *Jones*, 2 Atk. 600.

A post-nuptial settlement was made by a person indebted considerably at the time. It was not clear that all those debts were paid at the time the bill was filed by a subsequent creditor to set aside the deed:—Held, that a subsequent creditor may file a bill if any of the antecedent debts remain unsatisfied, and inquiries were directed as to the solvency of the settlor at the time of his death. *Jenkyn* v. *Vaughan*, 3 Drew. 419; 25 L. J., Ch. 338; 2 Jur. (N.S.) 109; 4 W. R. 214.

In Favour of Strangers.]—A voluntary settlement in favour of strangers, by one not indebted at the time, nor meaning a fraud, good against subsequent creditors. *Holloway* v. *Millard*, 1 Madd. 414.

In Favour of Child.]—But if to a child, and no fraud, and the party were not indebted at the time, it is good against subsequent creditors. *Townshend* v. *Windham*, 2 Ves. 10.

In Favour of Wife and Children.]—A voluntary settlement without fraud by a husband not indebted, in favour of his wife and children, is valid against subsequent creditors. On a bill by the wife, the court established the settlement, no creditor attempting to impeach it, and there being no allegation that the husband was indebted at the time, without directing an inquiry on that subject. It seems that a recital in a settlement after marriage, is not evidence against creditors of articles before marriage. *Battersbee* v. *Farrington*, 1 Swanst. 106; 1 Wils. Ch. 88; 18 R. R. 32.

Trader—Indebtedness.]—T. filed a bill on behalf of himself and other creditors of C., to administer his estate, and to set aside a voluntary settlement executed by C. T.'s debt was contracted after the date of the settlement, but it appeared, on inquiries directed in the suit, that C., who was a trader, with a capital of more than 120,000*l.*, was insolvent to the extent of about 1,300*l.* at the date of the settlement:—Held, that T. was entitled to have the settlement set aside. *Taylor* v. *Coenen*, 1 Ch. D. 636; 34 L. T. 18.

Evidence.]—If a voluntary settlement or a deed of gift is impeached by creditors whose debts had not been contracted at the date of the settlement, it is necessary to show either that the settlor made the settlement with an express intent to delay, hinder, or defraud creditors, or that, after the settlement, the settlor had no sufficient means or reasonable expectations of being able to pay his then existing debts, but was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void. *Spirett* v. *Willows*, 3 De G. J. & S. 293; 5 Giff. 49; 34 L. J., Ch. 365; 11 Jur. (N.S.) 70; 12 L. T. 614; 13 W. R. 329.

The fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, gives no different character to the settlement, and does not take it out of the statute (13 Eliz. c. 5). *Ib.*

c. In Contemplation of Trading.

Generally.]—A baker, who had carried on business for some years, being about to purchase a grocery business, which he intended to carry on together with his own trade, executed a voluntary settlement of nearly the whole of his property upon his wife and children. He afterwards bought the grocery business, and, having lost money by it, sold it, and continued to carry on his baking business. Within three years after the date of the settlement he filed a liquidating petition, his liabilities being in excess of his assets:—Held, that, independently of the question whether he was solvent at the date of the settlement, the settlement was void as against the trustee in the liquidation under the statute 13 Eliz. c. 5, on the ground that it was evidently executed with the view of putting the settlor's property out of the reach of his creditors in case he should fail in the speculation on which he was about to enter in carrying on a new business of which he knew nothing. *Mackay* v. *Douglas* (L. R. 14 Eq. 106) approved and followed. *Russell, Ex parte, Butterworth, In re*, 51 L. J., Ch. 521; 19 Ch. D. 588; 46 L. T. 113; 30 W. R. 584.

Settlor afterwards becoming Trader.]—One not in debt nor a trader makes a voluntary settlement on a child, and afterwards becomes a trader and a bankrupt; this settlement not liable to the bankruptcy. *Lilly* v. *Osborne*, 3 P. Wms. 298.

In 1858 a man, who was not then engaged in trade, and who owed no debts, made a voluntary settlement of 1,000*l.* The trusts of the deed were a life estate to himself determinable on bankruptcy, then a life estate to his wife for her separate use, then trusts for the children of the marriage, and an ultimate remainder to the settlor. In 1873 he for the first time engaged the trade. In 1875 he was adjudicated a bankrupt:—Held, that the settlement was void in toto as against the trustee. *Stephens, Ex parte, Pearson, In re*, 3 Ch. D. 807; 35 L. T. 68; 25 W. R. 126.

—— Settlement on Marriage.]—Settlement, on marriage, of freehold estates of inheritance, or freeholds for lives and years, by a man not indebted in trade or intending it, to the use of himself for life, unless he shall embark in trade and in the life of his wife become bankrupt, and from his decease or bankruptcy to secure an annuity for his wife, and subject thereto for his heirs, executors, etc. On his afterwards engaging in trade, and becoming bankrupt, void as against his creditors. *Higinbotham* v. *Holme*, 19 Ves 88; 12 R. R. 146.

Partnership.]—G., previous to entering into a partnership trade, executed a bond for 500*l.* to a trustee upon trust that, upon his death, failure in trade, or bankruptcy, the interest should be paid to his wife for her life, and that she should have a power to appoint the principal among the issue of the marriage. G. and his partner became bankrupts; the bond was voluntary, and decreed not to be set up against the creditors, but to be paid in case of a surplus, after payment of joint and several creditors. *Gardiner* v. *Shannon*, 2 Sch. & Lef. 228.

Subsequent Creditors.]—A voluntary settlement whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect. *Mackay* v. *Douglas*, 41 L. J., Ch. 539; L. R. 14 Eq. 106; 26 L. T. 721; 20 W. R. 652.

Onus of Proof.]—When a voluntary settlement is made on the eve of the settlor engaged in

trade, the burden rests upon him of showing that he was in a position to make it. *Ib.*

Evidence.]—In order to set aside a voluntary settlement as being void as against creditors, it is not necessary to show that the settlor contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency. *Ib.*

Defence to Suit.]—A debtor is not entitled to set up, as a defence to a suit to set aside a voluntary settlement, a release contained in an inspectorship deed by which he vested all his property in the inspectors, the settlement or the existence of the property comprised in it not having been disclosed at the time the inspectorship deed was executed. *Ib.*

5. Pending Actions or Judgments.

Generally.]—A conveyance by a debtor, who afterwards becomes insolvent, for the benefit of his creditors, is only void as against the assignees, and is not fraudulent, though made with the object of defeating or postponing persons claiming under a decree. *Lee* v. *Green*, 25 L. J., Ch. 269; 2 Jur. (N.S.) 170; 4 W. R. 270—L.JJ.

After notice of trial in an action of trespass, the defendant executed a voluntary conveyance of real estate to his daughter. The verdict went against him, and he afterwards took the benefit of the Insolvent Debtors Act:—Held, that the conveyance was void under 13 Eliz. c. 5, it being intended to defeat the plaintiff in the action. *Barling* v. *Bishopp*, 29 Beav. 417; 6 Jur. (N.S.) 812; 8 W. R. 631. See *Blenkinsopp* v. *Blenkinsopp*, 1 De G. M. & G. 495; 21 L. J., Ch. 401; 16 Jur. 787.

A. brings an action against B. for lying with his wife, after which B. assigns his estate to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should name, within ten days; then A. recovers 5,000*l.* damages, and brings his bill to set aside the deed as fraudulent, and made to defeat him of his recovery:—Held, not to be fraudulent, the plaintiff being no creditor at making the deed, and his debt, recovered after, founded in maleficio; but the others were real creditors, which it was conscientious to prefer; but for the surplus the plaintiff may come in. *Lewkner* v. *Freeman*, Pre. Ch. 105; Free. C. C. 236.

R., being indebted to A. by specialty and simple contract, and being sued in equity for the amount, executed a deed in 1816, whereby he purported to convey certain real estates to his daughter W. and her heirs. In 1817 A. obtained a decree against R. for payment of the money due to him, and thereupon issued a sequestration, and the sequestrators entered into possession of the lands comprised in the deed of 1816, and so continued until the death of R. in 1834. In 1826 W. sold and conveyed the lands to B., who had notice of the circumstances under which the deed of 1816 was executed. Afterwards, and after the passing of the 3 & 4 Will. 4, c. 104, R. died. The court were of opinion that the deed of 1816 was void for actual fraud, and:—Held, that R. died seised of the lands comprised in it, and that they were assets for the payment of his simple contract debts. *O'Connor* v. *Bernard*, 2 Jones, 654.

Absence of Consideration.]—A deed of sale conveying real estate, the property of a defendant in a suit then pending in the supreme court at Bombay:—Held, in the absence of satisfactory evidence of a bonâ fide consideration having been paid by the vendee, to be fraudulent and void as against the creditors of the vendor, and to have been executed for the purpose of defeating a sequestration. *Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Shoostry*, 6 Moore, Ind. App. 27; 8 Moore, P. C. 90.

Husband and Wife.]—In 1842 a husband, pending proceedings against him in the ecclesiastical court for a divorce, executed a voluntary settlement of real and personal estate. Sequestration afterwards issued against him, which was defeated by the deed. This court set aside the deed. *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568; 19 L. J., Ch. 425; 14 Jur. 777. Affirmed, 1 De G. M. & G. 495; 21 L. J., Ch. 401; 16 Jur. 787.

Marriage Settlement—Privity.]—A person pending an action against him for the recovery of a debt married a woman with whom he had cohabited for several years, and in consideration of the marriage executed a settlement of all his property. A court of equity, upon the suit of the creditor, finding that the wife had knowledge of the facts, declared the settlement fraudulent and void. *Bulmer* v. *Hunter*, 38 L. J., Ch. 543; L. R. 8 Eq. 46; 20 L. T. 942.

Sums Advanced for Maintenance.]—Bill against children for discovery of sums advanced to them, pendente lite, by their father, an insolvent executor; it appears, on the answers, that two of them received 500*l.* each on their marriages, but two others received 500*l.* each for their maintenance; it was decreed that the two last should refund, although they denied knowledge of their father's insolvency. *Partridge* v. *Gopp*, Amb. 596.

Costs of Suit.]—A remainderman, who failed in a suit instituted by him against the tenant for life in respect of alleged waste, and who was ordered to pay the costs of the suit, sold his remainder and executed a conveyance of it to the purchaser before the costs could be taxed, and he paid his solicitor's bill out of the proceeds of the sale without leaving sufficient to pay the defendant's costs of the suit, and without having any means of paying them:—Held, that the defendant was not entitled to have the conveyance set aside or declared fraudulent, or to recover from the remainderman's solicitor the portion which the solicitor had received of the proceeds of the sale in payment of his costs, and that the fact of the purchaser having or not having notice of the circumstances attending the sale, or the purpose of it, was immaterial. *Norteliffe* v. *Warburton*, 4 De G. F. & J. 449; 10 W. R. 635.

Trader—Assignment, in expectation of Sequestration.]—A trader debtor being in expectation that a writ of sequestration would issue against him for non-payment of a sum of money ordered to be paid by him into the court of chancery, executed a deed of mortgage, which was registered as a bill of sale, vesting substantially all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor should remain in possession of his

property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced his possession was to cease. A writ of sequestration was subsequently issued:—Held, that the deed was not void under 13 Eliz. c. 5, notwithstanding the fact that it conveyed the whole of the debtor's property for the benefit of some of his creditors, and that it contained a proviso that the debtor should remain in possession for six months. *Alton* v. *Harrison*, *Poyser* v. *Harrison*, 38 L. J., Ch. 669; L. R. 4 Ch. 622; 21 L. T. 282; 17 W. R. 1034.

—— **Privity of Purchaser—Sale of Goods.**]—A pawnbroker bought the stock of a trader in a hasty manner and without making any inquiries whether he was indebted, or why he was obliged to sell in a hurry. There were other circumstances of suspicion as to the bonâ fides of the sale, particularly that the purchaser did not call the vendor as a witness. Due change of possession took place, but no public manifestation of it was made, and the vendor was at the time of the sale liable to process for debt, and a few days after the sale execution issued:—Held, that, there being proof of payment and change of possession, the circumstances of suspicion did not amount to proof of fraud, and the purchase was good against the execution creditor. *Hale* v. *Metropolitan Saloon Omnibus Co.*, 4 Drew. 492; 28 L. J., Ch. 777; 7 W. R. 316.

Assignment for Benefit of Creditors.]—Where a debtor to the plaintiff, being sued by the plaintiff, pending the suit and before execution, being insolvent, executed an assignment of all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken:—Held, that the assignment was not fraudulent within 13 Eliz. c. 5, although made to the intent to delay the plaintiff of his execution. *Pickstock* v. *Lyster*, 3 M. & S. 371; 16 R. R. 300.

A., being in insolvent circumstances, assigned his property for the benefit of his creditors. B., who was a non-assenting party to the deed, was a creditor of A. on two bills of exchange, on which he was proceeding at the time of the deed of assignment. The deed was expressed to be meant to secure all the debts existing at the time of the execution:—Held, that the deed was not fraudulent and void against B., as tending to deprive B. of costs in the action. *Evans* v. *Jones*, 3 H. & C. 423; 34 L. J., Ex. 25; 11 Jur. (N.S.) 784; 11 L. T. 636.

Sale of Book Debts at Undervalue—Application of Proceeds in Defending Actions.]—Upon certain actions being commenced against the debtor, he sold book debts of the alleged value of 800*l.* for the sum of 150*l.*, part of which he used to defend the actions to which he was advised he had a good defence, and the remainder for the support of his family:—Held, that, the transfer made by the bankrupt not being an assignment of the whole of his property, nor an assignment to a person who was a party to the fraud, the transaction was not fraudulent either under the bankruptcy laws or under the statute of Elizabeth, and therefore the court below was wrong in not granting him an order of discharge. *Cranston, Ex parte, Cranston, In re*, 9 Morrell, 160.

Evidence.]—A., in 1856, while two actions (for debt and false imprisonment) were pending against him, executed two deeds, which purported to convey his property for valuable consideration to his step-son, O. In 1857, A. was arrested for the debt and costs recovered in one of the actions, and shortly afterwards petitioned the Insolvent Debtors Court for his discharge from custody, and the plaintiff, who had been his attorney, was appointed the assignee of his estate and effects. A bill that the conveyances were not made for good consideration, or bonâ fide, but with the intent and purpose to delay, hinder, and defraud creditors, was dismissed with costs, on the ground that the evidence failed to support the allegations. *Marlow* v. *Orgill*, 8 Jur. (N.S.) 829—L.JJ. Affirming 6 L. T. 854.

H., being indebted to the plaintiff, who had entered up judgment for the amount, and other persons, with his wife, by an indenture made in 1853, subsequent to their marriage, conveyed all the messuages, lands, and hereditaments of and to which his wife and himself in her right were or was seised or entitled, at law or in equity, for any estate of inheritance, to a trustee, upon trusts; and by another indenture of the same date an undivided moiety of a fund in court, to which H. and his wife, or H. alone in her right, were or was entitled, was assigned to the same trustee. The trusts declared were for the benefit of the wife for life, for her separate use, and after her decease for her children, with power to the wife to direct that the produce should after her death be paid to H. for life, and also power to direct the trustee to raise during her life a certain sum, and pay the same to H. The sum was subsequently raised, and a portion paid to H. The fund in court had, by a decree made in another cause in January, 1854, been ordered to be transferred to the trustee, and the residue was subsequently transferred. The plaintiff, having obtained a charging order, filed a bill, alleging that at the time of the execution of the indentures H. was insolvent, and that they were executed without good or valuable consideration, and intended to defeat creditors; and it prayed that they might be set aside as fraudulent and void against the creditors, or at all events so far as they affected the real estate. At the hearing the case against the personal estate was abandoned, and relief was sought against the real estate only, but it was not proved that there was any real estate:—Held, that the plaintiff was bound to show not only that he was a creditor, but that the settlement did actually put property out of the reach of creditors. *Turnley* v. *Hooper*, 2 Jur. 1081.

Held, also, that as the plaintiff had not proved that H. was indebted to the extent of insolvency, or that the object of the settlement was to defeat or delay creditors, the bill must be dismissed, with costs. *Ib.*

Practice—Statute of Frauds—Evidence.]—The plaintiff conveyed an estate to the defendant by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money paid by the defendant; but no purchase money actually passed, and the plaintiff alleged that he conveyed the estate to the defendant as a trustee for him. The defendant, in his answer, admitted that he gave no consideration for the estate, but stated that the plaintiff made the conveyance fearing that an adverse

decision would be made against him in a suit pending in chancery; and that it was understood that the defendant should account to the plaintiff for the rents until he could make arrangements for paying the purchase money, and if no such arrangements could be made that he should reconvey the estate. The defendant claimed to hold the estate discharged of any trust, and claimed the benefit of the Statute of Frauds:—Held, first, that there was no sufficient averment that the transaction was an illegal one. *Haigh* v. *Kaye*, 41 L. J., Ch. 567; L. R. 7 Ch. 469; 26 L. T. 675; 20 W. R. 597.

Held, secondly, that the Statute of Frauds could not be pleaded in answer to the claim; and that, as the evidence did not establish the existence of any such agreement as was alleged by the defendant, he must reconvey the estate. *Ib.*

—— **Outlawry — Charging Order — Right to Sue.**]—In December, 1845, the plaintiff obtained a judgment against his debtor, who in the same month, being otherwise largely indebted, conveyed his reversionary interest in certain real estate to trustees, upon trust for sale and to hold the proceeds, in default of a joint appointment by himself and his wife, for the benefit of his wife and child. In May, 1846, a settlement of the proceeds of the sale was made in favour of his wife and child. Previously to the execution of the settlement the plaintiff had sued out a writ of outlawry against the debtor, who had absconded, and on his return, in May, 1852, the plaintiff filed a bill against him, the cestuis que trustent and trustees of the settlement of May, 1846, for the purpose of impeaching it as voluntary. After the institution of the suit, the debtor was declared insolvent, and his assignee was made a party to the cause. The defendants, the trustees and cestuis que trustent of the settlement, alleged in their answers that the settlement of May, 1846, was in pursuance of the previous deed of December, 1845, and at the bar objected that, having regard to the outlawry, the plaintiff ought to have clothed himself with the legal title by a grant from the crown; that he ought also to have obtained a charging order under s. 12 of 1 & 2 Vict. c. 110, and that the judgment debtor having become insolvent, the right of suit was in his assignee:—Held, declaring that the settlement of May, 1846, was void against creditors; first, that the objection as to the want of a grant from the crown was invalid, because the plaintiff's claim was paramount to the settlement, which was good as against the insolvent, whose estate only vested in the crown; secondly, that, inasmuch as the funds which formed the subject of the settlement were in the names of trustees, not for the insolvent, but for others, the proceeding by charging order would have been nugatory; and, thirdly, that the insolvency having occurred after the institution of the suit, the frame of the suit was right. *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; 25 L. J., Ch. 232; 1 Jur. (N.S.) 985; 3 W. R. 218.

6. Operation between Parties.

Generally.]—Voluntary settlement void against creditors, good for other purposes. *Curtis* v. *Price*, 12 Ves. 103; 8 R. R. 303.

Voluntary settlement by bankrupt, though void against his creditors, subsists for all other purposes. *Bell, Ex parte*, 1 Glyn & J. 282.

Where an instrument has been entered into between two parties, for a purpose which may be considered fraudulent as against a third party, it may yet be binding as between themselves. *Shaw* v. *Jeffery*, 13 Moore, P. C. 432; 3 L. T. 1.

A supposed fraudulent intention as to third parties cannot be interpolated in construing an instrument as to the rights of the contracting parties. *Ib.*

An assignment of goods in fraud of creditors is valid as between parties to the deed. *Bessey* v. *Windham*, 6 Q. B. 166; 14 L. J., Q. B. 7.

An assignment in fraud of creditors is good as against the parties executing it, and their assigns stand in no better position. *Robinson* v. *McDonnel*, 2 B. & S. 134; see *Steel* v. *Brown*, 1 Taunt. 381; 9 R. R. 795.

—— **Conveyance to give Qualification.**]—A voluntary conveyance for the purpose of conferring a qualification under the Bedford Level Act, was executed by a father in favour of his son, and registered, but never communicated to the son, who died soon afterwards. The legal estate was outstanding in a mortgagee:—Held, that the father was entitled to have the property comprised in the deed conveyed to him. *Childers* v. *Childers*, 1 De G. & J. 482; 26 L. J., Ch. 743; 3 Jur. (N.S.) 1277; 5 W. R. 859.

Where a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game:—Held, that as against the parties to the deed it was valid, and was sufficient to support an ejectment from the premises. *Doe* d. *Roberts* v. *Roberts*, 2 B. & Ald. 367; 20 R. R. 447.

—— **To Confer Vote.**]—Under 7 & 8 Will. 3, c. 25, s. 7, and 10 Anne, c. 23, s. 1, a fraudulent conveyance made for the mere purpose of conferring a vote, is void only to the extent of preventing the right of voting from being acquired, but is valid and effectual as between the parties to pass the interest. *Phillpotts* v. *Philpotts*, 10 C. B. 85; 20 L. J., C. P. 11.

Rights of Party under Void Deed.]—Party in possession under a deed which was fraudulent and void as against creditors:—Held, not entitled to any allowance for sums expended by him for improvements upon the estate. *Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Shoostry*, 6 Moore, Ind. App. 27; 8 Moore, P. C. 90.

Suit by Debtor for Cancellation.]—A., with the view of placing his property out of the reach of his creditors, assigned and conveyed real and personal estate to B., to secure the repayment to B. of several alleged debts, together amounting to 4,900*l.*, which was the full value of the property; and the deeds contained powers of sale, with ultimate trusts for the benefit of A. A bill being filed by A. against B. to have the deeds given up and cancelled, and the property restored, it appeared from B.'s answer, which was the only evidencee in the cause, that, at the time the deeds were executed, A. was indebted to B. in the sum of 480*l.* B. also alleged by his answer a secret trust in favour of A.'s wife for her separate use:—Held, that the suit was maintainable by A., and that the deeds in any event could only stand as a security for what was actually due to B. Decree made, directing inquiries as to the existence of the debt claimed by B., and reserving

the question as to the security. *Barnard* v. *Sutton*, 12 L. J., Ch. 312 ; 7 Jur. 685.

See also SETTLEMENT (VOLUNTARY).

B. AS AGAINST PURCHASERS (27 Eliz. c. 4).

1. PROPERTY WITHIN THE STATUTE.

By 56 & 57 Vict. c. 21, an act to amend the law relating to voluntary conveyances, such conveyances if bonâ fide are not to be avoided under 27 Eliz. c. 4, saving transactions completed before the passing of the act.

Generally.]—Voluntary settlements of personal property made by persons not indebted at the time are good against subsequent purchaser for valuable consideration. *Jones* v. *Croucher*, 1 Sim. & S. 315.

Equitable Reversion.]—A voluntary assignment by deed of an equitable reversionary interest in personal property is valid. *Voyle* v. *Hughes*, 2 Sm. & G. 18 ; 2 Eq. R. 42 ; 23 L. J., Ch. 238 ; 18 Jur. 341 ; 2 W. R. 143.

A person entitled to an equitable reversionary interest in stock made a voluntary assignment of it by deed to trustees. No notice was given of this deed, either to the trustees named in it, or to any person interested in it, or to the original trustees of the stock ; the assignor retained the deed, and subsequently destroyed it, and made a different disposition by will of the fund, which was still standing in the names of the original trustees :—Held, that, unless the deed could be successfully impeached on the ground of fraud, mistake, or surprise, it operated as an effectual disposition of the fund, notwithstanding the absence of notice, and the retention and destruction of the deed by the assignor. *Way's Trusts, In re*, 2 De G. J. & S. 365 ; 34 L. J., Ch. 49 ; 10 Jur. (N.S.) 1166 ; 11 L. T. 495 ; 13 W. R. 149.

Copyhold Lands.]—Copyholds are within 27 Eliz. c. 4. *Doe* d. *Tunstill* v. *Botterill*, 2 N. & M. 64. *S. C.*, nom. *Doe* d. *Tunstill* v. *Bottriell*, 5 B. & Ad. 131 ; 2 L. J., K. B. 158.

Charitable Gift.]—A voluntary gift for charitable purposes is not to be treated as convinous within the meaning of 27 Eliz. c. 4, and is not avoided by a subsequent conveyance for value. *Ramsay* v. *Gilchrist*, 61 L. J., P. C. 72 ; [1892] A. C. 412 ; 66 L. T. 806 ; 56 J. P. 711—P. C.

Limitation without Consideration.]—In a conveyance of lands, a limitation without consideration is void as against a subsequent purchaser for good consideration, being fraudulent under 27 Eliz. c. 4. *Doe* d. *Ravenstock* v. *Rolfe*, 8 A. & E. 650 ; 3 N. & P. 648.

Covenant against Incumbering Lands Charged with Jointure, void against Incumbrancer.]—A., being tenant for life of certain premises, with power of limiting a jointure to his wife, a settlement is executed on his marriage, by which he demises the lands of which he was tenant for life to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin-money during the coverture, and he limits a jointure to her after his death. The same parties, on the same day, execute another instrument by which A. covenants not to sell or incumber the lands comprised in the term, and it is declared that if he shall at any time sell or incumber them, or attempt to do so, the trustees of the term shall receive the rents and profits and apply them as they may think fit for the maintenance and support of A. or his wife, or children or issue ; the covenant and this proviso are fraudulent and void as against a subsequent incumbrancer of A.'s life estate. *Phipps* v. *Ennismore*, 4 Russ. 131 ; 28 R. R. 27.

Purchased Estate—Furniture.]—By indenture of the 25th March, 1850, reciting that V. had contracted for the purchase of the H. estate, that estate was conveyed, by the direction of V., to trustees for sale, the sale's moneys to be held upon trusts of indenture of even date, being a voluntary settlement for the benefit of V. and his wife and family. By the same indenture of even date, V. assigned certain plate and furniture in the house at H. to the same trustees, upon the same trusts. The trustees were informed, and consented to act as trustees of the settlement of realty ; but it did not appear that they had ever seen the deeds, or executed them, or been informed of the particular contents, nor been communicated with as to the settlement of chattels, nor was any delivery made thereof. In 1851 V., being indebted to S. in the sum of 10,000*l.* and upwards, by indenture of the 29th of November, 1851, reciting that fact, conveyed "all his real and personal estate" to S., to sell and pay his own debt, and then to pay the surplus to V., his executors, administrators, and assigns. S. immediately took possession of the house at H., and of all the furniture and effects therein, which were substantially the same as those assigned by the indenture of the 25th March, 1850. V. was, from a period anterior to 1850 down to his decease in December, 1851, practically insolvent :—Held, that the transaction of 1850 was void as against S., claiming under the indenture of the 29th November, 1851, as a purchaser for valuable consideration, and without notice within the stat. 27 Eliz. c. 4 ; that the fact of the land never having been conveyed to V. at all made no difference ; the recital being that he had contracted for the purchase, he was held to be the owner in equity, and his equitable fee, therefore, would pass to S. ; and that the general description in the indenture of the 29th November, 1851, "all my real estate," would sufficiently include this, and satisfy the words of the stat. 27 Eliz., as to a subsequent sale of "the same estate." *Barton* or *Stone* v. *Van Heythuysen*, 11 Hare, 126 ; 18 Jur. 344.

2. PURCHASERS WITHIN THE STATUTE.

a. From Settlor.

Generally.]—Voluntary conveyance, though no fraud, void against subsequent purchaser for valuable consideration, and also against creditors, if indebted at the time, and also against mortgagee, who is considered as purchaser. (See Cowp. 280.) *Townshend* v. *Windham*, 2 Ves. 10.

The 27 Eliz., c. 4, against fraudulent conveyances, enables a settlor to defeat a settlement which he has created on behalf of his family, but it only does so upon a subsequent conveyance to a purchaser for actual value. A mortgagee is a purchaser within the meaning of the statute. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486 ; 23 L. T. 636 ; 19 W. R. 49.

The power of the settlor to defeat a voluntary settlement by selling the estate, under the 27 Eliz., c. 4, is not a "disposing power" within the meaning of the 13th section of the 1 & 2 Vict. c. 110. *Beavan* v. *Oxford* (*Lord*), 6 De G. M. & G. 507; 25 L. J., Ch. 299; 2 Jur. (N.S.) 121; 4 W. R. 275.

A court of equity will not interfere actively against a volunteer through the medium of a person (not a purchaser for value) claiming only through him who has created the voluntary settlement. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; 23 L. T. 636; 19 W. R. 49.

To make a voluntary settlement void against a subsequent purchaser within 27 Eliz. c. 4, it must be covinous and fraudulent, not voluntary only: a purchaser, to entitle himself to the protection of the statute against such fraudulent settlement, and to set it aside, must be a purchaser bonâ fide, or for good consideration, as marriage; but the consideration need not be marriage. *Doe* d. *Watson* v. *Routledge*, Cowp. 705.

Judgment Creditors.] — Judgment creditors are not purchasers of lands or hereditaments within the meaning of the statute against fraudulent conveyances, 27 Eliz. c. 4, so as to avoid a voluntary conveyance. *Beavan* v. *Oxford* (*Lord*), 6 De G. M. & G. 507; 25 L. J., Ch. 299; 2 Jur. (N.S.) 121; 4 W. R. 275.

In 1836 T. recovered a judgment against Lord O., which was duly docketed. In 1838 (before the 1 & 2 Vict. c. 110 came into operation) Lord O. executed a voluntary settlement in favour of his wife. After that statute had passed, other creditors recovered judgments against Lord O., which were duly registered under the 2 & 3 Vict. c. 11. T. omitted to register his judgment till 1849, and thereby lost his priority as against the subsequent creditors:—Held, that this did not entitle the latter to stand in his place as against the voluntary settlement. *Ib.*

The case of *Watts* v. *Porter* (3 El. & Bl. 743; 23 L. J., Q. B. 345) observed upon. *Ib.*

Where a voluntary settlement has been made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it which the settlor himself would not have possessed. *Dolphin* v. *Aylward*, L. R. 4 H. L. 436; 23 L. T. 636; 19 W. R. 49.

Power of Attorney—Sale.]—A power of attorney did not authorise the sale of any portion of certain land comprised in a voluntary settlement:—Held, that a sale, purporting to be in exercise of the power, was not sufficient to call into operation the statute 27 Eliz. c. 4. *General Meat Supply Association* v. *Boutfler*, 41 L. T. 719. Affirmed on other grounds.

Partnership.]—A. enters into partnership in fifths, with three owners, for twenty-one years, in digging for mines in A.'s lands, A. to have two-fifths, and in consideration of his ownership of the land, to have a tenth out of the share of the other partners; A. dies, and his widow sets up a voluntary settlement made after marriage: court inclined that the partners were as purchasers, and that the voluntary settlement should not stand against them. *Shaw* v. *Standish*, 2 Vern. 326.

Mortgagor and Mortgagee.]—Semble, that if the meaning of a transaction between a mortgagor and mortgagee is that the mortgagee should have his security, but that the mortgagor should have the title deeds, and be enabled therefrom to deal with third persons, that is within the principle of the statute of Elizabeth. *Perry-Herrick* v. *Attwood*, 27 L. J., Ch. 121; 4 Jur. (N.S.) 101; 6 W. R. 204—L.JJ.

Mortgage for Former Advance void against Subsequent Mortgagee.]—A mortgage executed in 1871 contained a recital that the mortgagor was indebted to the mortgagee in the sum of 1,500*l.* for moneys advanced by her to him, and that he had agreed to secure the payment of the same by the mortgage. The money had been advanced in 1864, and the evidence showed that there was at that time no agreement for a mortgage, and that there had been no subsequent pressure by the lender. The mortgage deed was retained in the possession of the mortgagor, and there was nothing to show that the mortgagee knew of its execution until February, 1874:—Held, that the mortgage was void under 27 Eliz. c. 4, as against a mortgagee for value whose mortgage was executed in February, 1872, the recital of the agreement not operating as an estoppel against him. *Cracknell* v. *Janson*, 48 L. J., Ch. 163; 11 Ch. D. 1; 40 L. T. 640; 27 W. R. 851.

A. voluntarily gave to his sisters, in 1848, a mortgage for a term of 200 years, to secure an antecedent debt. The sisters allowed him to retain the title deeds, that he might give security on the estate for another debt, for which he was being sued by L. Shortly afterwards A. agreed, in writing, to give L. a mortgage on the estate for the debt, and the deeds, in pursuance of this agreement, were deposited with P. and B., the London agents of A's solicitor, and who shortly afterwards became his solicitors, to be held by them for the purpose of giving effect to the security. A., in 1851, made a mortgage in fee to C., who had no notice of the prior incumbrances, and P. and B. handed over to C. the title deeds:—Held, that the mortgage of 1848 was void under 27 Eliz. c. 4, as against C., who therefore took the legal fee discharged of the term. *Lloyd* v. *Attwood*, 3 De G. & J., 614; 29 L. J., Ch. 97; 5 Jur. (N.S.) 1322.

Estoppel—Tenant for life under Voluntary Settlement joins Settlor in Mortgage in Fee.]—A son, who, under a voluntary settlement executed by his father, was entitled in remainder to an estate for life with remainder to his first and other sons in tail, subsequently to his marriage joined his father in two mortgages, which recited that his father was seised in fee, and covenanted that he was so seised; the father and the two mortgagees executed a subsequent mortgage in fee (to pay them off and raise a further sum), which the son did not execute, but was aware of and joined in a collateral deed for the purpose of barring all possible estates tail and vesting the fee in his father; part of the money raised by all the mortgages being for, and applied to, the use of the son:—Held, that he was estopped from setting up against his own acts any estate which he had at the time of the mortgages, and that, therefore, the mortgage was a good charge on his life estate. *Guardian Assurance Co.* v. *Avonmore* (*Viscount*), Ir. R. 6 Eq. 391.

Suit by Tenant in Tail under Recovery Deed —Right as against Purchaser from Tenant for

Life.]—A tenant for life, and his son, who was tenant in tail male in remainder, joined in recovery deeds purporting to assure the entailed property to the use of trustees for a term, in trust to pay off mortgage debts, with remainder to the use of the son during the life of the father, with remainder to the use of the father's wife for life, with remainder to the use of son for the life, with remainder to the use of the sons of the son successively in tail, with remainder to the use of the daughters in tail, with ultimate remainder to the use of the father in fee. The father executed these deeds with intent to defraud his creditors, but that object was concealed from the son. The father became bankrupt, and the deeds were, at the suit of the assignees, ordered to be delivered up and cancelled :—Held, in a subsequent suit of a grandson (tenant in tail under the recovery deeds), that the deeds were not only void as against the creditors, but that the grandson had no equity as against a purchaser from the son to have the trusts of the term performed. *Tarleton* v. *Liddell*, 4 De G. & Sm. 538. *S. C.*, 17 Q. B. 390 ; 20 L. J., Q. B. 507 ; 15 Jur. 1170.

Equity against Resettlement, Lost by Marriage and Acquiescence.]—A son, tenant in tail in remainder, when just of age in 1769, joined his father, tenant for life, in a recovery for the purpose of raising 3,000*l.* for the father, and resettling the estate ; the son taking back only an estate for life, with remainder to his first and other sons, &c. Whatever equity he might have had against that settlement was lost by his marriage and acquiescence, till after the death of his father in 1793, though under the circumstances there was no probability of issue. Upon this ground a bill, by trustees under a general trust for his creditors, claiming as purchasers under the statute 27 Eliz. c. 4, was dismissed without deciding whether they could sustain that character, or how a settlement, merely as being voluntary, is affected by the statutes of Eliz. *Brown* v. *Carter*, 5 Ves. 862 ; 5 R. R. 191.

Post-nuptial Settlement—Valid against Trustees of Inspectorship Deed.]—B., when solvent, by a voluntary post-nuptial settlement covenanted to assign certain leaseholds for his wife for life, with remainder to the children of the marriage, with ultimate remainder to himself, and executed the assignment. Three days afterwards, and about a year from the date of the settlement, he and his partner executed a deed of inspectorship, containing a general provision for the conveyance of the whole of their joint and separate estate to trustees for the benefit of creditors. The trustees of the settlement, in compliance with the trusts, having sold the leaseholds, a bill was filed to determine their rights and those of the trustees under the deed respectively to the proceeds of the sale :—Held, that the trustees, under the deed, could not be considered purchasers for value within 27 Eliz. c. 4, and consequently that the settlement was valid. *Cadell* v. *Bewley*, 15 L. T. 141 ; 15 W. R. 703.

Held, also, that even assuming the trustees were purchasers, the fact of the property not being particularly referred to in the deed of inspectorship was in itself sufficient to exclude the right of those claiming under it. *Ib.*

—— **Sale—Title of Purchaser.**]—A testator devised a copyhold estate to trustees, in trust for his wife for life, with remainder in trust for such persons as she should appoint by will or deed, attested by three witnesses, with remainder over. The wife married again, and she and her second husband, after their marriage, by deed attested by three witnesses, in pursuance of the power, appointed the estate, and directed the surviving trustee of her former husband's will to surrender it to the use of a mortgagee, in trust to secure the sum of 1,600*l.* and interest, and subject thereto to the use of the husband and wife, for their joint lives, and the life of the survivor, and after the decease of the survivor, in case there should be any daughters or younger sons of the marriage, upon trust to divide the produce among such daughters or younger sons ; and if there should be none such, then upon trust to surrender the estate to the use of such persons as the wife should, by will or deed, attested by three witnesses, appoint, and in default of such appointment to the right heirs of the wife. A surrender was made to the mortgagee accordingly. The husband and wife afterwards sold the estate, and the mortgage was paid off out of the purchase money ; the husband and wife joined with the mortgagee in surrendering to the use of the purchaser, and they all released to him all their interest, by a deed attested by two witnesses only :—Held, that the purchaser could make a good title by the assistance of the statute of 27 Eliz. c. 4 (against voluntary conveyances), without showing that there were no daughters or younger sons of the wife's second marriage. *Currie* v. *Nind*, 1 Myl. & Cr. 17 ; 5 L. J., Ch. 169.

Right of Purchaser from Voluntary Donee.]—A voluntary donee cannot, by a subsequent conveyance for valuable consideration, defeat a party who has a preferable title under the voluntary settlement. *Lewis* v. *Rees*, 3 K. & J. 132 ; 26 L. J., Ch. 101 ; 3 Jur. (N.S.) 12 ; 5 W. R. 96.

Conveyance for Value to One of Two Voluntary Donees.]—A voluntary conveyance from A. to B. and C. is defeated by a subsequent conveyance from A. to B. for a valuable consideration. *Doe* d. *Tunstill* v. *Botteril*, 2 N. & M. 64. *S. C.*, nom. *Doe* d. *Tunstill* v. *Bottriell*, 5 B. & Ad. 131 ; 2 L. J., K. B. 158.

Prior Voluntary Conveyance.]—A. B. by deed of the 30th of June, 1828, conveyed fee simple lands to a trustee for himself for life, and after his decease to pay an annuity of 50*l.* thereout to his daughter C. D., and subject thereto to convey to his son M. N. (the principal defendant), his heirs, executors, &c. By a deed of the 24th July, 1829, the lands were reconveyed to A. B. by the trustee and C. D. and M. N., discharged of the trusts of the deed of 1828. Subsequently A. B., in consideration of an annuity of 100*l.* for his own life, and 50*l.* for that of his widow, conveyed the same lands to M. N., his heirs, &c. A. B. having died, C. D. filed her bill to raise the arrears of the annuity of 50*l.* under the deed of 1828, and to have the deed of 1829 set aside, and made X. Y. a mortgagee of part of the lands from M. N., under a mortgage of 1836, a party to the suit ;—Held, that the deed of 1829 could not be sustained against the plaintiff, and that she was entitled to the arrears of the annuity under the deed of 1828. Held, also, that as between C. D.

and M. N., the deed of 1828 was not voluntary. *Blake* v. *Hyland*, 2 Dr. & Wal. 397.

Prior Deed for Value—Subsequent Voluntary Deed—Marriage of Grantee under Voluntary Deed.]—J. S., under his marriage settlement, was seised of certain estates in the county of Clare, for life, remainder to his sons successively in tail, subject to a charge of 5,000*l.* as a provision for younger children. B. S. was the eldest son of this marriage, W. S. another son, and there was a daughter Diana. J. S. afterwards purchased other estates, one of which was called K., which, in 1806, he conveyed by way of mortgage security to the Bishop of Elphin. In February, 1807, he executed a deed, by which, assuming to be the owner in fee of K., he conveyed it and other lands to trustees for himself for life, then to his eldest son, B. S., for life, remainder to the eldest and other sons of B. S. successively in tail. This deed contained a covenant on the part of B. S. to pay J. S.'s debts, and to discharge a sum of 2,000*l.* which J. S. had undertaken to pay to two children of Diana; and also an assignment by J. S. of his personal estate in favour of B. S., who was thereby appointed the attorney of J. S., with power to call in the debts due to him. The deed was registered (apparently without the knowledge of J. S. or of W. S.) upon the 1st June, 1807. On the 13th June, 1807, by a deed, to which J. S., B. S., two trustees, and W. S. were parties, J. S. granted, and B. S. confirmed to the trustees the lands of K. to J. S. for life, then to W. S. for life, remainder to his first and other sons in tail, with a power to each succeeding tenant for life to charge the same with a jointure for his wife; and by the same deed W. S. gave up his share of any benefit from the provision for younger children under his father's marriage settlement or otherwise. This deed was registered a few days afterwards. J. S. died in November, 1808, and W. S. entered into possession of the lands of K. W. S. married in 1815, and B. S. was a party to his marriage settlement, in which the lands of K. were included, and by which, under the power contained in the deed of June, 1807, W. S. created a jointure for his wife. B. S. paid his father's debts, satisfied the mortgage on the lands of K., obtained a reconveyance of them to himself, and died in 1837, having allowed W. S. to remain in undisturbed possession up to that time. W. S. continued in possession, and died in 1843. The son of B. S., claiming under the deed of February, 1807, brought ejectment against the son of W. S., who relied on the deed of June for his title. At a trial of this ejectment, the jury found that the deed of February, 1807, was a voluntary deed, and that that of June, 1807, was given for a valuable consideration. The court of queen's bench in Ireland directed a new trial, which took place, but the defendant did not appear, and the plaintiff obtained judgment against him by default. A bill was filed by the plaintiff in the court of chancery in Ireland to have the trusts of the deed of February, 1807, carried into execution, and that court decreed accordingly:—Held, that the decree was right; that after what had occurred at law it must be assumed that the deed of February, 1807, was given for a valuable consideration, and that the deed of June, 1807, was a voluntary deed; and, further, that the subsequent marriage of W. S., and the circumstances attending it, did not constitute his children purchasers for value under the latter deed, which could not prevail against an earlier and a previously registered deed that had been executed for a valuable consideration. *Scott* v. *Scott*, 4 H. L. Cas. 1065; 18 Jur. 755.

First and Second Conveyances by Different Persons.]—Semble, that the protection given to a purchaser under the statute against fraudulent conveyances is not to be confined to cases where the first and second conveyances are made by the same person. *Blake* v. *Hyland*, 2 Dr. & Wal. 397.

Revocation — Adverse Possession — Acquiescence.]—A. T., on the 25th September, 1835, assigned the principal sum of 740*l.* and interest, secured to her upon premises, unto her daughter E. T., for her own absolute use; and by a deed dated the day following E. T. covenanted with A. T. that she would stand possessed of the greater part of the sum upon trust to pay the interest to A. T. for life, and, after her decease, upon trust for H. L. for life for her separate use, with remainder in trust for her children. The indentures were, as alleged, executed by A. T., and delivered by her to E. T., who thereupon served notices upon the tenants and the mortgagor to pay the rents and interest to her, which had accordingly been paid to her. A. T. died in September, 1841. On a bill filed by H. L. and her children to have the trusts of the indenture of the 26th September, 1835, carried into effect, their claim was resisted by E. P. (formerly E. T.) and her husband W. P., on the ground that, in March, 1841, A. T. assigned the fund to W. P., in trust for E. P., with whom he intermarried in June, 1842, and upon that occasion the fund was, with other property belonging to W. P., assigned to trustees upon certain trusts. W. P. alleged that he had no knowledge of, and that his marriage settlement was made without notice of, the indenture of the 26th September, 1835, and that he was a bonâ fide purchaser for value of the fund claimed by H. L. and her children:—Held, that the indenture of the 26th September, 1835, was not revocable by A. T., and that neither upon the ground of adverse possession, nor upon that of acquiesence, had the plaintiffs lost their right to the fund. *Lanham* v. *Pirie*, 2 Jur. (N.S.) 753; 4 W. R. 699.

b. From Heir or Devisee of Settlor.

Generally.]—Voluntary settlement made by the father is fraudulent as to any mortgage by himself; otherwise, as to a mortgage made by the son. *Jones* v. *Purefoy*, 1 Vern. 46.

From Heir.]—A purchaser for value from an heir is not entitled, under the 27 Eliz. c. 4 to set aside a voluntary conveyance by his ancestor. *Lewis* v. *Rees*, 3 K. & J. 132: 26 L. J., Ch. 101; 3 Jur. (N.S.) 12; 5 W. R. 96.

—— **Bond.**]—Where obligor in bond binds his heir, and suffers land to descend, and heir aliens the land, relief was given against him and purchaser. *Bateman* v. *Bateman*, 1 Eq. Abr. 149.

Right of Heir.]—Semble, the heir-at-law of the author of a voluntary deed cannot avoid the deed under the stat. 27 Eliz. c. 4, by a conveyance for value. *Parker* v. *Carter*, 4 Hare, 409.

An heir cannot take advantage of the want of

consideration to defeat his ancestor's voluntary conveyance bonâ fide executed. *Lewis* v. *Rees*, 3 K. & J. 132; 26 L. J., Ch. 101; 3 Jur. (N.S.) 12; 5 W. R. 96.

From Devisee.]—A purchaser from a devisee of one who has made a voluntary conveyance during life is not entitled, under 27 Eliz. c. 4, to avoid the voluntary conveyance. *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 723; 21 L. J., Q. B. 139; 16 Jur. 359.

Assignment of Equitable Interest—Legal Estate got in—Sale by Beneficiaries under Will.]—Where an assignment was made by a settlor of an equitable interest upon definite and declared trusts in favour of volunteers, the legal estate being outstanding and subsequently got in by the settlor and sold by persons interested under his will:—Held, that claimants under the settlements were entitled to the assistance of the court against the owner of the legal estate to have the trusts of the settlement carried into execution. *Gilbert* v. *Overton*, 2 H. & M. 110; 33 L. J., Ch. 683; 10 Jur. (N.S.) 721; 10 L. T. 900; 12 W. R. 1141.

3. Consideration.

a. Valuable Consideration.

Generally.]—In deciding whether a deed is voluntary or not, the court will anxiously lay hold of any circumstances showing a consideration moving from the grantee to the grantor. *Rosher* v. *Williams*, 44 L. J., Ch. 419; L. R. 20 Eq. 210; 32 L. T. 387; 23 W. R. 561.

What is sufficient.]—A settlement purporting to be voluntary was made in consideration of a loan of 150*l.* given on the security of a promissory note, payable on demand:—Held, that the consideration was sufficient to exclude the operation of 27 Eliz. c. 4, and that the settlement was good against a subsequent purchaser for value. *Bayspoole* v. *Collins*, 40 L. J., Ch. 289; L. R. 6 Ch. 228; 25 L. T. 282; 19 W. R. 363.

A deed conveying the property of an intestate, upon trust, in pursuance of an agreement for the division of such property, made soon after the death of the intestate, between his sister and heiress-at-law, her husband, and her illegitimate son, and which agreement was founded on the supposition that the intestate had made a will disposing of his property in favour of the illegitimate son, which will had not been found:—Held, not to be voluntary within the statute of Elizabeth; but supported and enforced against the heiress-at-law and her husband, and also against subsequent purchasers from them for valuable consideration with notice of the trust deed. *Heap* v. *Tonge*, 9 Hare, 90; 20 L. J., Ch. 661.

Under the agreement and trust deed, other children of the sister and heiress-at-law, both legitimate and illegitimate, besides the child in whose favour it was suggested that a will might have been made, took interests in the property of the intestate; and it was held that the deed was not voluntary as to such other parties, but that they were within the consideration of the family contract. *Ib.*

A contract for sale for value, which had been entered into by a vendor upwards of ninety years of age, was upon his death resisted by his devisee, on the ground that the vendor had, by a deed executed by him before the date of the contract, conveyed the property in fee to the devisee, his great-nephew. The deed was expressed to be in consideration of natural love and affection, and contained a covenant by the grantee to "commence" a house upon the property according to plans to be furnished by the grantor; and that, if the grantor failed to furnish such plans, then the grantee "would build such a house as he, the grantee, should think fit." No house was ever commenced, and the deed contained no proviso for re-entry or other penalties for breach of covenant. Upon a bill by the purchaser for specific performance:—Held, that the deed was purely voluntary, there being an absence of any consideration by way of payment or benefit moving from the grantee to the grantor, and specific performance decreed accordingly. *Rosher* v. *Williams*, 44 L. J., Ch. 419; L. R. 20 Eq. 210; 32 L. T. 387; 23 W. R. 561.

—— **Concurrence in Conveyance.**]—The concurrence of a necessary party, in a conveyance containing a limitation without consideration, does not amount to a consideration, where the limitation is shown, by circumstances apparent on the face of the conveyance, and of other conveyances forming part of the transaction, not to have been made for the benefit, or at the desire, of such party, and the concurrence of such party does not appear to have been a part of the contract at the time. *Doe* d. *Ravenstock* v. *Rolfe*, 8 A. & E. 650; 3 N. & P. 648.

—— **Release of Adverse Claim.**]—The release of an adverse claim to a litigated estate is a good and valuable consideration in a deed to avoid a former voluntary grant by virtue of 27 Eliz. c. 4, although the releasee was not party to the original suit, but came in by consent, and entered into an order of reference; and although he would not have been bound by the judgment in the original suit. *Hill* v. *Exeter (Bishop)*, 2 Taunt. 69; 11 R. R. 527.

—— **Post-nuptial Settlement—Wife parting with her Interest.**]—A. and his wife, tenants in fee, in 1818 mortgaged their estate to B., the proviso for redemption being that on payment of the mortgage money B. should reconvey to A. and his wife, their heirs or assigns, or unto such other person or persons, and for such intents and purposes, and in such manner and form as A. and his wife, or the survivor of them, or the heirs or assigns of such survivor, should appoint. In pursuance of a covenant in the mortgage deed, a fine was levied by A. and his wife. In 1823 the mortgage money was repaid, and in 1827, by a deed reciting these circumstances, B., by the direction of A. and wife, conveyed, and A. and wife appointed trustee, the property to be held to the use of the wife for life, then of A. for life, and afterwards of S. (a daughter) and her children. After the death of the wife, A. in 1854 conveyed the estate of his son for a valuable consideration. The son, after A.'s death, instituted a suit to set aside the settlement of 1827 as voluntary and void against himself, a purchaser for value. Kindersley, V.-C., made a decree in the plaintiff's favour [4 Jur. (N.S.) 963], but upon appeal:—

Held, that a power was created by the proviso in the deed of 1818, which enabled A. and his wife effectually to convey their interests, as they did by the settlement of 1827, without levying a fine; and that the wife's parting with her interest for the purpose of the settlement was sufficient to prevent the settlement being voluntary on defendant's part, and accordingly the plaintiff's bill was dismissed with costs. *Atkinson* v. *Smith*, 28 L. J., Ch. 2; 4 Jur. (N.S.) 1160; 7 W. R. 42—L.JJ.

—— **Subsequent Mortgage by Husband and Wife.**]—A married woman, having become entitled under a will to freehold and leasehold property for her sole and separate use, joined her husband in making a settlement, whereby the husband and wife conveyed the freeholds, and the husband alone demised the leaseholds, subject to the annual payment of a shilling, if demanded, to trustees, upon trust for the wife for her separate use for life, remainder to the husband for life, remainder for the children (if any), with ultimate remainder to the wife absolutely. Two years afterwards the husband and wife (there being no children of the marriage) made a mortgage of the property:—Held, that the conveyance by the husband, though binding on the estate by the curtesy which he would have had in his wife's freeholds, if there had been issue, in the absence of any conveyance by her, was not sufficient to raise a consideration moving from the husband: and that the settlement was voluntary and void under the statute as against the mortgagee. *Shurmur* v. *Sedgwick*, 53 L. J., Ch. 87; 24 Ch. D. 597; 49 L. T. 156; 31 W. R. 884.

Mortgage for Benefit of Another—Indemnity and Settlement by Person benefited.]—A. mortgaged his own estate for 5,000*l.* for the benefit of B., and B. (pursuant to an agreement to that effect with A.) conveyed his estate, not only as an indemnity to A., but also to uses for the benefit of his own (B.'s) children and their issue:—Held, that there was a sufficient valuable consideration as between A. and B. to support the limitations to B.'s children, as against subsequent purchasers for valuable consideration from B. Held, also, that this court would have specifically enforced the whole agreement at the suit of A. *Ford* v. *Stuart*, 15 Beav. 493; 21 L. J., Ch. 514.

Mortgage—Additional security, not communicated to Mortgagee—Subsequent Mortgage of Lands comprised in further Security.]—A solicitor, having mortgaged an estate to the trustee of his settlement, fraudulently deposited with a creditor the title deeds which were in his possession as solicitor for the mortgagees, suppressing the fact of the original mortgage. In 1871 he mortgaged other lands to H. and T. in fee. He died insolvent in 1872, and shortly after his death a deed of November, 1860, was found in his safe, by which he had demised to the original mortgagee for the term of 400 years some of the lands comprised in the mortgage of 1871 by way of further security for the amount due on the original mortgage. No consideration was stated in this deed, and the conclusion was that it had never been communicated to the original mortgagee, or been out of B.'s possession:—Held, that the deed of November, 1860, was fraudulent and void, under 27 Eliz. c. 4, as against H. and T. *Barker, In re, Jones* v. *Bygott*, 44 L. J., Ch. 487; 23 W. R. 944.

Held, also, that the circumstances of the solicitor having been solicitor to the original mortgagee did not entitle the latter to claim the benefit of the deed as if it had been actually communicated to him. *Ib.*

Conveyance of Right of Presentation.]—A conveyance of the interest of one of four sisters, having the right of presentation, at a time when the church was full, of the clerk, presented by the eldest, in consideration of twenty shillings, of true and faithful services done, and for good and valuable consideration, is not on the face of it fraudulent against a subsequent purchaser. *Gully* v. *Exeter (Bishop)*, 10 B. & C. 584; 2 M. & P. 266; 8 L. J. (O.S.) K. B. 281.

Conveyance in Trust to Pay Debts, with Remainder for Wife and Children—Purchaser under New South Wales District Courts Act.]—Where a debtor conveyed all his real estate upon trust to sell and pay off his debts, and as to any ultimate surplus to pay the same to trustees to be held by them in trust for the separate use of his wife for life, and after her decease in trust for their children in equal shares as tenants in common:—Held, in a suit by a subsequent purchaser for value (at a sale in execution) of the grantor's interest in some lands comprised in the conveyance, that the deed of conveyance was not void under 27 Eliz. c. 4, as against a purchaser for value under the New South Wales District Courts Act, 1858, ss. 78 & 79. *Godfrey* v. *Poole*, 57 L. J., P. C. 78; 13 App. Cas. 497; 58 L. T. 685; 37 W. R. 357—P. C.

Failure of Consideration ex post facto.]—The failure by matter ex post facto, of what was at the date of a conveyance of land sufficient to constitute a valuable consideration for it, will not operate retrospectively so as to render the conveyance liable to be defeated, under the statute 10 Car. 1, sess. 2, c. 3 [similar to 27 Eliz. c. 4], by a subsequent conveyance for value of the same land by the same grantor to other uses. *Paget* v. *Paget*, 9 L. R. Ir. 128.

Consideration—Quantum of.]—In considering the operation of the 27 Eliz. c. 4, the court only considers whether the transaction is one purely voluntary or whether it is one of bargain, and the mere quantum of consideration is not material. *Townend* v. *Toker*, 35 L. J., Ch. 608; L. R. 1 Ch. 446; 12 Jur. (N.S.) 477; 14 L. T. 531; 14 W. R. 806.

—— **What is Valuable.**]—A settlor who was seised of an estate in fee simple, subject to mortgages, settled it upon herself for life, with remainder to her nephew in fee, the sole consideration expressed upon the instrument being natural love and affection, and a covenant by the nephew to pay off the mortgages when called on, and to indemnify the settlor against the same, and against all proceedings and costs in relation thereto. The settlor afterwards contracted to sell the estate to a purchaser for value, who filed his bill against the volunteer and the settlor for a specific performance of the contract:—Held, first, that the covenant for the payment of the mortgage money and of indemnity constituted a valuable consideration for the settlement, and

took the case out of the operation of the 27 Eliz. c. 4. *Ib.*

—— **Evidence of.**]—Held, secondly, that evidence was admissible to show valuable consideration, ultra what appeared upon the face of the deed. *Ib.*

—— **Parties to Suit.**]—Held, thirdly, that the volunteer was a proper party to the bill. *Ib.*

—— **Evidence of.**]—When a settlement is expressed to be made in consideration of natural love and affection, and no other consideration is expressed in the deed, evidence is admissible to prove that valuable consideration was given for the settlement, but such evidence must be most conclusive in order to induce the court to uphold the settlement as against a subsequent mortgagee for value, even though the latter had notice of the settlement. *Levy* v. *Creighton*, 31 L. T. 1.

The statement in a deed of settlement, executed after marriage, was that it was made in consideration of 5*s.*, and divers other good and valuable considerations:—Held, that this statement did not, as against strangers to the settlement, amount to evidence that it was not voluntary; and, a defendant claiming against it as a purchaser for valuable consideration, and insisting at the bar that the settlement was fraudulent and void under the statute 27 Eliz. c. 4, the court directed an inquiry whether the settlement was founded on any and what valuable consideration. *Kelson* v. *Kelson*, 10 Hare, 385; 22 L. J., Ch. 745; 17 Jur. 129; 1 W. R. 143.

Practice—Principles of Court's Intervention.]—Distinction upon the want of consideration upon a contract merely voluntary: this court will do nothing but take jurisdiction upon a trust actually created, unless perhaps against a party having a right to put an end to it by his own act under a sole power of revocation, by analogy to the distinction between the cases where an entail can be barred by fine, and where a recovery is necessary. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 99.

b. Settlements on Marriage.

Limitations in favour of issue—Settlor, having no issue, mortgages—Effect as to Successive Limitations.]—A., having the fee simple of an estate, on his marriage settles it to the use of self for life, remainder to trustees for 100 years to secure wife's jointure; remainder to other trustees for 500 years, for raising portions; remainder to the use of first and other sons of the marriage in tail male; remainder to first and other sons in tail male of any other marriage; remainder to the use of divers persons for life, etc.; with ultimate remainder to A., his heirs and assigns for ever. A., having no issue, executed a mortgage of part of the estate to B., and created a term of 500 years for securing the money lent; A. died without ever having had any lawful issue; and B. filed his bill to have the limitations, subsequent to those of the benefit of A.'s issue, declared voluntary as against him:—The court made a decree in favour of the security. *Gray* v. *Legard*, 9 L. J. (o.s.) Ch. 80.

Voluntary Settlement, what—Collaterals.]—By a marriage settlement, an estate, the property of the wife was limited in default of children of the wife to trustees, in trust to sell and divide the proceeds amongst the brothers and sisters of the wife. The wife died without issue:—Held, that the limitation in favour of her brothers and sisters was voluntary, and therefore void against the purchaser. *Cotterell* v. *Homer*, 13 Sim. 506; 7 Jur. 544.

Volunteers under Settlement—Subsequent Mortgage.]—A woman on her marriage conveyed certain property to trustees to the use of herself for life, and after her decease to the use of her husband, and after the decease of the survivor to the use of her son born before the marriage, and after his death to the use of his children as tenants in common, with an ultimate limitation in favour of the heirs of the woman, subject to a general power of appointment not in favour of any particular persons within the marriage consideration. After the decease of her husband the woman joined with the son in a mortgage of the property for valuable consideration:—Held, that the children of the son were volunteers, and that the limitations in their favour was defeated by the mortgage, and that there was nothing to bring their case within the principle laid down in *Newstead* v. *Searles*, (1 Atk. 264). *De Mestre* v. *West*, 60 L. J., P. C. 66; [1891] A. C. 264; 64 L. T. 375; 55 J. P. 613.

Ex post facto consideration—Prior voluntary settlement.]—The court, having come to the conclusion, as a matter of fact, that the marriage of W. had taken place upon the faith of a previous voluntary settlement made by his father:—Held, first, that the marriage supplied an ex post facto consideration for the settlement. *Guardian Assurance Co.* v. *Avonmore* (*Viscount*), Ir. R. 6 Eq. 396.

—— **Presumption of.**]—Held, secondly, that, in such a case there is no presumption as to whether or not a marriage had taken place on the faith of the voluntary deed, but that it is the duty of the court in the absence of direct proof, to form a reasonable judgment, by way of inference from the circumstances shown to have existed, whether or not the parties did know of the deed and act on it. *Ib.*

Bond before Marriage, afterwards Settlement.]—A bond before marriage to settle a jointure, and afterwards a settlement is made which settles the estate on the wife, and the issue of the marriage. This settlement is good as to the jointure, but fraudulent as to the children in respect of a purchaser. *Jason* v. *Jervis*, 1 Vern. 286.

Settlement by Widower—Limitation to first Wife's Children—Mortgage.]—By a settlement made on the second marriage of a widower, land belonging to him was conveyed in trust for his children by a first marriage absolutely, and personalty belonging to the wife was settled on her absolutely. The husband afterwards mortgaged the land:—Held, that the settlement was voluntary as regards the children of the husband, and that by 27 Eliz. c. 4, the limitation in their favour was void as against the mortgagee. *Cameron and Wells, In re*, 57 L. J., Ch. 69; 37 Ch. D. 32; 57 L. T. 645; 36 W. R. 5.

Settlement on Second Marriage—Illegitimate child by first husband.]—A widow, having an

illegitimate child by her first husband before her marriage with him, entered into marriage articles with a second husband, the settlement reciting that she was seised in fee of certain lands and that it was agreed on the treaty for the intended marriage that the lands, &c., should be settled as therein mentioned, and then the property was settled to the use of the wife for life; remainder to the use of the husband for life; remainder in fee to the child, described as her son, by her late husband begotten. The husband and wife afterwards joined in mortgaging the property, and the mortgagees had sold:—Held, that the limitation in favour of the child was not void as voluntary and fraudulent within 27 Eliz. c. 4, and that he was entitled to recover in ejectment. *Dickenson* v. *Wright*, 29 L. J., Ex. 150; 2 L. T. 155; 8 W. R. 418.

c. Post-nuptial Settlements.

Generally.]—A settlement by a tenant in fee for the maintenance of herself and children for her life, to raise portions for younger children, and the surplus to her heir-at-law, she having then many sons and daughters, is a voluntary settlement, and void against purchasers, under 27 Eliz. c. 4. *Goodright* d. *Humphreys* v. *Moses*, 2 Wm. Bl. 1019.

Voluntary settlement void, under the stat. 27 Eliz. c. 4, against a subsequent purchaser for a valuable consideration with notice, though a fair provision for a wife and children. An injunction restraining the husband from selling was refused, but a demurrer by the husband overruled as covering too much, the plaintiff being entitled until a sale to an execution of the trust. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; 11 R. R. 151.

A settlor being under no obligation, either at law or in equity, to settle certain land which he had, in consequence of the inability of C. to convey it, purchased of the trustees of H., without the intervention of C., a settlement of it, being made after marriage, was held purely voluntary, and void as against a bonâ fide purchaser for a valuable consideration. *Doe* d. *Barnes* v. *Roe*, 6 Scott, 525; 4 Bing. (N.C.) 737; 1 Arn. 279.

Consideration, what Sufficient.]—The owner of a freehold estate, which was worth beyond a mortgage to which it was subject, about 1,300*l.*, was persuaded by a relative of his wife to make a post-nuptial settlement of it on his wife and children. As an inducement to do this, he agreed to advance him 150*l.* on his promissory note to meet the interest on the mortgage which was then in arrear. The settlement was accordingly prepared and executed, but no mention was made in it of the advance of 150*l.*:—Held, on a bill by a subsequent mortgagee to establish priority over the settlement, that the advance of 150*l.* was a sufficient valuable consideration to support the settlement under 27 Eliz. c. 4, *Bayspoole* v. *Collins*, 40 L. J., Ch. 289; L. R. 6 Ch. 228; 25 L. T. 282; 19 W. R. 363.

Settlement for Value and Advancement of Issue.]—A settlement made after marriage, for valuable consideration, for advancement of the issue, may be considered as a purchase, and defeat a subsequent purchaser; and the value paid is not to be too strictly examined, there being room for bounty. *Jones* v. *Marsh*, Ca. t. Talbot, 64.

Settlement of a portion paid.]—Settlement after marriage of a portion paid is on good consideration, and equal to one made before marriage. *Ramsden* v. *Hylton*, 2 Ves. 305.

In consideration of portion paid.]—If A., in the lifetime of his first wife, settles lands to the use of himself for life, remainder to his first and other sons in tail, and the wife dies without issue: and A., on his second marriage agrees, in consideration of a portion paid, to settle part of the lands as a jointure on his second wife; the Court will set aside the first settlement as fraudulent against the second wife, who is a purchaser. *Douglasse* v. *Waad*, 1 Ch. Ca. 100.

Consideration—Something given up by both Husband and Wife.]—In an action for specific performance of an agreement to sell certain freehold property, a question arose as to whether a post-nuptial settlement was void under 27 Eliz. c. 4, as being a voluntary settlement. Previously to the settlement the property had been settled on the wife for life, with remainder to the husband in fee, and the wife was absolutely entitled to a one-seventh share of certain other property. The settlement contained a recital in the following words: "Whereas the said J. D. and E. D. are desirous that the hereinbefore-recited deed-poll should be altered, and that the property thereby settled should be re-settled as hereinafter appearing, and also that the said one-seventh share of the said hereditaments at Whitechapel, so as aforesaid vested in the said E. D., should be included in the new settlement intended to be hereby made," and the wife purported to revoke the deed-poll mentioned, and to join with the husband in re-settling the property upon trusts, giving the husband a life-interest in the whole after her decease, and subject thereto upon trust for third parties:—Held, that there was clear evidence of a bargain between the parties, and that, as both husband and wife gave up something in order to make a re-settlement, the settlement was not voluntary within the statute. *Schreiber* v. *Dinkel*, 54 L. T. 911—C. A. Affirming 54 L. J., Ch. 241.

—— **Relinquishment of Dower—Wife not Executing.**]—A person being entitled to the reversion in fee of certain lands, assigned by post-nuptial settlement the said lands to trustees in trust for himself for life and subject thereto to the intent that his wife (not a party to the deed) should, in lieu of dower, receive an annuity for her life. The settlor subsequently mortgaged the said lands, no mention being made of the settlement, and afterwards died:—Held, that as against the mortgagees the settlement was a voluntary deed and void; and that the alleged relinquishment of the wife's dower was not a valuable consideration for the settlement, as her dower still remained. *Conlan's Estate, In re*, 29 L. R. Ir. 199.

Conveyance by Married Woman.]—A voluntary conveyance by a married woman is within the statute against fraudulent conveyances (27 Eliz. c. 4). *Butterfield* v. *Heath*, 15 Beav. 408; 22 L. J., Ch. 270.

Of Wife's Property.]—Husband and wife executed a post-nuptial settlement of the wife's estate in favour of themselves and their children:—Held, that it was void as against a

subsequent purchaser from them for valuable consideration. *Butterfield* v. *Heath*, 15 Beav. 408; 22 L. J., Ch. 270.

Post-nuptial settlement of property belonging to the wife, upon trusts for the benefit of the husband and wife and her children, supported as against a subsequent mortgage of the property by the husband and wife. *Hewison* v. *Negus*, 22 L. J., Ch. 655; 17 Jur. 567; 1 W. R. 262.

Where a husband makes a post-nuptial settlement of property belonging to his wife, on his wife and children, otherwise unprovided for, if it be such as a court of equity, on a bill filed by the wife for a settlement, would direct to be made, it is not voluntary within the meaning of the 10 Car. 1, sess. 2, c. 8, s. 1. *Ashe* v. *Lowe*, Hay. & J. 287.

—— **Of Wife's Realty.**] — Real estate was devised to a single woman with a declaration of a wish that if she should marry she would before marriage settle it to her separate use for life and to such uses as she should by will appoint. She married without a settlement, and afterwards, by an acknowledged deed expressed to be made for giving effect to the testator's wish, the husband and wife conveyed the land to trustees during the life of the wife upon trust for her for her separate use without power of anticipation, and after her death to the use of the husband for life, with remainder to their children as therein mentioned. Subsequently the husband and wife mortgaged the property without notice of the settlement:—Held, that the settlement was for valuable consideration, and not void as against the mortgagee under 27 Eliz. c. 4. *Teasdale* v. *Braithwaite*, 46 L. J., Ch. 725; 5 Ch. D. 630; 36 L. T. 601; 25 W. R. 546—C. A.

—— **Of Wife's Freeholds.**]—By a post-nuptial settlement, freeholds belonging to the wife were settled by the husband and wife to the use of the wife for life, and after her decease to such uses as she should by will appoint, and in default of appointment to the use of her children, with a power during her life for the wife to lease at rack rent, and with a power of sale and exchange in the trustees with her consent:—Held, that the settlement was for valuable consideration, and therefore not void under 27 Eliz. c. 4, and that the same must be upheld against a subsequent mortgagee. *Foster and Lister, In re*, 46 L. J., Ch. 480; 6 Ch. D. 87; 36 L. T. 582; 25 W. R. 553.

—— **Marriage with Deceased Sister's Husband.**] — In July 1853, W., at that time a widow, married N., the widower of her deceased sister. In October, by a deed which purported to be a post-nuptial settlement and made between N. and A., his wife of the one part, and a trustee of the other part, they conveyed and assigned real and personal estate belonging to A., in trust for N. absolutely. The settlors lived together until 1859, when A. left the house of N., and ceased to reside with him. In 1860 A. assigned the same property to her brother C. for value; and, N. having advertised the property for sale, he instituted a suit for the purpose of having the deed of October set aside. A. was subsequently joined as co-plaintiff, and she stated that it was not until 1859 that she became fully aware of the invalidity of the marriage:—Held, that the deed must be set aside on the ground that the consideration failed. *Coulson* v. *Allison*, 2 Giff. 279; 6 Jur. (N.S.) 1140; 3 L. T. 260. Affirmed, 3 L. T. 763—L.JJ.

Revocable Settlement of Wife's Freeholds—Subsequent Mortgage.] — By a post-nuptial settlement, lands, of which the wife, before the marriage, had been seised in fee, were settled, subject to successive life estates for husband and wife, upon the children of the marriage, reserving to the husband and wife power of revocation, and power to charge the lands with 1,000*l*. The husband and wife executed a subsequent settlement, in conveying the lands in trust for the wife for her separate use during their joint lives, and, subject thereto, and to an annuity for the survivor, in trust for the children of the marriage. Afterwards both husband and wife purported to mortgage the lands in fee. There were children of the marriage who, after the death of their parents, the mortgagors, contended that the mortgage only affected the life estate limited to their mother by the second settlement:—Held, that the settlements were deeds for value, so that the mortgage could not prevail against the estates in remainder of the children of the marriage; also, that the second settlement, operating as a revocation of the first, extinguished the general power to charge 1,000*l*. thereby reserved. *Bell's Estate, In re*, 11 L. R. Ir. 512.

Assignment of Wife's Interest for benefit of Children — Covenant by Husband, enforced against Purchaser from Husband and Wife.]—A term of years was held upon trust for the separate use or E., a married woman, for her life, with remainder for T., her husband, for life, with remainder for their children. There were several children: and by deed, reciting that E., in order to further the prospects in life of the children, had consented to assign her life estate for the benefit of the children, and that T., for the same purpose, agreed to assign his life interest, in case he should survive his wife. E. assigned her life interest to trustees, for the benefit of the children; and T. covenanted that, if he should survive his wife, he would, if called on by the trustees, assign his estate and interest on the same trusts. E. and T. subsequently, for a valuable consideration, assigned to H.:—Held, that the children were entitled to enforce against H. a specific performance of T.'s covenant to assign his interest. *Joyce* v. *Hutton*, 12 Ir. Ch. R. 71.

Articles Upheld as for Valuable Consideration.] —The wife of A. claimed an annuity on his estates under a voluntary deed, or had a right to dower. She concurred in a sale of some of his estates to a stranger, and joined in a covenant to levy a fine, and was induced to do so by other estates of her husband being settled by articles under which the plaintiff (her grandson) claimed. The articles recited other considerations, but there was no proof of any; no fine was ever levied in pursuance of the covenant, but the purchaser was never disturbed. The articles were upheld as for sufficient consideration against a subsequent purchaser for value. *Fitzmaurice* v. *Sadleir*, Ir. R. 9 Eq. 595.

Agreement before Marriage, by Infant—Different Settlement Afterwards.]—In 1857 an infant engaged to be married wrote to his in-

tended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859 after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the seven and two other houses to trustees upon trust for his wife for life, for her separate use, and, after her death, upon trust for himself for life, and, after the death of the survivor, upon such trusts as the wife should by deed or will appoint, and, in default of appointment, in trust for her in fee. He subsequently agreed to sell three of the houses, and the purchaser sued for specific performance :—Held, that the purchaser was entitled to specific performance, for that, as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1857, and settled the property in a different way, there was no ratification in writing of the promise contained in that letter, and the settlement therefore was voluntary and void as against a purchaser for value. *Trowell* v. *Shenton*, 47 L. J., Ch. 738 ; 8 Ch. D. 318 ; 38 L. T. 369 ; 26 W. R. 837—C. A.

Purchaser's Liability as to Payment.]—A., by settlement after marriage, not being indebted, conveyed to trustees to family uses, reserving a power to sell, but covenanting that the purchase-money should be paid to the trustees, to be laid out to the same uses ; he sells to B., who has notice of the covenant, but pays his money to A., who dies insolvent ; B.'s representatives shall not be obliged to repay the money, the settlement being voluntary and fraudulent as against a purchaser. *Evelyn* v. *Templar*, 2 Bro. C. C. 148.

d. Leaseholds.

Generally.]—A lessee at a rack-rent is a purchaser for a valuable consideration. *Goodright* d. *Humphreys* v. *Moses*, 2 Wm. Bl. 1019.

There is no abstract and inflexible rule that every assignment of leasehold premises subject to a rent must necessarily be an assurance for good consideration within s. 14 of the 10 Car. 1, s. 2, c. 3 (Ir.), so as to prevail against a subsequent purchase for value. *Lee* v. *Matthews*, 6 L. R. Ir. 530.

Semble, the question in each case is, Was the dealing a bargain or a gift? The existence of onerous liabilities from which the assignee covenants to indemnify the assignor may give the transaction the character of a bargain, while, on the other hand, the gift of a valuable interest in lands is not less a gift because the property so given carries with it certain obligations. *Ib.*

Semble, the question in each case arises, Was the transaction a bargain involving mutual considerations, or a gift involving merely bounty from one party to the other? *Price* v. *Jenkins* (5 Ch. D. 619) dissented from. *Gardiner* v. *Gardiner* (12 Ir. C. L. R. 565) followed. *Ib.*

Premises held under a lease for an unexpired residue of twenty-five years, subject to a yearly rent of 1*l.* 10*s.*, were assigned by the lessee to his son-in-law the plaintiff, in consideration of natural love and affection, as recited in the deed of assignment. The lessee subsequently assigned the premises to the defendants in consideration of 50*l.* In an action by the plaintiff to recover possession, no evidence was given of any valuable consideration passing from the plaintiff, nor did the plaintiff require any question to be left to the jury, and the judge at the trial directed a verdict for the defendants :—Held, that the direction was right. *Ib.*

A bonâ fide settlement of leasehold property is not a voluntary settlement, since the obligation is cast upon the assignee of the lease of paying the rent and performing the covenants. *Doble, Ex parte and In re*, 38 L. T. 183 ; 26 W. R. 407.

A widower, on his second marriage, made a settlement, in which he assigned a leasehold property to trustees, one of whom was his son by a former marriage, upon trust for himself for life, and after his death for his said son. He afterwards contracted to sell the leasehold property to the plaintiff :—Held, that the settlement of the leasehold property on the son was not a voluntary conveyance under 27 Eliz. c. 4, on the ground that the assignment of leasehold property to which liability is attached is in itself a conveyance for valuable consideration. *Price* v. *Jenkins*, 46 L. J., Ch. 805 ; 5 Ch. D. 619 ; 37 L. T. 51—C. A. Reversing 25 W. R. 427. But see *Ridler, In re, Ridler* v. *Ridler*, 52 L. J., Ch. 343 ; 22 Ch. D. 74 ; 48 L. T. 396 ; 31 W. R. 93 ; 47 J. P. 479—C. A.

An assignment of leaseholds in consideration of natural love and affection, held not voluntary. *Price* v. *Jenkins* (5 Ch. D. 619) followed. *Harris* v. *Tubb*, 58 L. J., Ch. 434 ; 42 Ch. D. 79 ; 60 L. T. 699 ; 38 W. R. 75.

Surrender of Lease.] — Quære, whether a surrender of an old lease was a "conveyance" within s. 1 of 27 Eliz. c. 4, which would prevail over a previous settlement, assuming such settlement to be a voluntary conveyance within the same statute. *Lulham, In re, Brinton* v. *Lulham*, 53 L. T. 9 ; 33 W. R. 788—C. A. Affirming 53 L. J., Ch. 928.

See also II. A. 3. g. ante, col. 323.

4. Notice, Effect of.

Generally.]—Purchase is good, though notice of voluntary settlement, which is void. *Tomkins* v. *Ennis*, 1 Eq. Abr. 334.

If a settlement or other conveyance is void against a purchaser within 27 Eliz. c. 4, notice to the purchaser makes no difference. *Chapman* v. *Emery*, Cowp. 260.

Voluntary settlement, though free from actual fraud, meritorious as a provision for relations, void against a subsequent purchaser for a valuable consideration, with notice, whether by conveyance or articles. Specific performance decreed in the latter case. *Buckle* v. *Mitchell*, 18 Ves. 100 ; 11 R. R. 155.

Notice of the contents of a voluntary instrument has no effect in postponing a purchaser for valuable consideration. *Nixon* v. *Hamilton*, 1 Ir. Eq. R. 55.

Notice of the contents of a voluntary settlement has no effect even in equity ; notice of a covenant in a voluntary settlement, that the purchase-money should be paid to trustees to be laid out in other lands to be settled to the same uses :—Held, immaterial. *Buckle* v. *Mitchell*, 18 Ves. 112.

—— **Inference of Fraud.**]—A voluntary settlement of lands, made in consideration of natural

love and affection, is void as against a subsequent purchaser for a valuable consideration, though with notice of the prior settlement before all the purchase-money was paid or the deeds executed; though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction; for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the 27 Eliz. c. 4. *Doe* d. *Otley* v. *Manning*, 9 East, 59; 9 R. R. 503.

Covenant to lay out Purchase-money.]—Court of equity will not act in favour of a mere voluntary settlement, and therefore, upon a subsequent purchase with notice, and covenant to lay out the money to the same uses, will not lay hold of the money. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 93; 11 R. R. 151.

Post-nuptial Settlement—Covenant to settle Purchase-moneys—Payment.]—A., by settlement after marriage, not being indebted, conveys to trustees to family uses, reserving a power to sell, but covenanting that the purchase-money should be paid to the trustees, to be laid out to the same uses. He sells to B., who has notice of the covenant, but pays his money to A., who dies insolvent. B.'s representatives shall not be obliged to repay the money, the settlement being voluntary and fraudulent as against a purchaser. *Evelyn* v. *Templar*, 2 Bro. C. C. 148.

Rights of Sub-purchaser.]—A purchaser for a valuable consideration, without notice of a voluntary settlement, from a person who bought without notice, shall shelter himself under the first purchaser; but he cannot defend himself in equity upon articles only. *Brandlyn* v. *Ord*, 1 Atk. 571.

Sub-purchase from Fraudulent Purchaser.]—The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he, the purchaser, was ignorant. *Doe* d. *Bothel* v. *Martyr*, 1 Bos. & P. (N.R.) 332; 8 R. R. 821.

Generally — Practice — Injunction.]—Voluntary settlement void under the stat. 27 Eliz., c. 4, against a subsequent purchaser for a valuable consideration with notice, though a fair provision for a wife and children. An injunction restraining the husband from selling was refused, but a demurrer by the husband overruled as covering too much, the plaintiff being entitled until a sale to an execution of the trust. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; 11 R. R. 151.

Setting Aside after Lapse of Time.]—Fraudulent conveyance set aside, as against a purchaser with notice, notwithstanding a great length of time which had elapsed since the original transaction. *Alden* v. *Gregory*, 2 Eden, 280.

5. Specific Performance.

a. At Suit of Purchaser.

Generally.]—In a suit for specific performance against a vendor and those claiming under a voluntary settlement made by him previously to the contract for sale, the court refused to declare that the settlement was void under the 27 Eliz. c. 4. *Fletcher* v. *Ketteman*, 40 L. J., Ch. 624.

A. B. executed a voluntary settlement of real estate in favour of his wife and children, and afterwards contracted to sell it for valuable consideration. The purchaser filed a bill for specific performance against the vendor, his wife, children, and the trustees, in whom the legal estate was vested. One of the children was out of the jurisdiction, and did not appear. The court decreed a specific performance, and ordered the trustees to convey to the purchaser, saving rights of the absent party. *Willats* v. *Busby*, 5 Beav. 193; 12 L. J., Ch. 105.

b. At Suit of Settlor.

Generally.]—The author of a voluntary settlement cannot file a bill for the specific performance of a contract afterwards entered into by him to sell the settled estate. *Johnson* v. *Legard*, Turn. & R. 281.

A court of equity will not assist a vendor in defeating a prior voluntary settlement made by himself. *Smith* v. *Garland*, 2 Mer. 123; 16 R. R. 154.

Purchaser objecting to title on the ground of a voluntary settlement made by the vendor, a bill for specific performance by the vendor was dismissed, and an exception to the Master's report approving the title allowed. *Ib.*

On a bill by a vendor for specific performance, the purchaser set up a voluntary settlement as an objection to the title, but said he was willing to complete the purchase on having a good title. He had been let into possession as purchaser, and paid part of his purchase-money, and had paid off a mortgage and got a conveyance of the legal estate and possession of the title-deeds:—Held, that, notwithstanding the voluntary settlement the vendor was entitled to a decree for completing the purchase. *Peter* v. *Nicolls*, L. R. 11 Eq. 391; 24 L. T. 381; 19 W. R. 618.

Semble, that the principle of *Smith* v. *Garland* (2 Mer. 120; 16 R. R. 154) does not apply to a defendant who says he is willing to complete on having a good title. *Ib.*

At Suit of Creditors of Vendor.]—The court was of opinion that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance; there having been subsequent dealings with the estate which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could file such a bill. *Johnson* v. *Legard*, Turn. & R. 281; 3 Madd. 283; 6 M. & S. 60; 18 R. R. 234; *id.* 301.

III. EFFECT OF.

1. On Judgments, Setting Aside for Fraud.

a. In what Cases.

Probate.]—Probate obtained by fraud relieved against here, and a deed importing a consent thereto, set aside here, not in ecclesiastical court, and the defendant decreed to consent to a

revocation of the probate. *Barnesley* v. *Powel*, 1 Ves. 287.

In Case of Infant.]—On a bill to set aside a decree against an infant for fraud, if the same be not fraudulent, though in every respect not so equitable, the court will not set it aside. *Richmond* v. *Tayleur*, 1 P. Wms. 734.

A decree in equity is no protection to a purchase effected by management of vendor, tenant for life, and purchaser himself, to the prejudice of the remainderman entitled to the inheritance under colour of decree in equity, the remainderman though a party to suit being an infant at the time. *Colclough* v. *Bolger*, 4 Dow, 62.

Purchase under Decree.]—Purchase of estate under decree fraudulently obtained, set aside after a great length of time. *Gore* v. *Stacpoole*, 1 Dow, 18.

Quære, whether purchaser for valuable consideration, under decree fraudulently obtained, though ignorant of fraud, can protect himself when fraud appears on face of proceedings. *Id.* 30.

Where sales of estates had fraudulently taken place under decrees of the court of exchequer in Ireland, obtained by collusion between the tenant for life, the mortgagee, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been protected in such suits, a decree of the court of chancery in Ireland, on his coming into possession, granting him relief on a bill filed to redeem, was affirmed by the lords. *Bandon (Earl)* v. *Becher*, 3 Cl. & F. 479; 9 Bligh (N.S.) 532.

A decree of foreclosure had on sequestration in 1777, in pursuance of 7 Geo. 2, c. 14, against an absent mortgagor, known by the plaintiff to be incompetent from mental imbecility to conduct his affairs, and advantage having been taken in the account of the state of the defendant, and of his absence, and of his having nobody to manage his defence, and a sale had in 1780, in pursuance of such decree, to the person conducting the suit, set aside as fraudulent, and an inquiry directed into the circumstances, upon the ground of which the decree and former proceedings were impeached on original bill filed in 1785 by the heir of mortgagor. *Carew* v. *Johnston*, 2 Sch. & Lef. 280.

Bill, after length of time, to set aside, for fraud, a decree which had been made in favour of a protestant discoverer:—Dismissed, and dismissal affirmed on appeal. *Mulcahy* v. *Kennedy*, 1 Ridgw. P. C. 331.

Consent Order.]—A bill to set aside, on the ground of fraudulent representation, an order in an action at law made by consent, staying the action and directing the payment of a certain sum of money by the defendant to the plaintiff, and which sum the plaintiff afterwards accepted:—Held, to be demurrable, as it did not state that the plaintiff was ignorant of the alleged representation being fraudulent, not only at the time of the order, but at the time he received the money. *Dunn* v. *Cox*, 11 Hare, 61.

It appearing that a second action had been brought by the plaintiff, and had been stayed by the court of law, in consequence of the consent order made in the first action, and that the plaintiff had taken regular proceedings at law to set aside the order staying the second action, but that order had been sustained, this court refused to aid a suit in equity brought by the plaintiff, by giving him leave to amend, upon allowing a demurrer to his bill to set aside the consent order on the ground of such alleged fraud. *Ib.*

After Compromise.]—A judgment obtained by fraud after a compromise was treated as a nullity. *Gossain* v. *Gossain*, 8 W. R. 196.

Fraudulent Defence put in by Solicitor, without Client's Knowledge.]—Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, making admissions on which judgment was obtained against the client:—Held, that the court had jurisdiction to set aside the judgment and permit the client to withdraw the defence, and put in a fresh defence. *Williams* v. *Preston*, 51 L. J., Ch. 927; 20 Ch. D. 672; 47 L. T. 265; 30 W. R. 555.

After Enrolment—Fraud or Mistake.]—To set aside on the ground of fraud a decree signed and enrolled, actual positive fraud ought to be shown. Mere constructive fraud is not sufficient, at all events, after long delay. *Patch* v. *Ward*, L. R. 3 Ch. 203; 18 L. T. 134; 16 W. R. 441.

—— **Surprise.**]—Where the enrolment of a decree is gained by surprise, the court will vacate it. *Stevens* v. *Guppy*, Turn. & R. 178.

Enrolment of a decree may be opened if the enrolment was gained by surprise, or there is some irregularity in it. *Anon.*, 1 Vern. 131.

A decree obtained by surprise, and enrolment, vacated. *Parker* v. *Dee*, 3 Swanst. 534.

Order Ex parte.]—An order obtained ex parte was discharged on the ground of the suppression of material facts. *Atkin* v. *Moran*, Ir. R. 6 Eq. 79.

b. Proceedings for.

Generally—Fraud or Mistake.]—As to the mode of proceeding to be relieved from an admission in a decree fraudulently inserted or consented to by mistake. *Davenport* v. *Stafford*, 8 Beav. 503; 14 L. J., Ch. 414; 9 Jur. 801.

By Petition.]—A decree, though obtained by fraud, cannot be set aside by petition. *Mussel* v. *Morgan*, 3 Bro. C. C. 74.

A decree gained by fraud may be set aside by petition, as well as a judgment at law by motion; à fortiori may such decree be set aside by bill. *Sheldon* v. *Aland*, 3 P. Wms. 111.

On Original Bill.]—On suggestion of a gross fraud, the court will, upon an original bill, overrule a plea of a decree, and report made and confirmed thereon, if the suggestion of fraud be not denied. *Lloyd* v. *Mansell*, 2 P. Wms. 73.

—— **Bill of Review.**]—A bill of review, with matter come to the party's knowledge since the hearing, lies. Where the plaintiff in the bill has since the hearing discovered matter which would vary the decree; and where, if such matter was known to the other party, he was not in conscience obliged to have discovered it to the court; for, if the matter was known to the

other party, and such as in conscience he ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill. *Manaton* v. *Molesworth*, 1 Eden, 25.

The plaintiffs commenced an action to restrain the defendants from infringing their patent, and obtained a judgment which was reversed by the court of appeal, who dismissed the action on the ground that the defendants' process was no infringement of the plaintiffs' patent. After the order on appeal was passed and entered, the plaintiffs applied to have the appeal reheard with fresh evidence, on the ground that, when an expert sent down by the court, and whose evidence was in fact the only material evidence before the court as to the nature of the defendants' process, examined their works, they had fraudulently concealed from him parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the plaintiffs:—Held, that the court of appeal had no jurisdiction to rehear the appeal, and that the remedy of the plaintiffs was by original action analogous to a suit under the old practice to set aside a decree as obtained by fraud. *Flower* v. *Lloyd*, 6 Ch. D. 297; 37 L. T. 419.

The plaintiffs afterwards commenced an action to have it declared that the judgment on the appeal had been obtained by fraud, the defendants having made misstatements to and misled the inspector. The vice-chancellor considered the case of fraud proved, and made a decree in the plaintiffs' favour, but the court of appeal was of opinion that no fraud was proved, and dismissed the action. Semble, that an action to impeach a judgment on such grounds was not maintainable. *S. C.*, 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.

After Confirmation on Appeal.]—Where a judgment has been obtained by fraud, and more especially by the collusion of both parties, such judgment, although confirmed by the house of lords, may even in an inferior tribunal, be treated as a nullity. *Shedden* v. *Patrick*, 1 Macq. H. L. 535.

But the allegations of fraud and collusion must be specific, pointed and relevant, otherwise they cannot be admitted to proof. *Ib.*

To set aside a judgment procured by fraud, the proper course, when such judgment has been confirmed by the house of lords, is to apply to the house of lords. *Ib.*

Therefore it is wrong to ask the court below, upon proof of the fraud or collusion, to set aside a judgment confirmed by the house of lords. *Ib.*

In Case of Consent Order.]—If a plaintiff's consent to an order effecting a compromise has been obtained by fraud, his proper course is to move to have the order annulled before the judge who made it. *Parker* v. *Simpson*, 18 W. R. 204.

Jurisdiction of Court of Chancery.]—Though the court of chancery cannot review or correct a decree of the court of exchequer, yet, where such decree has been obtained collusively and fraudulently, a party whose interests are affected by it may raise in the court of chancery, either as actor or defendant, a question as to its validity. *Bandon (Earl)* v. *Becher*, 3 Cl. & F. 479; 9 Bligh (N.S.) 532.

Parties.]—To a bill to set aside for fraud a decree and purchase under it, a demurrer by the purchaser for not making creditors parties, who had proved in the office under the decree, and their debts afterwards by final decree made charges on the estate, and directed to be paid out of the purchase-money, overruled: although the decree fastened the debts on the estate, yet it did not fix them on the identical money of the purchaser. For when a valid sale shall have been made, the charge will then be transferred from the land to the purchase-money: in the meantime, it is on the land only. If the creditors were necessary parties to such a bill, the court, to be consistent, ought in all other cases to hear them before it opened a sale under its decree, which would be an intolerable grievance to the suitor. *Wallace* v. *Smith*, Beat. 381.

Evidence.]—In 1798, a marriage was solemnised by licence between a man and a female minor. Three years afterwards, in pursuance of a previous agreement, the woman instituted a suit for nullity of marriage, and a decree of nullity was pronounced, on the ground of non-consent of the minor's father. Early in the following year a daughter was born:—Held, that evidence showing that the sentence of the ecclesiastical court had been obtained by fraud and collusion was admissible. *Harrison* v. *Southampton Corporation*, 4 De G. M. & G. 137; 22 L. J., Ch. 722; 18 Jur. 1; 1 W. R. 422.

A marriage was solemnised between A. and B., but it was declared void by the ecclesiastical court. Some years afterwards a child of A. and B., en ventre sa mère at the time of the sentence, and who necessarily was no party to the proceeding, claimed property in this court as descendant of A.:—Held, first, that he was bound by the sentence, though he might avoid its effect by showing fraud and collusion in obtaining it; secondly, that such fraud and collusion must be shown to have taken place between the parties to the proceedings; and, thirdly, that proof that the costs of the unsuccessful party had been agreed to be paid, that witnesses were not examined and others not cross-examined, and that the difficulties were not interposed which might have been, did not, altogether, amount to proof of fraud and collusion. *Perry* v. *Meddowcroft*, 10 Beav. 122.

On appeal the lord chancellor, upon the claimant undertaking to file a bill to establish his claim as male lineal descendant of the father, allowed the exceptions to stand over, &c. *Ib.*

2. On Contracts.

Voidable—Not Void.]—A contract induced by fraud is not void, but voidable. *Oakes* v. *Turquand*, 36 L. J., Ch. 949; L. R. 2 H. L. 325; 16 L. T. 808; 15 W. R. 1201. S. P., *Murray* v. *Mann*, 2 Ex. 538; 17 L. J., Ex. 256; 12 Jur. 634.

Fraud only gives a right to avoid a contract or purchase; the property vests until avoided, and all the mesne dispositions to persons not parties to, or at least not cognisant of, the fraud, are valid. *Stevenson* v. *Newnham*, 13 C. B. 285; 22 L. J., C. P. 110; 17 Jur. 600—Ex. Ch.

Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be

injured by the fraud, subject to the condition that the other party, if the contract is disaffirmed, can be remitted to his former state. *Urquhart* v. *Macpherson*, 3 App. Cas. 831—P. C.

When a contract has been entered into by fraud, the person defrauded has the right to avoid it at any time, unless in the interval either he has elected to affirm it, or an innocent third person has acquired an interest under it, or the position of the fraudulent person is affected by the delay. *Morrison* v. *Universal Marine Insurance Co.*, 42 L. J., Ex. 115 ; L. R. 8 Ex. 197 ; 21 W. R. 774—Ex. Ch.

Making Good—Rescission.]—Where a party, by misrepresentation, draws another into a contract, such party may be compelled to make good the representation, if that be possible ; but, if it be impossible, the person deceived may avoid the contract. The same principle applies, though the party at the time believed the statement to be true, if in the due discharge of his duty he ought to have then known otherwise. *Pulsford* v. *Richards*, 17 Beav. 87 ; 22 L. J., Ch. 559 ; 17 Jur. 865 ; 1 W. R. 295.

Third parties, who by false representations induce others to enter into contracts, are stopped from afterwards falsifying their statement, and, if necessary, may be compelled to make them good. But the false statement of one, not a party to the agreement entered into on the faith of it, is not a ground for avoiding it. *Ib.*

Election to Rescind—When made.]—To support a plea of rescission of a contract on the ground of fraud, it is not necessary to prove that the circumstances of the fraud were known to the defendant, and the contract rescinded before action brought. The election to rescind may be made at any time, unless there has been a previous election to affirm the contract. *Clough* v. *L. & N. W. Ry.*, 41 L. J., Ex. 17 ; L. R. 7 Ex. 26 ; 25 L. T. 708 ; 20 W. R. 189—Ex. Ch.

A. purchased goods of a company, not intending to pay for them. The company delivered them to a carrier to deliver them, according to A.'s instructions, to C. The carrier afterwards held the goods for C., at his request, as a warehouseman. A. becoming bankrupt, the company demanded the goods, and the carrier redelivered them, under the mistaken supposition that the transitus was not yet over. In an action of trover against him :—Held, that an equitable plea of rescission of the contract, on the ground of A.'s fraud, to which C. was privy, would raise a good defence to the action, although the fraud was not discovered till the cross-examination of C. at the trial of the action. *Ib.*

Repudiation.]—In an action on a contract of sale signed by the defendant :—Held, that if, as he stated, the plaintiff had obtained his signature by leading him to understand that his attorney had prepared it, and approved of the security, and, that turning out not to be the fact, the contract had been repudiated immediately, the contract was avoided. *Ralph* v. *Barton*, 1 F. & F. 473.

Repudiation or Affirmation of Contract.]—A solicitor took money of his client's, and pretended to have invested it upon four mortgages. After his death it was discovered that three of these mortgages were absolutely valueless, and the client took no steps as regards them. He brought an action to enforce the other, which resulted in a compromise out of which he obtained part of the money due :—Held, that as regards this last one he had affirmed the contract, and could not now repudiate the mortgage, but as regards the other three he could. *Murray, In re, Dickson* v. *Murray*, 57 L. T. 223.

Waiver.]—Fraud cannot be condoned unless there is full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. *Moxon* v. *Payne*, 43 L. J., Ch. 240 ; L. R. 8 Ch. 881.

An agreement rendered inoperative by a collateral fraudulent agreement cannot be made valid by the abandonment of the collateral agreement. *Ib.*

The right of a person dealing with a company to set aside (as against the company) a contract, founded on the latter's unintentional misrepresentation, may be waived or released, expressly or indirectly ; but cannot be easily waived by anything the person does, or omits, while the falsehood of the misrepresentation remains doubtful. *Bank of Hindustan, China and Japan, In re, Campbell, Ex parte*, 42 L. J., Ch. 771. *S. C.*, on appeal, 43 L. J., Ch. 1 ; L. R. 9 Ch. 1 ; 29 L. T. 519 ; 22 W. R. 113.

Repudiation before Fraudulent Purpose Effected.]—The plaintiff, being in embarrassed circumstances, in pursuance of an agreement between him and A., made over all his stock-in-trade to A., and fictitious bills of exchange were given by A. in the plaintiff's favour. Possession of the goods was given to A., together with an inventory, but no bill of sale was executed by the plaintiff. The object of the transaction was to prevent the plaintiff's creditors getting hold of the goods, and so being paid in full. The defendant was a creditor for 100*l.*, and was cognisant of what was concocted between the plaintiff and A. After A. had removed the goods from the plaintiff's premises, two meetings of the plaintiff's creditors were held, but no compromise was effected with the creditors. Some months afterwards A. executed a bill of sale of the goods to the defendant, for the alleged purpose of securing the debt due from the plaintiff to the defendant, but the plaintiff was no party to the bill of sale, nor did he sanction or know of it. The plaintiff having demanded the goods from A. and the defendant, brought an action against the defendant for the detention :—Held, that, the fraudulent purpose not having been carried out, the plaintiff was not relying on the illegal transaction, but was entitled to repudiate it and recover his goods from A., and the defendant had no better title than A., as he knew how A. had become possessed of the goods. *Taylor* v. *Bowers*, 45 L. J., Q. B. 163 ; 1 Q. B. D. 291 ; 34 L. T. 938 ; 24 W. R. 499—C. A.

Reinstating Opposite Party.]—A contract cannot be avoided for fraud unless the person defrauded has disaffirmed the contract and reinstated as far as possible the opposite party. *Dawes* v. *Harness*, 44 L. J., C. P. 194 ; L. R. 10 C. P. 166 ; 32 L. T. 159 ; 23 W. R. 398. S. P., *Urquhart* v. *Macpherson*, 3 App. Cas. 831—P. C.

Where status quo not Possible.]—A person induced by fraud to enter into a contract under which he pays money may, at his option, rescind the contract, and recover back the price, if he can return what he has received under it. But, when he can no longer place the parties in statu quo, as if he has become unable to return what he has received in the same plight as that in which he received it, the right to rescind no longer exists, and his remedy must be by an action for deceit, and not for money had and received. *Clarke* v. *Dickson*, El., Bl. & El. 148; 27 L. J., Q. B. 223; 4 Jur. (N.S.) 715.

The rule, that a party cannot repudiate an executed contract on the ground of fraud, unless on the condition of restoring the other party to his original position, is not affected by the fact that the latter has by his acts rendered such restoration impossible. *Savage* v. *Canning*, Ir. R. 1 C. L. 434; 16 W. R. 133.

As to Part of Contract.]—A fraudulent representation as to any part of that which induces a party to enter into a contract authorises a rescission of the contract. *Kennedy* v. *Panama, New Zealand, and Australian Royal Mail Co.*, 8 B. & S. 571; 36 L. J., Q. B. 260; L. R. 2 Q. B. 580; 17 L. T. 62; 15 W. R. 1039.

Aliter, where there has been an innocent misrepresentation or misapprehension, unless it is as to the substance of the whole consideration, going as it were to the root of the matter. *Ib.*

Collateral Statements.]—A collateral statement, made at the time of entering into a contract, but not embodied in it, must, in order to invalidate the contract on the ground of its being a fraudulent statement, be shown not only to have been false, but to have been known to be so by the party making it, and that the other party was thereby induced to enter into the contract. *Moens* v. *Heyworth*, 10 M. & W. 147; 10 L. J., Ex. 177.

A. applied to B. for a lease of premises, intending at the time he applied to use them as a brothel; B. relying upon the innocent though false misrepresentations of a third party, to whom he was referred by A., that A. was a respectable man, and on A.'s own fraudulent representation that he intended to carry on the trade of a perfumer, granted him a lease; A. accordingly entered into possession, and used the premises as a brothel; whereupon B. forcibly ejected him; A. brought ejectment to recover possession:—Held, that he was entitled to recover, for that the fraudulent misrepresentations were as to matters collateral to the lease, and did not avoid it. *Feret* v. *Hill*, 15 C. B. 207; 2 C. L. R. 1366; 23 L. J., C. P. 185; 18 Jur. 1014; 2 W. R. 493.

A contract may be avoided by a false and fraudulent representation, though not relating directly to the nature or character of its subject-matter, if it is so closely connected with the contract as that the party sued upon it would not, but for the representation, have entered into it, and was induced to enter into it, to the knowledge of the other party, by such representation. *Cunham* v. *Barry*, 15 C. B. 597; 3 C. L. R. 487; 24 L. J., C. P. 100; 1 Jur. (N.S.) 402.

Insurance.]—Pending a contract for the sale of a policy of insurance, the person whose life was insured met with an accident, which was proved by medical evidence not to have had effects serious or dangerous to his life. He was afterwards attacked by a disease of old-standing, of which he died, but from which no danger to his life was apprehended until after the contract was completed. The vendee was aware of both the accident and the illness, but did not communicate either to the vendor. The court refused to rescind the contract, or to restrain proceedings at law upon it. *Thompson* v. *Lambert*, Ir. R. 2 Eq. 433; 17 W. R. 111.

A policy of insurance on the life of A. had been assigned to the plaintiff; the defendant, having privately ascertained that A. was dangerously ill, treated with the plaintiff for the purchase of the policy for a small sum, representing it as the then value of the policy, the plaintiff not being aware of A.'s illness:—Held, that the sale was void, and that the plaintiff might recover the value of the policy in an action of trover. *Jones* v. *Keene*, 2 M. & Rob. 348.

Contracts between Solicitors—Interests of Minors.]—The court would not enforce the terms of a contract between two solicitors, whereby the one, who was solicitor for minors in a matter and several causes, agreed, without notice to the court or the friends of the minors, to hand over to the other, and the other to undertake, the business on behalf of the minors, to be conducted by the latter in the name of the former, on the terms of getting half [illegible] of the [illegible] although the latter had, in pursuance of the contract, conducted the business for a year, and made large expenditures, such contract being at variance with the interests of the minors and the policy of the court. Both parties to such a contract being in pari delicto, the court would not act for either of them. *Leech*, *Ex parte*, Ir. R. 5 Eq. 371.

Bankrupt Purchasing Goods.]—A trader, after being served with the petition on which he was afterwards adjudicated bankrupt, purchased goods at an auction, and removed them without payment, without disclosing the fact of the bankruptcy proceedings:—Held, that this omission did not of itself amount to a misrepresentation such as to avoid the contract, and entitle the vendor to a return of the goods. *Whittaker*, *Ex parte*, *Shackleton*, *In re*, 44 L. J., Bk. 91; L. R. 10 Ch. 446; 32 L. T. 443; 23 W. R. 555.

Shareholder after Winding-up Commenced—Right of Innocent Third Parties Intervening.]—A shareholder, who has been induced by fraud to take shares in a company, cannot maintain his action against the company to rescind the contract and recover back the amount paid for his shares, after the company, being unable to pay its creditors, has commenced winding up voluntarily without supervision under the Companies Act, 1862. *Collins* v. *City and County Bank*, 47 L. J., C. P. 681; 3 C. P. D. 282; 38 L. T. 9—C. A. S. P., *Morrison* v. *Universal Marine Insurance Co.*, ante, col. 365.

Misrepresentation in Prospectus of Company—Recovery of Price of Shares.]—A steam-packet company entered into a contract with the government of New Zealand relating to th

mail service of the colony. This contract the government of the colony refused to recognise, on the ground that it was beyond the authority of the postmaster-general. Meantime the company issued a prospectus, giving notice that they were prepared to receive applications for new shares "in order to enable the company to perform the contract recently entered into with the general government of New Zealand for a monthly mail service between Sydney, New Zealand, and Panama." A party, after seeing this prospectus, applied for and obtained an allotment of shares:—Held, that he was not entitled, upon finding that the mail service contract was repudiated by the colonial government, to recover back the price of his shares, as, although the prospectus contained an implied statement that the contract was binding upon the colonial government, yet the misrepresentation was not fraudulent, and was not such as to show that there was a complete difference in substance between the shares which were bargained for and those which were obtained, so as to constitute an entire failure of consideration. *Kennedy* v. *Panama, New Zealand, and Australian Royal Mail Co.*, 8 B. & S. 571; 36 L. J., Q. B. 260; L. R. 2 Q. B. 580; 17 L. T. 62; 15 W. R. 1039.

Recovery of Deposits on Shares.]—In an action by an allottee of shares in a railway company for the recovery of his deposit, it appeared that the company issued a prospectus, which stated the capital to consist of 60,000 shares, of 25*l.* each, and the plaintiff, after having paid his deposit, executed the subscribers' agreement, which contained the usual terms as to the disposition of the deposits. At the time when he executed the deed the deposits upon 18,160 shares only had been paid, although 35,000 shares had been allotted, which fact was not communicated to him:—Held, that the withholding of this fact did not amount to such a fraud as to avoid the deed, and that the plaintiff was not entitled to recover back his deposit. *Vane* v. *Cobbold*, 1 Ex. 798.

To get Company's Shares quoted.]—A telegraph company invited applications for shares, received some in the ordinary way and allotted some, on which deposits were paid. The number allotted was, however, insufficient to procure a settling-day on the Stock Exchange, and some of the directors of the company, S., the promoter, and C., the manager of the bank, agreed, in order that the bank might certify to the committee of the Stock Exchange the requisite amount of shares to have been subscribed, that an account should be opened in S.'s name with the bank, and another account in the name of the company; that the company should guarantee to the bank the repayment of any money drawn by S., and charge with such repayment any balance in their favour; that the bank should have a bonus of 600*l.*, and C. of 1,000*l.*; that S. should get persons to apply for shares which should be duly allotted, and should draw on his account for, and pay into the company's account the requisite deposits, taking blank transfers from the pretended allottees. This plan was carried out. Accounts were opened, that in the name of the company with 1,500*l.* really paid in; that in S.'s name with a loan of 1,500*l.* from the bank. Sham applicants were obtained by S., and shares allotted to them. S. thereupon drew on his account, and with the proceeds paid the requisite deposits into the account of the company. The pretended allottees, immediately after the shares were allotted, handed blank transfers to S. Finally the account with the bank stood with a credit of 24,505*l.* 18*s.* 6*d.*, made up of the 1,500*l.* really paid in and the pretended deposits. S.'s account stood with a debit of 24,506*l.* 8*s.* 4*d.*, made up of the sums he had drawn and the 1,500*l.* loan. No settling-day was ever granted; and the company afterwards went into liquidation under a winding-up order. In an action by the company to recover the whole amount of their credit, the bank paid their bonus of 600*l.* into court, and denied liability as to the residue:—Held, that the company was entitled to the 1,500*l.* actually paid by them to the bank, but to no more; and that judgment must therefore be given for them for 900*l.* *British and American Telegraph Co.* v. *Albion Bank*, 41 L. J., Ex. 67; L. R. 7 Ex. 119; 26 L. T. 257; 20 W. R. 413.

Dealings between Principal to a Contract and Agent of other Principal.]—A telegraph works company agreed with a telegraph cable company to lay a cable, the cable to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable company's engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the works company when they received the instalments from the cable company:—Held, that, under the circumstances, the agreement between the engineer and the works company was a fraud, which entitled the cable company to have their contract rescinded, and to receive back the money which they had paid under that contract. *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.*, 45 L. J., Ch. 121; L. R. 10 Ch. 515; 32 L. T. 517; 23 W. R. 583.

Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the first-named principal to have the contract rescinded, and to refuse to proceed with it in any shape.—Per James, L.J. *Ib.*

As the works company had by their fraudulent conduct prevented the cable company from having the full benefit of the contract, the cable company was entitled to have the contract rescinded.—Per Mellish, L.J. *Ib.*

And see *Smith* v. *Sorby*, 3 Q. B. D. 552, n.

Sale of Fittings of Public-house—Misrepresentation of Business.]—A contract for the sale of fixtures and fittings of a public-house is avoided by a false representation by the vendor as to the amount of business attached to the house, though the agreement expressly excludes goodwill. *Hutchinson* v. *Morley*, 7 Scott, 341; 2 Arn. 2; 3 Jur. 288. And see *Redgrave* v. *Hurd*; 51 L. J., Ch. 113; 20 Ch. D. 1; 45 L. T. 485; 30 W. R. 251—C. A.

Bond—Lapse of Time.]—Action to set aside bond for misrepresentation, undue influence, and want of consideration:—Held, no undue influence or misrepresentation or want of consideration;

and, plaintiff having delayed for over five years before disputing liability, no relief in court of equity. *Richards* v. *Witham*, 66 L. T. 695—C. A.

Effect of Time-tables.]—The tickets issued by a railway company were expressed to be "issued subject to the company's regulations and to the conditions in the time-tables." In these conditions it was stated that every attention would be paid to ensure punctuality, but that the company would not be responsible for loss or injury arising from unpunctuality, nor in cases where they had granted tickets to places off their own line for the arrival of their own trains in time for the nominally corresponding train of any other company. The plaintiff took a through ticket from a station on the company's line to a station on the line of another company, and travelled by a train by which, according to the company's time-tables, he should have reached his destination at 7.30 p.m. This train was twenty-seven minutes late at the last station on their line, and the plaintiff consequently failed to catch the corresponding train at that place, and, having proceeded a further stage by a later train which stopped short of the place to which he had booked, he completed his journey in a special train, and arrived at his destination between 8.30 and 9 p.m. He had no business or engagement to necessitate his punctual arrival, and had he waited for the next ordinary train he would have arrived at 10 p.m. The Common Pleas Division held that he was entitled to recover the cost of the special train from the company. On appeal by the company:—Held, that the company had contracted to pay every attention to insure punctuality, and that there had been a breach of such contract, but that the taking of a special train was under the circumstances an unreasonable proceeding, and that he was not entitled to the cost of so doing. *Le Blanche* v. *L. & N. W. Ry.*, 45 L. J., C. P. 521; 1 C. P. D. 286; 34 L. T. 667; 24 W. R. 808—C. A.

The Great Northern Railway Company, whose line communicated with the line of the North-Eastern Railway Company at Milford, had arrangements by which their trains starting from Peterborough at 7 p.m., and going to Milford, there met a train of the North-Eastern Railway Company running from Milford to Hull, by which passengers from Peterborough to Hull were forwarded. The Great Northern Company published monthly time-tables, in which they stated, in the usual way, that the 7 p.m. train from Peterborough carried to Hull. At the end of a month, after the Great Northern time-tables for the ensuing month were prepared in this form and printed, but before they were published, the North-Eastern Company discontinued the train from Milford to Hull. The Great Northern made no alteration in their time-tables already printed, but published and circulated them after they knew that there was no such train. The plaintiff having seen one of the time-tables, made arrangements, on the faith of it, to go from Peterborough to Hull by the 7 p.m. train; he came to Peterborough in time, went to the station, and then, for the first time, learned that he could go no further than Milford by that train. He was delayed in his journey and sustained damage, for which he sued the Great Northern Company:—Held, that he was entitled to recover, on the ground that the circulation of the time-tables amounted to a representation on the part of the Great Northern Railway Company that there was a train, which was false to their knowledge, and calculated to induce the plaintiff to act as he did. *Denton* v. *G. N. Ry.*, 5 El. & Bl. 860; 25 L. J., Q. B. 129; 2 Jur. (N.S.) 185; 4 W. R. 240.

3. Misrepresentations as to Credit.

What is a Representation—Within 9 Geo. 4, c. 14.]—A representation made by a party as to the credit of a firm, of which he is a member, is a representation as to the credit of "another person," within the statute. *Devaux* v. *Steinkeller*, 8 Scott, 202; 6 Bing. (N.C.) 84; 8 D. P. C. 33; 9 L. J., C. P. 30; 3 Jur. 1053.

A representation by the defendant that money might be safely lent to A., because the title-deeds to an estate, which belonged to A., were in the defendant's possession, and that nothing could be done without his knowledge, and that the plaintiff would be safe in making the loan, is a representation as to the ability of A. within the statute. *Swan* v. *Phillips*, 3 N. & P. 447; 8 A. & E. 457; 1 W. W. & H. 374; 7 L. J., Q. B. 200; 2 Jur. 494.

The "certification" of a transfer of shares given by a secretary on behalf of his company is not a representation as to credit or ability within s. 6 of Lord Tenterden's Act. *Bishop* v. *Balkis Consolidated Co.*, 59 L. J., Q. B. 565; 25 Q. B. D. 512; 63 L. T. 601; 39 W. R. 99; 2 Meg. 292—C. A.

When Action Lies.]—In an action for giving a false character to a tradesman, whereby he was induced to trust an insolvent person, fraud is necessary to support the action. *Tapp* v. *Lee*, 3 Bos. & P. 367.

If A. fraudulently represents the circumstances of B. to be good, in order to induce C. to give him credit, and adds, "if he does not pay for the goods, I will"; an action may be maintained against A. for the misrepresentation, notwithstanding the addition of the promise. *Hamar* v. *Alexander*, 2 Bos. & P. (N.R.) 241.

If a person employs an agent to take orders, and a representation is made to him of the solvency of a person, whom he advises his employers to trust for goods, if he at the time knew that such person was not solvent, though he did not communicate it to his employers, they cannot maintain an action against the person who made such false representation. *Cowen* v. *Simpson*, 1 Esp. 290.

If A. inquires generally of B. concerning the circumstances of C., A. cannot maintain an action against B. for a deceitful representation upon this subject if C. pays A. for the goods which it was in contemplation to sell when the representation was made, although C. becomes insolvent, and is indebted to A. for other goods subsequently sold. *De Graves* v. *Smith*, 2 Camp. 533.

To an inquiry concerning the credit of another who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from his own knowledge, and not from hearsay, will not sustain an action for damages, on account of a loss sustained by the default of the party, who turned out to be a person of no credit, if it appears that such representation was made by the defendant bonâ fide, and with a belief of the truth of it; for the foundation of the action

is fraud and deceit in the defendant, and damage to the plaintiff by means thereof. And taking the assertion of knowledge secundum subjectam materiam, viz. the credit of another, it meant no other than a strong belief, founded on what appeared to the defendant to be reasonable and certain grounds. *Haycroft* v. *Creasy*, 2 East, 92; 6 R. R. 380.

—— **For Goods Sold or for Deceit.**]—A man by false representation induces another to supply goods on the credit of a third person, and enters into a collateral undertaking, not in writing, to pay for them; he is not liable for goods sold, but must be sued in an action of deceit. *Thompson* v. *Bond*, 1 Camp. 4.

—— **9 Geo. 4, c. 14.**]—Section 6 of Lord Tenterden's Act—which provides that no action shall be brought whereby to charge any person upon a representation concerning the credit of any other person, to the intent that such other person may obtain credit, money, or goods, unless such assurance be in writing, signed by the party to be charged—applies to a case where the representation is made, in order that the party to be charged may obtain a benefit from the credit, money, or goods being obtained by such other person. *Pearson* v. *Seligman*, 48 L. T. 842; 31 W. R. 730—C. A.

An action cannot be maintained against a trustee for a false representation by parol of the incumbrances effected on the trust fund by the cestui que trust, such a representation being within the statute. Per Lord Abinger, C. B., and Gurney, B., diss. Parke, B., and Alderson, B. *Lyde* v. *Barnard*, 1 Gale, 388; 1 M. & W. 101; 1 Tyr. & G. 250; 5 L. J., Ex. 117.

Where a false and fraudulent representation has been made in writing concerning the character or credit of a third person, to the intent and purpose that such third person may obtain credit, and he does obtain credit, an action will lie against the person making the misrepresentation, at the suit of the person injured by giving the credit, though there may have been other circumstances which concurred in inducing such credit, if the representation substantially and mainly conduced to the obtaining of the credit. *Wade* v. *Tatton*, 18 C. B. 371; 25 L. J., C. P. 240; 2 Jur. (N.S.) 491; 4 W. R. 548—Ex. Ch.

—— **Misrepresentation must be in Writing.**]—Where credit was given upon the representation of a third person, and the representation was fraudulent, no action would lie unless the representation was in writing. *Haslock* v. *Fergusson*, 2 N. & P. 269; 7 A. & E. 86; 6 L. J., K. B. 247; 1 Jur. 689.

—— **Signature by Agent.**]—The signature of an authorised agent is not sufficient whereon to charge a party making a false representation. *Williams* v. *Mason*, 28 L. T. 232; 21 W. R. 386. S. P., *Swift* v. *Jewesbury*, 43 L. J., Q. B. 56; L. R. 9 Q. B. 301; 30 L. T. 31; 22 W. R. 319—Ex. Ch.

Mercantile Law Amendment Act (Scotland), 1856.]—Section 6 of the Mercantile Law Amendment Act (Scotland), 1856, by which "all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted" for the purpose therein stated, must be in writing, makes any verbal representations to which it applies absolutely inefficacious, no matter what may be the further and fraudulent design of the person who made them. *Clydesdale Bank* v. *Paton*, 65 L. J., P. C. 73; [1896] A. C. 381; 74 L. T. 738—H. L. (Sc.).

But if a person induces another to accept bills on behalf of a third person, not for the purpose of obtaining further credit from that person, but in order to obtain payment of a debt due to himself, the case is outside the statute; and, to sustain an action for the amount of such bills, such purpose must be shown to have been carried into effect. *Ib.*

By Lord Herschell: Section 100 of the Bills of Exchange Act, 1882, has not repealed pro tanto the Mercantile Law Amendment Act wherever obligations or bills of exchange have been obtained by representations as to conduct, credit, or character. *Ib.*

The pursuers (respondents) alleged that the agent of the defenders (appellants), who were a bank, gave them a verbal assurance that no portion of the proceeds of any acceptances by the pursuers would be applied towards extinction of a debt due by the drawers to the bank, and that, acting on such assurance, the pursuers accepted bills which were applied to the credit of the drawers' banking account. But it was not proved that the bank closed the drawers' account or failed to allow the drawers the free use of the proceeds of the acceptances:—Held, that the respondents were not entitled to recover the amount of the acceptances. *Ib.*

When Action Lies—Lapse of Time—Amount of Liability.]—If A. makes an inquiry of B. as to the circumstances of C. with respect to opening an account with him as a general customer, and B. fraudulently misrepresents them, in consequence of which A. sells C. goods from time to time, and is afterwards a loser by him, an action lies for the deceit, although the buyer pays for the first parcel of goods, on the purchase of which the reference is made; but the defendant is liable only within a reasonable time, and to a reasonable amount. *Hutchinson* v. *Bell*, 1 Taunt. 658.

Amount of Liability.]—A tradesman can only recover, against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable to the false representation. Therefore, if the tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it. *Corbett* v. *Brown*, 8 Bing. 35; 1 M. & Sc. 85; 5 Car. & P. 363; 1 M. & Rob. 108; 1 L. J., C. P. 13.

Evidence.]—In an action for falsely representing the character of another, by reason of which false representation he obtained credit of the plaintiff, it is necessary to prove against the defendant both fraud and falsehood, viz., that the representation which he made was false, and that the defendant knew it to be false at the time he made it: falsehood without fraud is not sufficient. *Ashlin* v. *White*, Holt, N. P. 387.

—— **Foundation of Action.**]—Where a defen-

dant recommended an agent to the plaintiff with a knowledge that his representation of the character of the agent was false:—Held, in an action to recover damages arising from the misconduct of the agent, that it was not necessary for the plaintiff to prove a malicious or an interested motive by the defendant for the misrepresentation; if what the defendant said was false within his own knowledge, and occasioned an injury to the plaintiff, it is a sufficient ground of action. *Foster* v. *Charles*, 4 M. & P. 61, 741; 6 Bing. 396; 7 *id.* 105; 8 L. J. (o.s.) C. P. 118; 31 R. R. 446.

Remedy in Damages—Evidence.]—Effect of wilful misrepresentation as to credit, giving a remedy by way of damages on ground of fraud. In bankruptcy where evidence of party is received, it must be in all particulars consistent, clear, and unambiguous. *Carr*, *Ex parte*, 3 V. & B. 108; 13 R. R. 158.

—— **Liability in Damages.**]—A., who was about to grant a lease to B., wrote to C., who was named by B. as a referee: "B. is desirous of leasing premises from us of about the annual value of 400*l.*, and we will be glad if you will say if you know him to be in a good and responsible position to meet the responsibility of such an undertaking, and if you can recommend him as a safe and advisable tenant." C. answered: "I have much pleasure in replying affirmatively." On this B. was accepted as tenant, but afterwards deserted the premises without paying any rent. C., when he answered the reference, was well acquainted with the antecedents of B., and knew him to be a person of no substantial means, who had twice previously failed in business similar to that which he intended to carry on on the premises in question. C., however, had no positive intention to deceive:—Held, that C. was answerable to A. in damages for misrepresentation. *Leddell* v. *McDougal*, 29 W. R. 403—C. A.

4. On Other Transactions.

Generally.]—If a person be fraudulently prevented from doing any act, it will in equity be considered as if that act had been done. *Middleton* v. *Middleton*, 1 J. & W. 94; 20 R. R. 233.

Deed.]—If a party executes a deed, under a false representation as to its effects, or contents, it is avoided by fraud. *Consols Insurance Association* v. *Newall*, 3 F. & F. 130.

If an ignorant person is induced to execute an instrument, supposing it to operate in one way, and it really operates in another, such instrument is invalid. *Doe* d. *Lloyd* v. *Bennett*, 8 Car. & P. 124.

On the 18th January, 1883, A., a solicitor, obtained from his sisters, B. and C., their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of 400*l.* and payment to them of 300*l.*, they conveyed their shares of freehold property, which was subject to a mortgage to K., to A. in fee. No money was at the time due from B. and C. to A., nor was any payment whatever made to them. The deeds were not read over or explained to B. and C., who had no idea that they were thereby conveying their property, and signed in full reliance on A.'s statement that he was going to clear off the mortgage and wanted to send the deeds to K. On the next day A. deposited the deeds with a bank as security for an advance. A. having absconded, the property was claimed by the bank as equitable mortgagees, and the claim was resisted by B. and C. on the ground that the conveyances, having been obtained by fraud and misrepresentation, were void as against them:—Held, that, inasmuch as B. and C., though they may not have understood the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of the 18th of January, 1883, were not void but voidable only. *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597—C. A.

A. procured B. to execute to him an assignment of a lease, by means of a false and fraudulent representation that he, A., was executor and devisee of C., and in that capacity a creditor of B.; B. was, in fact, indebted to C. for part of the alleged consideration-moneys:—Held, that A. might maintain ejectment; the fraudulent representations not being sufficient (at law) to avoid the deed, and a court of law being incompetent to do perfect justice between the parties. *Austin* v. *Taite*, 8 Ir. C. L. R. 35—Ex. Ch.

Claim, stating that the defendants were carriers of passengers by railway, and the plaintiff was received by them as a passenger in an express train, which, by their negligence came into collision with an engine, and he was injured. Defence, that after the collision the plaintiff accepted money from the officer of the company in satisfaction of his cause of action, and executed a release. Reply, that the officer procured the plaintiff to execute the release by fraudulently representing to him for that purpose that his injuries were of a trivial and temporary nature, and, that if they should afterwards turn out to be more serious than he then anticipated, he would still, though he had executed the deed, be in a position to obtain further compensation from the company, and that the plaintiff was thereby induced to execute the deed, and that after he had executed it his injuries turned out to be of a more serious nature than he had anticipated:—Held, that the reply was good, as it contained a separate and independent statement that the plaintiff was induced to execute the deed in consequence of a fraudulent representation that his injuries were of a trivial and temporary character. *Hirschfield* v. *L. B. & S. C. Ry.*, 46 L. J., Q. B. 94; 2 Q. B. D. 1; 35 L. T. 473.

Semble, that a fraudulent representation as to the effect of a deed may be relied upon as a defence to an action upon the deed. *Ib.*

—— **Fraud of Solicitor.**]—Where A., a solicitor, induced B. to execute a mortgage of her estate to C., under the representation that it was necessary to raise money to pay off an old mortgage of her sister's on their common estate, and that the thing was a mere renewal, and would not cause her to incur liability:—Held, that the deed was void. *Lee* v. *Angas*, 15 W. R. 119.

—— **Release of Equity of Redemption, obtained by Misrepresentations of Mortgagor and Solicitor, set Aside.**]—A release of the equity of redemption was set aside at the instance of the mortgagee, he having been induced

to accept it, and in consideration thereof to covenant for the payment of a perpetual annuity to the mortgagor, and to give the mortgagor a perpetual right of redemption, by means of misrepresentations by the mortgagor and his solicitor (who was also the solicitor for the mortgagee) as to the title of the mortgagor, the value of the premises, and the nature of the contract he was entering into. *Roddy* v. *Williams*, 3 Jo. & Lat. 1.

—— **Remainder in Settlement set Aside.**]—A remainder in a marriage settlement fraudulently inserted by party drawing settlement for his own benefit, set aside. *Morris* v. *Nixon*, 1 Str. 144.

—— **Setting Aside Rent-charge.**]—Grant of a rent-charge in fee, after A. dying without issue male, set aside for fraud. *Ardglasse* v. *Muschamp*, 1 Vern. 237; 2 Ch. Rep. 266.

Revocation of Will.]—A deed obtained by fraud is not a revocation of a prior will. *Howes* v. *Wyatt*, 3 Bro. C. C. 156. And see 2 Cox, 263.

Disinheriting Heir.]—Though a person has an intention to disinherit his heir, yet, if it was owing to fraud, this will fetch the estate back and revest it in the heir. *Bennet* v. *Vade*, 2 Atk. 324; 9 Mod. 312.

Fraudulent Assignment—Effect as between Party and Stranger.]—An assignment of goods in fraud of creditors is valid as between either party and a stranger. *Bessey* v. *Windham*, 6 Q. B. 166; 14 L. J., Q. B. 7.

Invoking own Fraud.]—No man can be allowed to allege his own fraud to avoid his own deed. *Watts* v. *Brookes*, 3 Ves. 613.

Grant of Property acquired by Fraud—Intention to Defeat Claim.]—It is no objection to a conveyance that the grantor acquired the property by fraud, and that the grant tends (and was designed, as the adverse party alleges) to defeat the equitable right of third persons to relief against such fraud. *Murley* v. *Sherren*, 8 A. & E. 754; 1 P. & D. 126; 8 L. J., Q. B. 152.

Stockbroker—Fraudulently Obtaining Cancellation of Transfer.]—A broker employed by the plaintiff to purchase shares, which the plaintiff paid for, procured the instrument of transfer to the plaintiff, and the plaintiff's signature thereto, and received from the plaintiff the certificates and transfer for the purpose of registration. Soon afterwards he fraudulently procured the plaintiff to cancel his signature to the transfer, and by means of the cancelled transfer and the certificates, induced the vendor to execute a fresh transfer to himself, and thereupon procured the shares to be registered in his own name, and then mortgaged them:—Held, that the effect of the first transfer was not destroyed by the cancellation fraudulently procured, and the registration in the name of the broker, and the transfer to his mortgagee, were decreed to be set aside. *Donaldson* v. *Gillot*, L. R. 3 Eq. 274; 12 Jur. (N.S.) 959; 15 L. T. 382; 15 W. R. 166.

When Interest of Third Parties has Intervened.]—B., for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, placed money to their credit, which they were to hold in trust for him. Some of the money having been drawn out with B.'s consent, and the company having been ordered to be wound up while a balance remained:—Held, that B. could not claim to have the balance paid to him. *Great Berlin Steamboat Co., In re*, 54 L. J., Ch. 68; 26 Ch. D. 616; 51 L. T. 445—C. A.

Sale of Goods.]—An action lies for the value of goods which the defendant had by fraud procured the plaintiff to sell to an insolvent, and which the defendant had gotten into his own possession; for he could not set up the sale, because his own fraud had procured it, and the mere possession, unaccounted for, raises an assumpsit to pay. *Hill* v. *Perrott*, 3 Taunt. 274.

Where goods were supplied to a minor upon a fraudulent representation by his father that he was about to relinquish his business in favour of his son:—Held, that the father was responsible for goods sold and delivered. *Biddle* v. *Levy*, 1 Stark. 20.

IV. PRACTICE.

1. GENERALLY.

Pleading.]—Equity will not allow unfair demands to be set up against just and fair ones. *Walker* v. *Gascoigne*, 13 Vin. 544, pl. 13.

Pending Suit for Relief.]—Held, that, pending a suit to set aside agreements, defendants were bound to give plaintiff the benefit of those terms in agreement, which were for his advantage. *Rowe* v. *Wood*, 2 J. & W. 559; 22 R. R. 208.

Innocent Persons.]—If one of two innocent persons is to suffer by the fraud of a third, the person who employs the fraudulent agent must suffer rather than the other. *Nixon* v. *Hamilton*, 1 Ir. Eq. R. 57.

Relief against fraud intended against one person takes effect upon another; and the same principle prevails in trespass and criminal cases. *Clifford* v. *Brooke*, 13 Ves. 132.

Particeps Criminis.]—A party to a fraud cannot file a bill against his accomplice to prevent him from taking more of the spoil than his share, for the court will not interfere to enforce honour among thieves. *Hamilton* v. *Ball*, 2 Ir. Eq. R. 191.

Where Part Performance.]—If an agreement is in part performed by one of the parties, it is too late for the other to complain of fraud, surprise, &c., or attempt to set the agreement aside on that account; for a court of equity will decree a specific performance of the remaining part of it. *Anglesey* (*Earl*) v. *Annesley*, 1 Bro. P. C. 289.

Presumption of Fraud—Lapse of Time—Principles of Exercise of Jurisdiction.]—After a long lapse of time since the transaction complained of, there having been parties in esse competent to impeach them, fraud is not to be assumed on doubtful evidence; but, if it be

clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a court of equity, and in that case it is immaterial by what machinery or contrivance the fraudulent transactions may have been effected, whether by a decree in equity, or judgment at law or otherwise. But, in proportion as such jurisdiction is powerful, so ought the caution of the court to be anxiously exercised, lest, in its zeal to do equity, the reverse may be effected. *Bowen* v. *Evans*, 2 H. L. Cas. 257. Affirming 1 Jo. & Lat. 178; 6 Ir. Eq. R. 569.

2. Jurisdiction.

Generally.]—It is the peculiar province of courts of equity to give relief in all cases of fraud, or of contracts in which any advantage is unduly taken by either of the parties of the distress or necessities of the other. *Kenrick* v. *Hudson*, 2 Bro. P. C. 222.

—— **Practice at Law and in Equity.**]—Distinction between misrepresentations giving a legal, and those giving an equitable, remedy. *Whitmore* v. *Makeson*, 16 Beav. 126.

To set aside bargains at law, fraud must be proved; equity relieves against presumptive fraud. *Chesterfield (Earl)* v. *Janssen*, 1 Atk. 352; 2 Ves. 125.

Distinction between legal and equitable jurisdiction upon fraud, which at law must be proved, not presumed; and the equitable jurisdiction may be exercised upon an instrument unduly obtained, where a court of law could not enter into the question. *Fullagar* v. *Clark*, 18 Ves. 483.

All deceitful practices and artful devices, contrary to the plain rules of common honesty, are frauds at common law, and punishable there; but for some frauds or deceits there is no remedy at law, in which cases they are cognisable in equity, as one of the chief branches of its original jurisdiction. *Farmer* v. *Smith*, Toth. 101. *White* v. *Small*, 2 Ch. Ca. 103. *Jones* v. *Crawley*, Rep. t. Finch, 161.

—— **Concurrent Jurisdiction.**] — Courts of equity have a concurrent jurisdiction with courts of law in cases of fraud, and, therefore, a demurrer for want of equity will not lie to a bill praying relief against a fraudulent policy of insurance. *Sowerby* v. *Warder*, 2 Cox, 268.

Court of chancery has concurrent jurisdiction with courts of law in cases of fraud, but there are courses of conduct which chancery construes as fraudulent but which courts of law would not notice. *Clarke* v. *Manning*, 7 Beav. 162.

R. filed a bill in equity against B. to recover money advanced. Upon demurrer by B. stating the facts, and alleging all the representations to be false:—Held, that the allegation of fraud gave jurisdiction to a court of equity notwithstanding the concurrent jurisdiction at law. *Ramshire* v. *Bolton*, 38 L. J., Ch. 594; L. R. 8 Eq. 294; 21 L. T. 51; 17 W. R. 986.

Relief at Law, no Bar.]—It is no objection to a party's applying to equity for relief in a case of fraud, that he may also have relief at law. *Blackwood* v. *Gregg*, 1 Hay. & J. 310.

—— **Receipt obtained by Fraud.**] — To an action for compensation for injuries from a railway accident, the company pleaded a receipt in full; the plaintiff then filed a bill alleging the receipt to have been obtained by fraud, and praying that the company might be restrained from setting it up, but for no further relief:—Held, on demurrer, that although the plaintiff might have met the plea by equitable replication, he was entitled to come to equity for the relief needed for the purposes of his action, and that he had rightly limited the prayer of his bill to such relief. *Stewart* v. *G. W. Ry.*, 2 De G. J. & S. 319; 11 Jur. (N.S.) 627; 13 L. T. 79; 13 W. R. 907.

—— **Attempt to Defeat Plaintiff's Claim.**]—In a suit arising out of a contract between the plaintiff and the defendant, it appeared that, if the contract had been correctly acted on, the plaintiff would have had a legal right against the defendant, but that he was deprived of this right by the acts of the defendant and his agents:—Held, under the circumstances, and on demurrer to a bill filed for discovery and for relief according to the terms of the contract, that for the defendant to use these acts as a means of defeating the plaintiff's remedy was a fraud which the court would interfere to prevent; and, also, that it was no answer to the plaintiff's claim to say that the conduct of the defendant rendered him subject to an action for damages by the plaintiff. *M'Intosh* v. *G. W. Ry.*, 2 Mac. & G. 74; 2 Hall & Tw. 250; 19 L. J., Ch. 374; 14 Jur. 819. Affirming 2 De G. & Sm. 748. And see *Steward* v. *East India Co.*, 3 De G. & Sm. 770, n.

—— **Money Paid.**]—The court will grant relief on a bill filed to recover money paid on the faith of fraudulent representations, and it is no objection to such bill that the plaintiff has his remedy at law. *Hill* v. *Lane*, 40 L. J., Ch. 41; L. R. 11 Eq. 215; 23 L. T. 547; 19 W. R. 194.

Money Advanced.]—Where on representations which a man knows to be false another is induced to advance money, or do some other act, that is a fraud which will be taken cognisance of as within the jurisdiction of a court of equity. *Ramshire* v. *Bolton*, 38 L. J., Ch. 594; L. R. 8 Eq. 294; 21 L. T. 51; 17 W. R. 986.

Representation of Intention to Abandon a Legal Right.] — Where a person possesses a legal right, a court of equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will equity interfere even though the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into irrevocable enjoyments. To raise an equity in such a case there must be a misrepresentation of existing facts, and not of mere intention. *Jorden* v. *Money*, 5 H. L. Cas. 185; 23 L. J., Ch. 865.

It is immaterial whether there is a misrepresentation of a fact as it actually existed, or a misrepresentation of an intention to do or abstain from doing an act, which would lead to the damage of the party whom you thereby induced to deal, in marriage, or in purchase, or in anything of that sort, on the faith of that representation. Semble. Per Lord St. Leonards. *Ib.*

To give Effect to an Equity.]—When a defendant in an action in one of the divisions of

the high court of justice other than the chancery division relies on an equity to have a deed set aside as part of his defence, the division in which the action is may give effect to the equity so far as is incidental to the purposes of the defence. *Mostyn* v. *West Mostyn Coal and Iron Co.*, 45 L. J., C. P. 401 ; 1 C. P. D. 145; 34 L. T. 325; 24 W. R. 401.

To Deal with Disputed Facts.]—A bill having been filed for the cancellation of two agreements entered into between the plaintiff and defendant, as having been obtained by the misrepresentation of the latter, a motion was made to restrain an action which had been commenced by the defendant upon the first agreement, shortly before filing the bill :—Held, that, although the court of chancery had complete jurisdiction in such a case, yet a court of law was the more proper tribunal for dealing with disputed facts respecting the circumstances under which the agreements were entered into ; and the motion was accordingly refused with costs. *Clark* v. *Chapple*, 29 L. T. 204.

Deed.]—The court will not refuse relief to an injured party to a deed on the ground that he has executed it with an illegal purpose, if that purpose has not taken effect. *Symes* v. *Hughes*, 39 L. J., Ch. 304 ; L. R. 9 Eq. 475 ; 22 L. T. 462.

It is no ground for a court of equity to set aside a deed that a person put an unguarded confidence in another. *Langley* v. *Brown*, 2 Atk. 202.

Mistakes and misapprehensions in the drawers of deeds are as much a head of relief as fraud and imposition. *Ib.*

Will.]—Settled, ever since the case of *Powis* v. *Andrews*, that a will cannot be set aside for fraud here, because, where it is a will of personal estate, it may be done in the ecclesiastical court, and if of real estate, at law. *Bennet* v. *Vade*, 2 Atk. 324 ; 9 Mod. 312.

Deed and Will.]—Diversity betwixt a deed and a will gained from a weak man, and upon a misrepresentation ; equity will set aside the first, but not the latter. *James* v. *Greaves*, 2 P. Wms. 270.

Fraud in Deeds.]—Equity can determine as to fraud in deeds without issue at law. *White* v. *Hussey*, Pre. Ch. 14.

Agreements.]—Agreements, and solemn conveyances in consequence of them, are not to be set aside on slight grounds, where the contracting parties have not been deceived or misled by any concealment or misrepresentation on the part of the persons with whom they contracted. *Butler* v. *Butler*, 1 Bro. P. C. 383.

Contract.]—The plaintiffs, through the introduction of R., entered into a contract with B. de M. for the supply of goods. During the negotiations for a second contract, R. falsely represented that B. de M. would not complete it without the advance of an extra sum by the plaintiffs, on which R. was also to have a commission. The plaintiffs accordingly paid R. a sum of money in part discharge of what was due for such commission, and gave him a letter undertaking to pay the rest. They subsequently discovered the fraudulent representations, and on R. bringing an action on the letter of undertaking against the plaintiffs, they filed a bill to restrain the action and to make him deliver up the letter of undertaking :—Held, that the fraud could be pleaded in the action, and that a court of law was the proper tribunal, and that there was no equity to compel R. to give up the letter of undertaking. *Fennelly* v. *Ranscelot*, 19 W. R. 966.

Policy of Assurance.]—A bill will lie to have a policy of assurance upon life delivered up to be cancelled on the ground of fraud ; and the more proper time to institute such a suit is during the lifetime of the party whose life is insured. *Fenn* v. *Craig*, 3 Y. & C. 216 ; 3 Jur. 22.

Grant of Annuity.]—Where the grantee of an annuity is induced by false representations, or improper concealment of facts, on the part of the grantor, or his agent, to become the purchaser of an annuity, although he may have relief at law, a court of equity has concurrent jurisdiction. *Adamson* v. *Evitt*, 2 Russ & M. 66 ; 9 L. J. (o.s.) Ch. 1.

Letters Patent.]—Bill in equity lies to set aside letters patent obtained by fraud. *Att.-Gen.* v. *Vernon*, 1 Vern. 227, 370 ; 2 Ch. Rep. 353.

Unfair Possession of Bond.]—Where A. purchases a rent-charge of B. for a certain sum of money, and gives his bond for part of the purchase-money, and afterwards unfairly gets the bonds into his own possession, a court of equity will oblige him to pay the principal and interest thereby secured. *Kenrick* v. *Hudson*, 4 Bro. P. C. 222.

Cutting Timber Contrary to Bond.]—A. agreed with B. for the purchase of timber, and, together with C., entered into a bond, that A., his executors and administrators, should not cut any timber under a particular size ; but A.'s name was only made use of in this agreement for C. C. cuts down timber under the size stipulated ; but, as there could be no remedy against C. upon the bond, it was held to be a fraud upon B., the seller, and therefore relievable in equity. *Butler* v. *Prendergast*, 4 Bro. P. C. 174.

Extending Lands.]—If extender of lands extended undervalue lands by fraud, equity will give relief. *Duplege's case*, Cary, 5.

Fine by Releasee to Uses.]—By an antenuptial settlement, lands of the wife were released to the use of the releasees to uses and their heirs during the joint lives of the husband and wife and the life of the survivor, on certain trusts, with a limitation to the use of the wife in fee, in the event (which happened) of there being no issue of the marriage. After the death of the husband, who survived the wife, the surviving releasee to uses, with a tenant in possession of the land under a lease from the husband, made a feoffment and levied a fine to the use of himself in fee :—Held, that a court of equity might entertain a suit instituted by the heir-at-law of the wife against the releasee to uses to recover possession of the land and title-deeds. Semble, that the surviving releasee to uses, after the determination of his own legal estate, had no rightful title to the custody of the title-deeds,

and could not be considered as holding them as a trustee for the reversioner; but, semble, that the fine was fraudulent, and that, whether void at law on that ground or not, the question of its validity ought not of necessity to be left to the decision of a court of law. *Reece* v. *Trye*, 1 De G. & Sm. 273.

Intended Marriage, not Taking Place.]—Where a man, in consideration of an intended marriage which never took effect, and of a debt stated to be owing by him to the intended wife, conveys to her, and there is no proof of actual fraud nor of actual mistake, though some of the deeds in the transaction are absurdly framed, it was held that there was no ground to relieve, either under the head of fraud or mistake, nor any pretence to set aside the deeds. *Langley* v. *Brown*, 2 Atk. 195.

Misrepresentation of Solicitor on Mortgage.]—The plaintiffs lent A. B. money on mortgage, on the application of his solicitor, who assured them, in writing, that in his opinion he would be able to pay the amount. The plaintiffs, alleging this to be a false and fraudulent misrepresentation, instituted a suit in equity to make the solicitor personally liable:—Held, that their remedy, if any, was at law. *Whitmore* v. *Mackeson*, 16 Beav. 126.

Partnership—Sale of Bankrupt Partner's Share.]—An uncertificated bankrupt's creditors had been paid their principal in full, but without interest. He filed a bill against his former solicitor, his two partners, and the assignee of the estate in bankruptcy, to set aside a sale which had been made of a share of his business to his partners as having been made at an undervalue, fraudulently and by means of a conspiracy between all the parties. The sale had been made under the direction of the court of chancery in a partnership suit:—Held, that he had no locus standi in the court of chancery. *Motion* v. *Maojen*, 41 L. J., Ch. 596; L. R. 14 Eq. 202; 20 W. R. 861.

Railway.]—There is no equity to restrain by injunction the owners of a railroad made over the plaintiff's land from using the railroad after it has been completed, or from interrupting the plaintiff's workmen in removing it, and restoring the land to its original state, although the possession of the land for the purpose of constructing the railroad may have been obtained from a tenant of the plaintiff by means of circumvention and fraud. *Deere* v. *Guest*, 1 Myl. & Cr. 516; 6 L. J., Ch. 69.

Foreign Securities.]—A court of equity will not relieve against fraud, where the transaction, in which the fraud was practised, was a contract for the purchase of securities purporting to be granted by a foreign government not recognised by the government of this country. *Thompson* v. *Barclay*, 6 L. J. (o.s.) Ch. 93. Affirmed, 9 *id.* 215.

Foreign Country.]—Semble, a person on whom an injury is fraudulently committed may have a remedy in the courts of any country where the fraud occurs, and even although he be at the time an alien enemy. *Collins* v. *Brown*, 3 K. & J. 423; 3 Jur. (N.S.) 929; 5 W. R. 676.

Indictment.]—For any offence within 13 Eliz. c. 5, s. 3, the offender may be proceeded against by indictment. In such an indictment it is not necessary to set out the specific acts which constitute the fraud. *Reg.* v. *Smith*, 6 Cox, C. C. 31.

Question for Jury.]—Although a deed, which defeats or delays the sheriff on an execution, must defeat and delay an execution creditor, and it may be matter of law whether it would delay or defeat the sheriff, yet, under 13 Eliz. c. 5, it is for the jury on all the facts whether that was the intent with which it was executed. *Henderson* v. *Lloyd*, 3 F. & F. 7.

Relief in Damages.]—Bill not sustained on the ground of fraud or mistake; the relief being in the nature of damages, the subject of an action; and the charges of fraud not being proved, the bill was dismissed with costs. *Clifford* v. *Brooke*, 13 Ves. 131.

3. Action, when lies.

Generally.]—If A. fraudulently makes a representation which is false, and which he knows to be false, to B., meaning that B. shall act upon it, and B., believing it to be true, does act upon it, and thereby suffers a damage, B. may maintain an action on the case against A. for the deceit, there being in such case the conjunction of wrong and loss, entitling the injured and suffering party to a compensation in damages. *Gerhard* v. *Bates*, 2 El. & Bl. 476; 1 C. L. R. 868; 22 L. J., Q. B. 364; 17 Jur. 1097; 1 W. R. 383.

Except in cases where a contract has been entered into, a party is not liable to an action for making a false representation to another, by which damage accrues to that party, unless the representation is made under circumstances which render it morally fraudulent. *Taylor* v. *Ashton*, 11 M. & W. 401; 12 L. J., Ex. 363; 7 Jur. 978.

But if a party makes an untrue representation to another, for a fraudulent purpose, with the intent to induce the latter to do an act which he afterwards does to his prejudice, an action for deceit lies, and it is not necessary to show also that the defendant knew the representation to be untrue, if he communicated it for a deceitful purpose. *Ib.*

The representation must, however, be fraudulently made; and where directors of a banking company published a report representing the flourishing state of the bank, which was calculated to induce parties to purchase shares, such representation being false, but not false within the knowledge of the directors, who published it without any intention to deceive:—Held, that they were not liable for loss sustained by the purchase and retention of the shares, on the faith of the report, though the jury found them guilty of gross negligence in publishing it. *Ib.*

In an action against brewers for fraudulently misrepresenting the value of a public-house business which they had sold:—Held, no case, that they had overstated the amount of the takings, it not being shown that the misstatement was wilful, and they having placed the publican's books before the purchaser. *Collins* v. *Gripper*, 1 F. & F. 332. And see *Redgrave*

v. *Hurd*, 51 L. J., Ch. 113; 20 Ch. D. 1; 45 L. T. 483; 30 W. R. 251—C. A.

—— **Sufficiency of Declaration—Equitable Relief.**]—The defendants, corn merchants in London, received a telegram from their agents at Gibraltar, to the effect that a cargo of rye, shipped for the defendants at Sulina, had arrived at Gibraltar in good condition. The defendants advertised the cargo for sale, and, on the plaintiff's agent negotiating with them for the purchase of it, showed him the telegram. The plaintiff thereupon purchased the cargo, which turned out to be rotten, and was sold by the plaintiff at a loss. The defendants did not know whether or not the cargo had been examined by their agents at Gibraltar; but they knew it was not usual to examine cargoes at a British port of call unless an order was sent to the agent there from the owner; and they had sent no such order in this instance:—Held, that these facts would not support a count in a declaration before the Judicature Acts for false representation, and that the plaintiff was not entitled to any equitable relief, not claimed in the pleadings, as having suffered loss through a false representation innocently made by the defendants. *Schroeder* v. *Mendl*, 37 L. T. 452—C. A.

—— **Sufficiency of Allegation.**]—The plaintiff being desirous to dispose of his interest in certain buildings, trade and stock, in which trade he was engaged with the defendant, pending a treaty between them for the purchase by the defendant, the latter falsely and deceitfully represented to the plaintiff that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, and that those persons would not consent to his giving the plaintiff more for his interest than a certain sum; whereas, in truth, neither A. and B., with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with the defendant that he should make the best terms he could with the plaintiff, and would have given him a larger sum, and, in fact, the defendant charged them with a larger price in account for the purchase of the plaintiff's interest:—Held, that an action did not lie for this false and deceitful representation by the bidder of the seller's probability of getting a better price for his property, for it was either a mere false representation of another's intention, or, at most, a gratis dictum of the bidder upon a matter which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely; but that, at any rate, the count was bad, in not showing that the plaintiff had been damaged by such false representation, inasmuch as it was not alleged that the other intended partners of the defendant would have bid at all without him, or that he would have joined in giving the additional price. *Vernon* v. *Keys*, 12 East, 632. Affirmed, 4 Taunt. 488; 11 R. R. 499—Ex. Ch.

—— **Knowledge of Defendant.**]—No action will lie for a false representation unless the party making it knows it to be untrue and makes it with the intention of inducing the party to act upon it, and the latter does so act upon it and sustains damage in consequence. *Behn* v. *Kemble*, 7 C. B. (N.S.) 260.

A statement, or a representation, false in fact, but not known to be so by the party making it, but, on the contrary, made honestly and in the full belief that it is true, is not actionable. *Collins* v. *Evans*, Dav. & M. 669; 5 Q. B. 805; 13 L. J., Q. B. 180; 8 Jur. 345—Ex. Ch.

An action of deceit does not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making such representation did not know it to be untrue. *Freeman* v. *Baker*, 5 B. & Ad. 797; 2 N. & M. 446; 5 Car. & P. 475; 3 L. J., K. B. 17.

—— **For Damages for Misrepresentation, where neither Breach of Contract nor Fraud.**]—In an action for damages for a misrepresentation with reference to the subject-matter of a contract, in the absence of any breach of contract or warranty, fraud is an essential element of the cause of action. *Jolliffe* v. *Baker*, 52 L. J., Q. B. 609; 11 Q. B. D. 255; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

—— **Voluntary Agreement—Subsequent Contract for Value.**]—A. entered into a voluntary agreement as to a leasehold with B., and he afterwards contracted to sell it to C. for a valuable consideration:—Held, that a suit by C. against A. and B. to have the rights of the parties declared could not be maintained. *De Houghton* v. *Money*, 35 Beav. 98; 13 L. T. 447; 14 W. R. 159.

Action of Deceit.]—The wilfully telling an untruth to a party, to induce him to alter his condition, whereby he is induced to alter it, is a fraud in law for which an action of deceit will lie. *Murray* v. *Mann*, 2 Ex. 538; 17 L. J., Ex. 256; 12 Jur. 634. S. P., *Watson* v. *Poulson*, 15 Jur. 1111.

An action of deceit will not lie in respect of a negligent as distinguished from a fraudulent misrepresentation. *Angus* v. *Clifford*, 60 L. J., Ch. 443; [1891] 2 Ch. 449; 65 L. T. 274; 39 W. R. 498—C. A.

The authorities establish the following propositions:—First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. *Derry* v. *Peek*, 58 L. J., Ch. 864; 14 App. Cas. 337; 61 L. T. 265; 38 W. R. 33; 1 Meg. 292; 54 J. P. 148—Herschell (Lord).

If, by false and fraudulent representations, a party is induced to enter into a written agreement, and is thereby damnified, he may maintain an action for the deceit. *Dobel* v. *Stevens*, 3 D. & R. 490; 3 B. & C. 623; 3 L. J. (O.S.) K. B. 89.

If a representation is made, before a sale, of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale is afterwards reduced into writing, in which that representation is not embodied, no action for deceit lies against the vendor on the ground that the article sold is not answerable to that representation, whether the vendor knew of the

defects or not. *Pickering* v. *Dowson*, 4 Taunt. 779.

Where a false representation as to the value of a business which has been made by A. to B. is communicated by B. to C., with notice to A., and C. acts upon it, an action for deceit may be brought by C. against A. *Pilmore* v. *Hood*, 5 Bing. (N.C.) 97; 6 Scott, 827; 1 Arn. 390; 7 D. P. C. 136; 8 L. J., C. P. 11.

The purchaser of a warranted but worthless watch is entitled to maintain an action for deceit, although it is stipulated that, if he dislikes the watch, the vendor will exchange it for one of equal value. *Wallace* v. *Jarman*, 2 Stark. 162.

—— **Not Sustainable in Absence of Fraud.**]—A declaration stated that the defendants falsely and fraudulently deceived the plaintiff in this, that the defendants, as brokers employed by him to purchase oil, falsely represented to him that they had purchased for him twenty-five tons of palm-oil, to arrive by the "Celma," at 30*l.* per ton; by reason of which false representation the plaintiff, believing that twenty-five tons of palm-oil had been so bought, and would be delivered accordingly, entered into certain contracts, whereas the defendants had not purchased the quantity of palm-oil or any palm-oil by the "Celma" on the terms aforesaid, but on different terms, viz. that the twenty-five tons were sold, and would be delivered to the plaintiff after and subject to the prior delivery of 800 tons of palm-oil from the vessel. The declaration proceeded to state that, by reason of the vessel not having more than 800 tons of palm-oil on board, no part of the twenty-five tons could be delivered to the plaintiff, whereby he was obliged to purchase a like quantity of palm-oil at other places at a higher price:—Held that, as the declaration was founded upon deceit, in the absence of fraud the action could not be sustained. *Thom* v. *Bigland*, 8 Ex. 725; 22 L. J., Ex. 243; 1 W. R. 290. And see *Ward* v. *Hobbs*, 48 L. J., Q. B. 281: 4 App. Cas. 13; 40 L. T. 73; 27 W. R. 114.

Foundation of Suit.]—Where representations are made of the nature and character of property offered for sale, affecting its value, and those representations turn out to be false to the knowledge of the party making them, a foundation is laid for an action of damages for the deceit, and for a suit in equity to set aside the contract of sale. *Attwood* v. *Small*, 6 Cl. & F. 232.

—— **Falsehood of Defendant — Damage to Plaintiff.**]—A false affirmation made by a defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case, in the nature of deceit. *Pasley* v. *Freeman*, 3 Term Rep. 51; 1 R. R. 634.

In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is. *Ib.*

Plaintiff having Means of Knowledge of Fraud.]—The mere possession by a purchaser of the means of knowledge does not prevent the vendor's liability for a false representation; and the vendor having sold a lease as of a longer term, he knowing it to be of a shorter, is liable, although he sent a draft conveyance reciting the lease, the recital not having been referred to by the purchaser. *Ferrier* v. *Peacock*, 2 F. & F. 717.

Rights pending Action.]—Pending an action to rescind an executed contract for the purchase of debentures on the ground of misrepresentation, the plaintiffs have a lien on the debentures for the purchase-money, and are entitled to intervene in an action instituted by other debenture-holders for the protection of all the debentures, in order to do all that is reasonable to protect and prevent the purchased debentures from being injured, so long as they do not thereby injure them, and they are entitled to oppose the vendors in such proceedings, provided they do so in good faith, and in the interest of those entitled to the purchased debentures. *Imperial Ottoman Bank* v. *Trustees, Executors and Securities Insurance Corporation*, 13 R. 287.

Lloyd's Register—Misstatement in Class Certificate—Action by Purchaser of Ship.]—Lloyd's committee had furnished the owner of a sailing yacht with a certificate which classed the yacht A 1 for eleven years. After the owner had sold the yacht to the plaintiff, it was discovered that she was not entitled to this classification. The plaintiff brought an action for damages against the committee upon the ground that owing to the representation in the certificate he had given more for the yacht than she was worth:—Held, that the plaintiff had no cause of action. *Thiodon* v. *Tindall*, 60 L. J., Q. B. 526; 65 L. T. 343; 40 W. R. 141; 7 Asp. M. C. 76.

Written Contract — Previous Parol Representations Untrue—Written Contract silent as to Subject-matter of Representation.]—The defendant had let a house to the plaintiff for a term of seven years. The plaintiff alleged that previous to the execution of the lease the defendant said he would make the drainage and water-closet perfect in every way, and subsequently, after certain alterations had been made, the defendant said that the water-closet was as sound as could be and in perfect order. The lease, which was executed after these representations, was silent as to the state of the drainage and water-closet, but the plaintiff said he was induced by these representations to take the lease. In an action to recover damages in respect of an illness alleged to have been caused by the defective state of the water-closet:—Held, that the plaintiff was not entitled to recover, as, assuming the representations to have been made, they did not amount to an agreement, but were at most a misrepresentation, for which in the absence of fraud no action would lie. *Burtsal* v. *Bianchi*, 65 L. T. 678.

Stock Exchange—Cornering Market.]—By his statement of claim the plaintiff alleged that the defendants, who were the promoters of a company, conspired to make and made false and fraudulent representations to the directors of the company by which the bulk of the shares in the company were allotted to the nominees of the defendants, instead of to the public as the directors were induced to believe, and also by false and fraudulent representations to the Committee of the Stock Exchange obtained from them a settling day; and that the object of the defendants was

to gain control of the market in the shares of the company, and to cause a belief that allotment had been bonâ fide made to the public, and to induce the public to make contracts for selling such shares, and so to compel such members of the public as had entered into such contracts to purchase shares from the defendants at such prices as the defendants should choose to fix. The plaintiff was one of the members of the public who was thus induced to make contracts for the sale of shares in the company, and in order to fulfil his contracts was compelled to purchase shares at a greatly enhanced price, and suffered damage thereby :—Held, that no cause of action was disclosed. *Salaman* v. *Warner*, 65 L. T. 132 —C. A.

Company — Prospectus — Misstatement — Material Inducement.]—The directors of a company issued a prospectus inviting subscriptions for debentures, stating that the property of the company was subject to a mortgage of 21,500*l*., but omitting to state a second mortgage of 5,000*l*. The prospectus further stated that the objects of the issue of debentures were—(1) to purchase horses and vans ; (2) to complete alterations and additions ; (3) to supply cheap fish. The true object was to get rid of pressing liabilities. The plaintiff advanced 1,500*l*. upon debentures under the erroneous belief that the prospectus offered him a charge, and would not have advanced his money but for such belief, but he also relied upon the false statements contained in the prospectus as to the financial condition of the company :—Held, that the misstatement of the objects for which the debentures were issued was a material misstatement of fact, influencing the conduct of the plaintiff, and rendered the directors liable to an action for deceit, although the plaintiff was also influenced by his own mistake. *Edgington* v. *Fitzmaurice*, 55 L. J., Ch. 650 ; 29 Ch. D. 459 ; 53 L. T. 369 ; 33 W. R. 911 ; 50 J. P. 52—C. A.

At Suit of Sheriff.]—A sheriff, upon the representation of the plaintiff in a suit, having seized goods under a fi. fa. as belonging to the defendant, and damages having been recovered against the sheriff by a third person claiming the goods, an action lies at the suit of the sheriff for the false representation. *Humphrys* v. *Pratt*, 5 Bligh (N.S.), 154.

4. Parties.

Persons partially Interested.] — A person, partially interested in an estate, may maintain a suit to set aside a conveyance of such interest fraudulently obtained from him, without making the other persons interested in the estates parties. *Henley* v. *Stone*, 3 Beav. 355.

Grantor and Grantees.]—The right of instituting a suit to set aside a conveyance on equitable grounds passes by the grantor's subsequent conveyance of the same property, and the grantee under the subsequent conveyance may institute such suit without making the grantor a co-plaintiff. *Dickinson* v. *Burrell*, 35 L. J., Ch. 371 ; L. R. 1 Eq. 337 ; 12 Jur. (N.S.) 199 ; 14 W. R. 412.

A. having executed a conveyance of real estate to B., which was liable to be set aside on equitable grounds, afterwards made a voluntary settlement of the same property in trust for himself for life, with remainder to his children as he should appoint, and in default of appointment to all his children who should attain twenty-one, or (being daughters) should marry, in equal shares :—Held, that the infant children of A. could maintain a bill, making A. and the trustees of the settlement defendants, to set aside the conveyance to B. *Ib.*

Heir of Grantor—Devisee of Grantor—Remaindermen.]—A bill, filed in 1850 to set aside for fraud a limitation under a deed of 1818, by which the reversion in lands was limited to the defendant for life, stated that the defendant went to America in 1822, to avoid service of subpœna, and there concealed herself, which prevented the grantor from taking proceedings to set aside the deed ; and that the grantor devised the said lands to the use of the plaintiff for life, "with remainder as therein," and also devised the said lands to the use of the plaintiff absolutely :—Held, on demurrer, that lapse of time was not a bar to the plaintiff, and that she might, as devisee, maintain a suit to set aside the deed without making the heir at law of the grantor a party ; but held, also, that the persons entitled to the estate after the death of the plaintiff were necessary parties. *Johnston* v. *Howison*, 13 Ir. Eq. R. 463.

Creditor having Judgment at Law.] — To impeach a settlement for fraud there must be a creditor to complain of it, and he must be enabled to sue by having obtained judgment at law for his debt, and must state that he is defrauded by it. *Colman* v. *Croker*, 1 Ves. 161.

Parties Grieved.]—The assignees of an insolvent debtor are parties grieved, within 13 Eliz. c. 5, s. 2, against fraudulent conveyances, and may recover the penalty thereby given from the insolvent and others, parties to such conveyance. *Butcher* v. *Harrison*, 4 B. & Ad. 129 ; 1 N. & M. 677 ; 2 L. J., K. B. 189. S. P., *Doe* d. *Grimsby* v. *Ball*, 11 M. & W. 531 ; 12 L. J., Ex. 328.

Creditor having Lien.]—In order to entitle a creditor of a living debtor to set aside a fraudulent conveyance under 13 Eliz. c. 5, it is not necessary that the creditor should have any lien or charging order on the property comprised in the conveyance ; but in the absence of such lien the court will not apply the property in satisfaction of the creditor's claim. *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347 ; 20 L. T. 163 ; 17 W. R. 601.

Heir.]—Where a young man just of age was imposed on in the sale of an estate, his heir held not precluded from suing to set aside the sale because the party defrauded had by will bequeathed a third of the balance of purchase money remaining due at his death to a third party. *Bellamy* v. *Sabine*, 2 Ph. 425 ; 17 L. J., Ch. 105. And see *S. C.*, 5 L. J., Ch. 36.

Devisee of Client, Action by—Heir, not Necessary Party.]—The right to set aside a conveyance improperly obtained by a solicitor from his client is devisable, and the heir at law is not a necessary party to a suit by the devisee to set it

aside. *Uppington* v. *Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291.

Agreement against being made a Party.]—A party cannot protect himself from being made a co-defendant to a suit in which fraudulent misconduct upon his part is alleged, upon the mere ground of an agreement between himself and the plaintiff anterior to the acts complained of that he should not be made a party to, or required to answer, any suit at law in equity in respect of anything done or omitted to be done by him in the performance of certain duties, to his neglect of which the charge of misconduct refers. Nor can he object in such a case that the bill does not pray any active relief as against himself. *Scott* v. *Liverpool Corporation*, 25 L. J., Ch. 227; 2 Jur. (N.S.) 111; 4 W. R. 210.

Fraud of several Persons.]—Where the bill seeks to be relieved from the consequences of a fraud, committed by several persons, it is not necessary to make all of them defendants, because in such a case there is no right to contribution between them. *Seddon* v. *Connell*, 4 Myl. & Cr. 79; 9 L. J., Ch. 341.

Liability of several Parties.]—Where a liability arises from a wrongful act of several parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1; 9 Sim. 30.

For Purpose of Discovery.]—The rule that a person implicated in a fraudulent transaction may be a party to a suit impeaching the transaction, for purposes of discovery and costs, is confined to cases in which the defendant fills the position of agent (including that of attorney or solicitor) or arbitrator. *Weise* v. *Wardle*, L. R. 19 Eq. 171; 23 W. R. 208.

Where a solicitor is implicated in a case of fraud, he may be made a party to a bill seeking relief in respect of that fraud, for the purpose of discovery; the only relief asked against him being that he should be ordered to pay the costs. *Gilbert* v. *Lewes*, 1 De G. J. & Sm. 38; 32 L. J., Ch. 347; 9 Jur. (N.S.) 187; 9 L. T. 541; 11 W. R. 223.

Solicitors.]—A solicitor, who has joined with his client in practising a fraud, may be made a co-defendant to a suit to set aside the transaction. *Beadles* v. *Burch*, 10 Sim. 332; 9 L. J., Ch. 57; 4 Jur. 189.

A solicitor assisting his client in obtaining a fraudulent release is properly made a party, and liable to costs, if the principal be not solvent. *Bowles* v. *Stewart*, 1 Sch. & Lef. 227.

In a suit to impeach a deed for fraud, a solicitor or agent concerned in procuring it may be made a party, but the bill must pray costs against him. *Crofts* v. *Allman*, 12 Ir. Eq. R. 451.

A solicitor may be made a party to a bill to set aside a deed for fraud, if he be a party to the fraud, and costs are prayed against him. *Kelly* v. *Jackson*, 13 Ir. Eq. R. 129.

Agents—Fraud of Co-Agent.]—Two agents of a company (brothers) conspired to conceal the true state of its affairs, whereby H., one of them, was enabled, in 1817, to buy shares of G. at a price much below their real value. The fraud was not discovered till 1860, soon after which time G.'s representative filed a bill against the representatives of both, praying a re-transfer of the shares, and payment of the intermediate dividends. It was not pretended that J., the other agent, derived any pecuniary benefit from the sale to H. The bill was demurred to by J.'s representative, for want of equity, and for multifariousness; the court overruled the demurrer on both points. *Walsham* v. *Stainton*, 3 N. R. 56; 32 L. J., Ch. 557; 8 L. T. 633; 11 W. R. 771. *And see* 1 H. & M. 322.

In such a case agents are in a sense trustees for their principal, and they are liable for the frauds by either, with the privity of the other against the principal. Though an action would lie for deceit against the conniving agent, who derived no pecuniary benefit from the purchase, there is a concurrent jurisdiction in equity. *Ib.*

Invalid Marriage by Fraud—Suit to Enforce Subsequent Assignment.]—A., already married, went through the ceremony of marriage with W., and joined with her in executing an assignment of her interest in a trust fund to a purchaser, B. The fraud practised upon W. by A. did not affect the validity of the assignment, nor was it necessary to make A. a party to a suit by B., to obtain the benefit of the assignment. *Sturge* v. *Starr*, 2 Myl. & K. 195.

Persons Having no Interest.]—A bill charging fraud, in which both A. M. and W. M. were concerned, and that the defendants (therefore including A. M.) might pay the costs, this case came within the rule that a person charged with fraud, though having no interest, was a proper party to a suit; and, as it could not be said that no relief could be had against A. M. at the hearing, a demurrer for want of equity must be overruled. A demurrer ore tenus was not sustainable, the two matters alleged to be improperly joined (realty and personalty) being properly connected as the subject of one instrument. *Innes* v. *Mitchell*, 5 W. R. 673.

Persons not Implicated.]—Observations on the practice of making solicitors, agents, and arbitrators parties to a suit, alleging against the principal defendant fraud, in which the co-defendants were not implicated. *Mathias* v. *Yetts*, 46 L. T. 497—C. A.

Bankrupts.]—A bill was filed against a bankrupt and his assignees, seeking to set aside conveyances as having been fraudulently procured by the bankrupt before his bankruptcy:—Held, that the charge of fraud did not make the bankrupt a proper party. *Gilbert* v. *Lewis*, 2 J. & H. 452; 32 L. J., Ch. 347. Affirmed, 9 Jur. (N.S.) 187; 7 L. T. 541; 11 W. R. 233.

Held, also, that, although a decree declaring the deeds to be fraudulent would, in a sense, make the bankrupt a trustee of the property, this was not sufficient to make him a proper party to the suit. *Ib.*

A bill was filed by the trustee in bankruptcy of W., against W. and his son, praying that it might be declared that a voluntary conveyance by W. to his son previously to the bankruptcy was fraudulent and void, and that the defendants might deliver up certain documents, and that the defendants, or one of them, might pay the costs of the suit:—Held, that W. was not a

proper party. *Weise* v. *Wardle*, L. R., 19 Eq. 171; 23 W. R. 208.

Arbitrators.]—An award was made upon a submission not under the statute of Will. 3, between two parties in difference, on which one of the parties obtained judgment against the other party in action at law. The unsuccessful party filed a bill in equity against the successful party and the arbitrator, to set aside the award:—Held, that, whether the award was or was not impeachable on equitable grounds, yet, inasmuch as there was no evidence to raise suspicion that the arbitrator had acted corruptly, partially, or unfairly, he ought not to have been made a party to the suit, and the bill was dismissed as against him with costs, before the court had come to any opinion for or against his award. *Hamilton* v. *Bankin*, 3 De G. & Sm. 782; 19 L. J., Ch. 307; 15 Jur. 70.

Creditors.]—To a bill to set aside for fraud a decree and purchase under it, a demurrer by the purchaser for not making creditors parties, who had proved in the office under the decree, and their debts afterwards, by the final decree, made charges on the estate, and directed to be paid out of the purchase-money, overruled; although the decree fastened the debts on the estate, yet it did not fix them on the identical money of the purchaser; for, when a valid sale shall have been made, the charge will then be transferred from the land to the purchase-money; in the meantime, it is on the land only. If the creditors were necessary parties to such a bill, the court, to be consistent, ought in all other cases to hear them before it opened a sale under its decree, which would be an intolerable grievance to the suitor. *Wallace* v. *Smith*, Beat. 381. *Creed* v. *Creed*, 2 Hog, 215.

Persons Having Equitable Charges.]—It is not an universal principle that all persons having equitable charges on land must be defendants to suits relating to it. There are many cases in which the court can sufficiently protect such interests, without loading the estate by such defendants. *Wallace* v. *Smith*, Beat. 385.

Parents.]—The parent is not a necessary party to a suit to set aside a deed fraudulent on marriage, but is a competent witness to prove the fraud on a bill filed by the husband and wife. *Scott* v. *Scott*, 1 Cox, 367.

Person Having Outstanding Term.]—A bill was filed for relief against a conveyance of a real estate made fraudulently to defeat a sequestration of the privy council:—Held, that a person alleged to have concurred in the fraud, and to whom an outstanding term had been assigned to attend the inheritance, was properly made a party to the suit. *Taylor* v. *Wild*, 8 Beav. 159.

Person Joining in Bond.]—To a bill filed against the executors and trustees under a will, seeking to set aside, on the ground of fraud, a bond of indemnity and a release executed by one of the plaintiffs, and a release executed by the other, it was objected, at the hearing, that another person, who had joined in executing the bond, had not been made a party to the suit:—Held, that he was a necessary party. *Colby* v. *Hawkins*, 6 Jur. 162.

Mortgagee.]—To bill by creditors to set aside purchase from defendant on ground of fraud, mortgagee of purchaser ought to be made party. *Copis* v. *Middleton*, 2 Madd. 410; 17 R. R. 226.

5. Pleadings.

Plea of Fraud.]—To an action upon a contract of indemnity, a plea that the defendant had been induced to enter into the contract by the fraudulent misrepresentation of the plaintiff, but without averring that he had repudiated the contract by giving up the benefit which he had received under it, is a bad plea. *Anderson* v. *Costello*, Ir. R. 5 C. L. 544; 19 W. R. 628.

The ordinary plea of fraud in an action on a contract contains an averment by implication that the defendant repudiated the contract, and, if the defendant has affirmed the contract, the plea is not proved, and no special replication is needed. *Dawes* v. *Harness*, 44 L. J., C. P. 194; L. R. 10 C. P. 166; 32 L. T. 159; 23 W. R. 398.

A general allegation of fraud is, on demurrer, an answer to an alleged contract, although the pleading alleging the contract shows that the person defrauded took a special benefit under the contract. *Irlam* v. *Midland Ry.*, 23 W. R. 660.

When in an action for a debt the defendant pleads that he has liquidated his affairs by arrangement, and that the debt sued for is provable under the liquidation, and the plaintiff replies that the liquidation resolution has been obtained by fraud, the High Court of Justice has jurisdiction to inquire into and decide the question of fraud. *Eyre* v. *Smith*, 2 C. P. D. 435; 37 L. T. 417; 25 W. R. 871—C. A.

To an action for rent on an indenture of demise, whether entry under the demise is averred or not, a plea that the defendant accepted the lease in consequence of a representation fraudulently made by the lessor to him that the lessor was the owner of the premises, the lessor well knowing when he made the representation that the title to the premises was in the defendant, is bad, for want of averment that the contract had been repudiated by him. *Meldon* v. *Lawless*, 18 W. R. 261.

The 10 Car. 1 (Ir.) sess. 2, c. 3, s. 10, corresponds with 13 Eliz. c. 5, ss. 1, 2. In an action for rent reserved by a lease, and claimed by the plaintiffs suing as assignees of the reversion, a paragraph of the defence alleged that the assignment of the reversion was made with the intent to defraud the creditors of the assignor, of which the plaintiffs had notice; that after the alleged assignment, and before action brought, the assignor became bankrupt, and that his assignee in bankruptcy demanded and obtained from the defendants payment of the rent sued for:—Held, upon demurrer, that this was a valid answer to the action, as the demand and receipt of such rent by the assignee in bankruptcy, representing the general creditors of the assignor, showed an election to treat any such assignment as void, and that it was immaterial whether, in so acting, the assignee in bankruptcy was in fact aware of the assignment having been made. *Searton* v. *Canny*, 8 L. R., Ir. 216.

A first set of counts was for work done and money paid by, and on an account stated with, the testator D. The second set was for the same, by and with the plaintiffs as executors of D. Plea, that the testator caused the defendant to

enter into the promises by fraud:—Held, that the plea was applicable to the promises in the second set of counts, which were made after the death of the testator, inasmuch as the defendant might treat them as founded upon the contracts with the testator stated in the first plea. *Connop* v. *Levy*, 5 Railw. Cas. 124; 11 Q. B. 769; 17 L. J., Q. B. 125; 12 Jur. 306.

Plea of fraud in usual form, to be common counts for goods sold, &c., is good. Leave to reply and demur, refused. *Lawton* v. *Elmore*, 27 L. J., Ex. 141.

In an action on an agreement, in which fraud is pleaded, a wilful misrepresentation must be shown. *Stevens* v. *Webb*, 7 Car. & P. 60.

Declaration on a written agreement, by which the plaintiff agreed to purchase of the defendant his leasehold interest in a farm, possession of which was to be given by the defendant to the plaintiff on his delivering to the defendant bills of exchange, which had been delivered accordingly. Breach, not giving possession of the farm to the plaintiff. Plea, that the lease contained a covenant by the defendant not to part with his interest in the farm without the consent of his lessor, with a condition for re-entry by the lessor in case of breach of such covenant; that before making the agreement the defendant had, in answer to an application to the lessor for permission to part with the possession, been told by such lessor that there would be no objection to the defendant doing so if he could find a successor eligible as tenant; that the plaintiff had notice of this, and that the agreement was made for the purpose of M. becoming the occupier of the farm; and that, in order to induce the defendant to enter into the agreement, the plaintiff represented to the defendant that M. was a person of respectability, and eligible as tenant of the farm. The plea then stated that M. was not a person of respectability, and was not eligible as tenant, as the plaintiff at the time of making the agreement knew, but that the defendant was then ignorant thereof, as the plaintiff also knew:—Held, that the plea showed that the defendant had been induced to make the contract by a false representation in a material matter connected with the contract, and therefore was good as a plea of fraud. *Canham* v. *Barry*, 15 C. B. 597; 3 C. L. R. 487; 24 L. J., C. P. 100; 1 Jur. (N.S.) 402.

Action for non-performance of an agreement to take a ready-furnished house. Plea, that the plaintiff caused and procured the defendant to enter into the agreement by means of fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. It appeared at the trial, that the plaintiff had employed C. to let the house, and the defendant being in treaty with C. for taking it, asked him "If there was any objection to the house?" to which he answered that there was not; and the defendant entered into and signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C. the agent did not:—Held, that it was not sufficient to support the plea that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that, as the representation was not embodied in the contract, the contract could not be affected by it unless it was a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea. *Cornfoot* v. *Fowke*, 6 M. & W. 358; 9 L. J., Ex. 297; 4 Jur. 919.

A contract entered into by a local board provided that payment for the work executed thereunder, i. e. the making of a reservoir, should be made by instalments upon the certificates of a certain engineer. Several payments had been made, when it was discovered that the reservoir would not hold water, and further payment was refused. Thereupon the contractor brought an action against the board for 1,067*l.* 11*s.* 6*d.*, the balance due under the contract, which was stayed, however, on the board executing an agreement with the contractor undertaking to pay the sum of 800*l.* at the expiration of six months. The agreement was assigned by the contractor to a bank with whom he had an account, and to whom he was indebted to an amount exceeding 800*l.* Notice of the assignment was given by the bank to the board, and at the expiration of the six months the bank brought the present action against the board to recover the amount secured by the agreement, when, for the first time, the board denied their liability, on the ground that they had discovered that the contractor and the engineer had conspired together to give false certificates; and that, therefore, the agreement was one which had been obtained by fraud:—Held, that the defence that the agreement had been obtained by the fraud and collusion of the contractor was a good answer to the action brought against the defendants. *Wakefield and Barnsley Banking Co.* v. *Normanton Local Board*, 44 L. T. 697; 45 J. P. 601—C. A.

Held, also, that there was no obligation on the part of the defendants to give notice to the bank of the discovery of the fraud until steps were taken to enforce the agreement. *Ib.*

Sufficiency of Plea.]—To an action for breach of an agreement to enter into partnership with the plaintiff, the defendant pleaded that the plaintiff carried on trade in partnership with S., which partnership was about to be wound up and dissolved: that the defendant made the agreement on the faith, and under the belief, that the plaintiff had up to that time acted with honesty towards his partner in the conduct of the business, and in relation to the pecuniary affairs thereof; but that the defendant discovered that the plaintiff had before the agreement acted with fraud and dishonesty towards his partner in the conduct of the business, and in relation to the pecuniary affairs thereof, which fraudulent and dishonest acts were unknown to the defendant at the time of his entering into the agreement; wherefore he repudiated and declined to carry into effect the agreement:—Held, that this plea afforded no answer to the action. *Andrewes* v. *Garstin*, 10 C. B. (N.S.) 444; 31 L. J., C. P. 15; 7 Jur. (N.S.) 1124; 4 L. T. 580; 9 W. R. 782.

Several Allegations of Fraud.]—Where material allegations of fraud are proved, the plaintiff will obtain relief though other allegations of fraud may not be proved. *Moxon* v. *Payne*, 43 L. J., Ch. 240; L. R. 8 Ch. 881.

Particulars of Fraud.]—In an action by an

insurance company against a shareholder for calls, he pleaded that he had been induced to take the shares through the fraud of the company:—Held, that he must give particulars of the acts of fraud intended to be relied upon in support of such plea, or have the plea of fraud struck out. *M'Creight* v. *Stevens*, 1 H. & C. 454; 31 L. J., Ex. 455; 6 L. T. 503; 10 W. R. 798.

Particulars granted on a general plea (by way of equitable defence) of fraud on the part of a cestui que trust. *Pitts* v. *Chambers*, 1 F. & F. 684.

Where, in an action of contract, the defendant in one paragraph of the statement of defence pleaded fraud generally, an order was made, on the application of the plaintiff, for particulars of the acts of fraud relied upon in that paragraph, although the statement of defence in subsequent paragraphs specifically set out certain alleged fraudulent representations. *Barton* v. *Bradshaw*, 8 L. R. Ir. 30.

Particulars of Plea—Rebuttal.]—In an action to enforce a contract in which the defendant sets up the plea that he was induced by fraud to enter into the contract, it is not necessary for the defendant expressly to repudiate the contract; in order to rebut the plea, it is for the plaintiff to show that the defendant had adhered to the contract notwithstanding the discovery of the fraud. *Aaron's Reefs, Limited* v. *Twiss*, 65 L. J., P. C. 54; [1896] A. C. 273; 74 L. T. 794—H. L. (Ir.)

Sufficiency of Allegation.]—In an action for a deceit, the plaintiff declared that he had employed the defendant to obtain a lease for him; that the defendant fraudulently represented to him that a premium of 150*l.* was to be paid for it, whereas only 100*l.* was to be paid; by means of which fraudulent representation, the defendant obtained from him 50*l.*, and converted it to his own use:—Held, that these allegations were sufficient, without further stating that the 50*l.* so obtained was over and above the 100*l.* to be paid for the lease. *Pewtress* v. *Austin*, 2 Marshall, 217; 6 Taunt. 522; 16 R. R. 667.

Sufficiency of Plaint.]—The particulars of a plaint in a county court were as follows: "The plaintiff sues the defendant in tort for legal fraud and deceit committed under the following circumstances: for that the defendant in March, 1872, caused to be inserted in a public newspaper an advertisement for the letting by tender, with immediate possession, of a farm; and the plaintiff, believing in the bona fides of such advertisement, and desiring to become tenant of a place of the description advertised, did take trouble and pains and incurred expense in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view of becoming tenant, whereas afterwards it appeared that the defendant had no power to let the property as advertised, and caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement. And that the defendant knew, at the time he caused such advertisement to be published, that he had not the power to let the farm, and that the farm was not to be let." The county court judge ruled that the particulars disclosed no cause of action, and nonsuited the plaintiff:—Held, that the particulars contained allegations amounting to a fraudulent representation, for which an action would lie. *Richardson* v. *Silvester*, 43 L. J., Q. B. 1; L. R. 9 Q. B. 34; 29 L. T. 393; 22 W. R. 74.

Sufficiency of Count.]—The attorney of P., who had obtained judgment in an action against W. F., caused a fieri facias to issue against W. F., and indorsed on the writ, "The defendant is a ——, and resides at R., in your bailiwick." The writ was delivered to the sheriff, who seized the goods of the son, he being the only person of that name who resided at R.; the real defendant, the father, resided at C., which adjoined R. An action having been brought by the son against the sheriff, in which the sheriff had to pay damages, he sued the attorney to recover compensation. It was agreed that both the attorney and the sheriff acted bonâ fide. The count alleged that the defendant, by an indorsement on the writ, and with the intent that the plaintiff should act on the statement contained in the indorsement, falsely stated and represented to the plaintiff that the W. F. against whose goods the writ was directed resided at R.:—Held, that the count, which was simply for a misrepresentation, could not be supported. *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129; 6 Jur. (N.S.) 444; 2 L. T. 49; 8 W. R. 321.

Sufficiency of Declaration.]—A declaration—after stating that the defendant let a house to the plaintiff, knowing at the time that it was in a state dangerous to occupy, knowing also that the plaintiff was ignorant of its state, that he took it for the purpose of immediate occupation, and that he believed that he could immediately occupy it—alleged that the defendant never at any time gave the plaintiff notice that the house was in that state: that the plaintiff entered, and that the house fell and did special damage:—Held, that the declaration did not disclose a good cause of action; for it did not show that the defendant made any misrepresentation to the plaintiff as to the state of the house, nor that the plaintiff was induced by his own belief of its soundness, or by anything in the conduct of the defendant amounting to deceit, to hire the house. *Keates* v. *Cadogan* (*Earl*), 10 C. B. 591; 20 L. J., C. P. 76; 15 Jur. 428.

—— **Amendment.**]—The plaintiff bought of the defendant the household furniture, fixtures, utensils in trade, &c., of a public-house, as per inventory taken by W. W., for 262*l.*, upon a representation by the defendant that the receipts of the house were 80*l.* per month, which representation turned out to be false. In an action for this misrepresentation, the declaration alleged the agreement to be for the purchase of the good-will, furniture, fixtures, &c.:—Held, that the declaration substantially stated the true nature of the agreement, and that, at all events, the court would, if necessary, amend it. *Cater* v. *Wood*, 19 C. B. (N.S.) 286.

—— **Option of Issue.**]—Where the case made by bill was, that a trust-deed, which it sought to set aside, was the produce of sheer imposture and plain dealing, and was obtained by means of a successful conspiracy between the defendant and his solicitor, whereby the plaintiff was entrapped into the execution of the deed, under the fiction that it was an instrument of a totally different kind; and evidence was adduced only

to prove that the plaintiff was a very ignorant and illiterate person, easily imposed upon, and that she executed the deed in question without distinct explanation, and without the advice of her own solicitor, who resided near, and whom she expressed a desire to consult:—Held, that the case, as it appeared on the evidence, was not sufficiently put in issue by the bill, to enable the court to set aside the deed; but the court gave the plaintiff an option of an issue, to try whether the execution had been fraudulently obtained; and, the plaintiff declining such issue, the court, having regard to the evidence adduced, though the imputations in the bill on the defendant and on his solicitor were very grave, dismissed the bill without costs. *Griggs* v. *Staplee*, 2 De G. & Sm. 572; 13 Jur. 29.

—— **Natural Result.**]—A declaration stated that the plaintiff was a dealer in printed silk goods, and sent the defendant divers lots of such goods, the last of which contained handkerchiefs, which had been printed by the plaintiff with an ornamental pattern, and that he was about to print others in the same manner for profit; all which was known to the defendant; yet he, to defraud the plaintiff, and to induce him to desist from so printing the same and deprive him of the profits, and acquire the same for his own use and benefit, falsely represented to the plaintiff, concerning the last lot and the handkerchiefs, that in the last lot there was a copy of a registered pattern, and that the parties intended to proceed against the plaintiff in the most expensive manner by injunction (meaning that the pattern was a copy of a pattern registered according to the statute), whereas in fact no such pattern had been registered; and no parties did so intend, as the defendant well knew. Special damage:—Held, that the declaration disclosed a good cause of action, and that the special damage naturally flowed from the wrongful act of defendant, and that the innuendo was unnecessary. *Barley* v. *Walford*, 15 L. J., Q. B. 369; 9 Q. B. 197; 10 Jur. 917.

A declaration stated that the plaintiff, defendant and C. entered into a joint speculation in railway shares; that C. advanced 6,000*l*., 2,000*l*. on his own behalf, 2,000*l*. as a loan to the plaintiff, and 2,000*l*. on behalf of the defendant; that C. was desirous of retiring from the adventure, and the defendant offered to take upon himself the whole of the adventure and debt of 6,000*l*., provided the plaintiff would consent to abandon his share to the defendant, and C. would accept the defendant as his debtor in the place of the plaintiff for the 2,000*l*.; that the plaintiff abandoned his share of the adventure, and the defendant agreed to take upon himself the whole adventure and become debtor to C. for the 6,000*l*.; and C., on the faith and in the belief that such an arrangement was made, consented to accept the defendant as such debtor in the place of the plaintiff; nevertheless the defendant, knowing that he alone was capable of proving that the plaintiff had assented to the arrangement, fraudulently, falsely, and maliciously, and before the 14 & 15 Vict. c. 99, amending the law of evidence, and in order to induce C. to believe that the joint adventure had never been put an end to, and to induce C. to sue the plaintiff for the 2,000*l*. and to deter him from calling the defendant as a witness, and to destroy his credit as a witness if so called, wrote, and sent to C. a letter, purporting to be addressed to the plaintiff, but directed to C., wherein he fraudulently and falsely pretended to expostulate with the plaintiff, and asserted that the plaintiff had positively refused to concur in the arrangement, whereby C. was induced to believe that the plaintiff had never agreed to retire from the adventure, and acting on such belief C. brought an action against the plaintiff to recover the 2,000*l*.; that the action was referred upon the terms that neither the plaintiff nor the defendant should be examined, and C. recovered against the plaintiff 2,486*l*., which he was compelled to pay:—Held, bad, since it did not appear that the damage to the plaintiff was the natural result of the wrongful act of the defendant. *Collins* v. *Cave*, 6 H. & N. 131; 30 L. J., Ex. 55; 6 Jur. (N.S.) 1160; 8 W. R. 586—Ex. Ch.

Sufficiency—Setting Aside Executed Contract, in Equity.]—Where an application is made in equity to set aside an executed contract, on the ground of the defendant having stated what is false, or concealed what ought to be disclosed, the circumstances alleged must show that his conduct amounts in equity to fraud. *New Brunswick and Canada Ry. and Land Co.* v. *Conybeare*, 9 H. L. Cas. 711; 31 L. J., Ch. 297; 8 Jur. (N.S.) 575; 6 L. T. 109; 10 W. R. 305.

General Charge of Fraud—Answer.]—Upon bill to set aside deed, except trust for debts upon a general charge of fraud, misapprehension, and misrepresentation, or to control management of trust, and for account against trustees:—Held:—1st, That deed could not be set aside partially for fraud, nor, under bill, totally. 2ndly, that general charges of fraud require no answer, and could not support a decree. *Myddleton* v. *Kenyon* (*Lord*), 2 Ves. 391.

Discovery.]—Bill to be relieved against fraud, defendant must answer discovery. *Manningham* v. *Bolingbroke*, Dick. 533.

Production.]—Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien. *Balch* v. *Symes*, Turn. & R. 87; 23 R. R. 195. See *Tyler* v. *Drayton*, 2 Sim. & S. 309.

Interrogatories.]—To a bill filed in equity to set aside a conveyance as fraudulent under the 13 Eliz. c. 5, s. 3, the defendant, by his answer, refused to answer any portion of it, on the ground that the statute imposed a forfeiture and six months' imprisonment. After the time for excepting had expired, the plaintiff amended his bill by striking out the allegations of fraud, and by attempting to remove the objection, and he again filed interrogatories. The defendant, by answer, again insisted on the objection, and that the proceedings of the plaintiff were a mere snare, and he refused to answer any portion of the bill. The court came to the conclusion that the bills were substantially the same, and the answer to the first being deemed sufficient, the defendant was not bound to answer the second. *Wich* v. *Parker*, 22 Beav. 59.

Defence by Persons not Creditors—Plea of 13 Eliz. c. 5.]—On the 8th December, 1885, T. G. Tuck executed a deed of gift of certain furniture

to Harriet his wife. This deed was not registered as a bill of sale. On the 5th April, 1888, T. G. Tuck gave a bill of sale of the same furniture to the defendants as security for a loan. On the 30th July, 1888, the defendants took possession. On the 31st July, T. G. Tuck died. On the 4th August his widow brought an action to restrain the defendants from entering into possession, and for damages. The defence was that none of the furniture was the property of T. G. Tuck, but belonged to the defendants under their bill of sale :—Held, that the defendants could not raise the defence of the statute 13 Eliz. c. 5, because they were not defending as creditors, but as persons entitled to the possession of specific property, and had not raised the point in their pleadings. The point should have been raised by way of counter-claim or separate action by the defendants for themselves and all other creditors. *Tuck* v. *Southern Counties Deposit Bank*, 45 Ch. D. 471 ; 60 L. T. 885. Affirmed on other grounds in C. A.

Setting up Jus tertii.]—Judgment having been obtained against the plaintiff, he executed a bill of sale of his plate to M. to defeat the execution. M. afterwards took an assignment of the judgment, and issued an execution against the plaintiff and seized his goods, whereupon the latter, for the purpose of defeating the execution of M., deposited the plate with the defendant :—Held, in trover for the plate, that the defendant was entitled to set up the right of M. to it. *Cheesman* v. *Excell*, 6 Ex. 341 ; 20 L. J., Ex. 209.

Estoppel.]—In an action for calls by a company against a shareholder, in which the jury have found that the contract to take the shares was induced by fraud, the defendant is not estopped from setting up the plea of fraud merely on the ground that he did not, immediately on the discovery of the fraud, repudiate the contract. *Aaron's Reefs* v. *Twiss*, 65 L. J., P. C. 54 ; [1896] A. C. 273 ; 74 L. T. 794—H. L. (Ir.)

Striking out Statement of Claim—Order XXV., Rule 4.]—In an action to set aside a marriage settlement, the plaintiff alleged, as the ground of his action, that previous to the execution of the settlement made upon the marriage between himself and I. S., the latter stated to him that her first husband had been divorced from her, at her suit, by reason of his cruelty and adultery, and that she had not herself been guilty of adultery ; that such statements were made to induce him to execute the settlement and contract the marriage ; that, in reliance on the representations, he executed the settlement and married I. S. ; that he subsequently discovered that the representations were false to the knowledge of I. S., and that she herself had been divorced from her husband at his suit and by reason of her adultery :—Held, on motion by the defendant, that the plaintiff's statement of claim must be struck out under Ord. XXV. r. 4 as disclosing no reasonable ground of action. *Johnston* v. *Johnston*, 53 L. J., Ch. 1014 ; 51 L. T. 537 ; 32 W. R. 1016. Affirmed, 52 L. T. 76 ; 33 W. R. 239—C. A.

6. Evidence and Onus of Proof.

Generally.]—In a concerted account of a fraudulent transaction, the most striking contradictions may be expected on the minor details or collateral facts rather than on the leading circumstances. *Brydges* v. *King*, 1 Hag. Ec. 301.

Where equity is sought upon the ground of compelling a party to make good the representations which he has made, and which he has the power of making good, there must, if they relate to property, be clear and distinct evidence of the representations, and of the property to which they relate. *Turner* v. *Ince*, 5 Jur. (N.S.) 1072.

—— **Suspicion of Fraud.**]—The party in possession of the legal right is entitled to put his antagonist on strict proof of fraud before the court can relieve or direct an issue. Suspicion of fraud is not sufficient. *Ross* v. *Steele*, 1 Ir. Eq. R. 171.

Mere suspicion of a fraudulent intention to protect property against the just claims of third parties will not suffice to establish the fact that the transaction was wholly colourable as between the original parties to the instrument, as such a transaction is not as between themselves rendered void, because it may have the effect of defeating the claims of creditors. *Shaw* v. *Jeffery*, 13 Moore, P. C. 432 ; 3 L. T. 1.

—— **Confession of Fraud.**]—Fraud is a conclusion of law resulting from facts. Confession is no fact, but merely evidence of it. *Mulholland* v. *Hendrick*, Beat. 280.

—— **Action of Deceit.**] — In an action for deceit the plaintiff must show, first, that the false statements made to him were fraudulent ; secondly, that they were a cause inducing him to act to his prejudice. *Smith* v. *Chadwick*, 53 L. J., Ch. 873 ; 9 App. Cas. 187 ; 50 L. T. 697 ; 32 W. R. 687 ; 48 J. P. 644—H. L. (E.)

Partial Proof.]—Where material allegations of fraud are proved, the plaintiff will obtain relief although other allegations of fraud may not be proved. *Moxon* v. *Payne*, 43 L. J., Ch. 240 ; L. R. 8 Ch. 881.

If a bill makes a case of actual fraud, and at the hearing the fraud is disproved, or not established, the court will not in general allow the bill to be used for any secondary or inferior kind of relief to which the plaintiff might otherwise have been entitled, but will dismiss it at once. But, where a bill sought to set aside a bottomry bond, as having been concocted in a fraudulent conspiracy between the captain of the ship and the obligee, though the fraud was disproved at the hearing, the court, at the request of the defendant, directed the usual inquiries for the purpose of ascertaining how much of the sum secured by the bond was a proper subject of bottomry. *Glascott* v. *Lang*, 2 Ph. 310 ; 16 L. J., Ch. 429 ; 11 Jur. 642. S. P., *Dobson* v. *Lyall*, 2 Ph. 323, n.

If a case of fraud is made by a bill, and is not established by the evidence, and another case for relief is alleged in the same bill and proved, so much only of the bill as relates to the case of fraud is dismissed, and relief may be given on the other part of it. *Parr* v. *Jewell*, 1 K. & J. 671 ; 3 W. R. 567.

But, if a case of actual fraud is alleged by the bill, the plaintiff cannot obtain relief upon such a bill by proving only a case of constructive fraud. *Ib.*

The bill alleged that the plaintiff, without consideration, gave a promissory note, and accepted certain bills of exchange, for the accommodation of A., and that A. discounted the note and negotiated the bills for his own use, and paid them before or after they became due, and told the plaintiff that he had done so, and that he was ready to give them up to the plaintiff. The bill also alleged that A. afterwards fell ill, and when he was near his death his son found among his papers the note and bill uncancelled, and handed them over to B., who gave them to the defendant, and that the defendant knew when he received them that B. had obtained possession of them without the sanction of A., and without consideration; and the bill sought to have the note and bills delivered up, and to restrain an action by the defendant upon them:—Quære, whether, the case of fraud not having been proved, the plaintiff could obtain relief upon proof that the note and bills were given without consideration to A., and that there was an express agreement between him and the plaintiff that they should not be negotiated when overdue. *Ib.*

Where the principal object of the bill is relief, on the ground of fraud, and the plaintiff fails to prove the fraud, the court may dismiss the whole bill. *Maguire* v. *O'Reilly*, 3 Jo. & Lat. 224; 9 Ir. Eq. R. 335.

Semble, when a bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree, by establishing some one or more of the facts quite independent of fraud, but which might of themselves create a case under a distinct head of equity. *Price* v. *Berrington*, 3 Mac. & G. 486; 15 Jur. 999.

Although, when a bill alleges a case of fraud only and the fraud is not proved, the bill will be dismissed; yet, if the case alleged is not one of fraud only, relief may be given on the alternative case made by the bill. *Traill* v. *Baring*, 4 De G. J. & S. 318.

If the relief sought by the bill is based on fraud, the failure to prove it is fatal; but, if by striking out of the bill the charge of fraud there is sufficient equity stated and proved, and the charge of fraud is only subsidiary, it is a matter only affecting costs. *London Chartered Bank of Australia* v. *Lempriere*, 9 Moore, P. C. (N.S.) 426; 42 L. J., P. C. 49; L. R. 4 P. C. 572; 29 L. T. 186; 21 W. R. 513.

A bill which rests on a charge of fraud, if the charge of fraud fails, cannot be sustained on other grounds. *M'Elroy* v. *Murphy*, 22 W. R. 501.

A bill to set aside a deed containing charges of fraud, which the court deems not to be proved, will be dismissed as to those charges, but need not be dismissed altogether, if there are other charges which the court deems to constitute what amounts to great irregularity and legal fraud, and to require the granting of the relief prayed. *Hilliard* v. *Eiffe*, L. R. 7 H. L. 39.

Inference.]—Although the court requires strict proof of the existence of fraud, yet, where a case of fraud is proved, it will draw reasonable inference as to the time when it was commenced. *Panama and South Pacific Telegraph Co.* v. *India-Rubber, Gutta-Percha, and Telegraph Works Co.*, 45 L. J., Ch. 121; L. R. 10 Ch. 515; 32 L. T. 517; 23 W. R. 583.

A., the executor of B., filed a bill against C., stating that he had fraudulently obtained a bill of exchange from B., and praying that the bill might be delivered up. It appeared that an action had been brought by the direction of C. on the bill, and that, after the evidence for the plaintiff had been gone into, the counsel for the plaintiff had elected to be nonsuited. C. declined to give any undertaking to have another action tried at the next assizes. The court took into consideration the alleged fraud, and, being satisfied that an inference of fraud was to be drawn, ordered the bill to be delivered up. *Allen* v. *Davis*, 20 L. J., Ch. 44.

After the death of A., a captain in the navy, who died at a very advanced age in Greenwich Hospital, B., a dentist, produced a bill of exchange for 262*l.*, alleged to have been given him by A., and stated at one time that 100*l.*, part of it, was for medical attendance, and the rest a gift, and at another time that there was a contract that he was to attend to A.'s teeth for the rest of his life, and supply him with teeth. B. indorsed the bill to C., to whom he owed about 14*l.*, on the understanding that C. should bring an action on it for their joint benefit. The action was tried, and the counsel for the plaintiff elected to be nonsuited:—Held, that under these circumstances an inference of fraud was to be drawn. *Ib.*

—— **Clandestinity.**]—Clandestinity is a strong indication of fraud. *Brydges* v. *King*, 1 Hag. Ecc. 310.

—— **Inference of Fact—Not Presumption of Law—"Renewable Lease."**]—In 1869, P., a member of a firm of solicitors, by his advice induced the plaintiff to invest moneys upon the security of an equitable mortgage of a lease which he represented as renewable, and which had previously been renewed by custom every fourteen years, but the future renewal whereof was prohibited by statute passed in 1868. In 1875 P. fraudulently, and without the knowledge of his partners, gave a legal mortgage of the lease to a third party without notice of the plaintiff's mortgage. The security proved insufficient, and P. having absconded, the plaintiff sought to make P.'s firm liable for the loss sustained by him:—Held, that it is an inference of fact, and not a presumption of law, that, if a material representation calculated to induce a person to enter into a contract is made to him, he was thereby induced to enter into the contract. Dictum of Jessel, M.R., in *Redgrave* v. *Hurd* (20 Ch. D. 1, 21), commented on and explained. *Hughes* v. *Twisden*, 55 L. J., Ch. 481; 54 L. T. 570; 37 W. R. 498.

Presumption.]—It is not easy to overcome the presumption that a man of mature age, who has long acted as a legal practitioner, is competent in an ordinary transaction to take care of himself, though unassisted by counsel. But there is an equity which in certain circumstances will give relief even to such an individual. *Tennent* v. *Tennent*, L. R. 2 H. L. (Sc.) 6.

A subsequent sale for value not being by the voluntary grantor, no presumption arose that the prior grant was fraudulent. *Godfrey* v. *Poole*, 57 L. J., P. C. 78; 13 App. Cas. 497; 58 L. T. 685; 37 W. R. 357.

—— **Rebuttal of.**]—Every primâ facie presumption of fraud or undue influence may be

rebutted by positive proofs of fair dealing, showing that the contracting party was under no influence unduly exercised. *Moore* v. *M'Kay*, Beat. 294.

Laches.]—Fraud being established against a party, it is for him, if he alleges laches in the other party, to show when the latter acquired a knowledge of the truth, and prove that he knowingly forbore to assert his right. *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221 ; 22 W. R. 492.

Purchase from Poor Ignorant Person.]—The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving that the purchase was fair, just, and reasonable. *Fry* v. *Lane*, 58 L. J., Ch. 113 ; 40 Ch. D. 312 ; 60 L. T. 12 ; 37 W. R. 135.

Conveyance by Father, Tenant for Life, and Son, Reversioner in Fee, Just of Age—Onus on Purchaser.]—If an estate held in trust for a father for life, with remainder to his son in fee, were sold by the father and son immediately on the son's coming of age, the whole purchase money being paid to the father, the trustee disapproving of the transaction, and, if the purchaser afterwards came to the court to obtain the legal estate, the purchaser would be bound to prove, as against the son, the straightforwardness of the transaction. *Hannah* v. *Hodgson*, 30 Beav. 19 ; 5 L. T. 42 ; 9 W. R. 726.

Fiduciary Relation between Parties—Onus.]—Where a person holding a fiduciary character purchases from his cestui que trust, and the sale is complained of, a court of equity imposes the burden of proof upon the purchaser, to show that all due protection has been afforded to the vendor ; aliter, where no such fiduciary relation subsists. *Harrison* v. *Guest*, 6 De G. M. & G. 424 ; 25 L. J., Ch. 544 ; 2 Jur. (N.S.) 911 ; 4 W. R. 585. Affirmed, 8 H. L. Cas. 481.

Annuity to Medical Attendant.]—A married woman joined with her trustee, who was her confidential medical attendant, in granting annuities secured on her separate estate for his benefit. She afterwards sought to set them aside :—Held that the onus of proving their invalidity was on her :—Held, also, that the principle of *Archer* v. *Hudson* (7 Beav. 551) did not apply. *Blaikie* v. *Clark*, 15 Beav. 595 ; 22 L. J., Ch. 377.

Sale to Elderly Spinster at Undervalue—Onus.]—A small freehold property was agreed to be sold by an elderly spinster in humble life to a person far above her in station. The agreement was come to between the parties alone. In respect of the consideration, the vendor sought and obtained a slight advance on that offered by the purchaser. The purchaser's solicitor drew the conveyance, and it was presented to the vendor ready for execution, and executed by her without any advice. The Master of the Rolls having set aside the conveyance :—Held, that his decree was right, because the parties to the contract were in such relative positions that (a case of undervalue being on the evidence affirmatively deposed to) it lay on the purchaser (contrary to the usual rule) to show affirmatively that the price he had given was the value, and on the evidence he had failed in doing so. *Baker* v. *Monk*, 4 De G. J. & S. 388 ; 10 Jur. (N.S.) 691 ; 12 W. R. 779.

Fraud as to Deeds.]—In every case where a plaintiff comes to the court to set aside a deed on the ground of fraud, it is necessary that there should be clear and unequivocal proof of the facts which are said to constitute the fraud, and it must be shown that the facts are such as in the eye of the court amount to fraud. *Lumley* v. *Desborough*, 22 L. T. 597.

Fraud in procuring a deed, and the circumstances attending it, may be proved by parol evidence. *Blake* v. *Marnell*, 2 Ball & B. 47 ; 12 R. R. 68. Affirmed, 4 Dow, 248 ; 16 R. R. 56.

Where the answer of a defendant insists that a covenant was inserted without his knowledge or consent in a deed executed by him, and that the deed was not read over to him, and that the covenant is a fraud upon him, such deed cannot be proved vivâ voce against him as an executor, but it may be so proved as against another defendant whose answer does not impeach the validity of the covenant. *Barfield* v. *Kelly*, 4 Russ. 355.

Declaration of a party to a deed previous to the execution, admitted in support of the deed against imputations of fraud ; declarations subsequent impeaching the deed were rejected. *Conolly* v. *Howe* (*Lord*), 5 Ves. 700.

A deed may be impeached by matter dehors, as upon averment of illegal and corrupt consideration. *Bulmer, Ex parte*, 13 Ves. 318.

From the obscurity and inaccuracy of a deed, fraud and inadequacy of consideration will not be presumed after the death of the parties. *M'Namara* v. *Browne*, 2 Ball & B. 1.

The recital in a deed of a fact, which may or may not (according to circumstances) in equity amount to a fraud, will not of necessity affect a purchaser for value denying notice of fraud. *Kenny* v. *Brown*, 3 Ridgw. P. C. 512.

—— **Not Reading Document.**]—Not reading a deed to a person in the rough draft before the execution, nor in the engrossment at the time it was executed, is a badge of fraud. *Bennet* v. *Vade*, 2 Atk. 324 ; 9 Mod. 312.

—— **Evidence of Understanding Deed.**]—When a party is subject to the obligation of showing that an unprofessional person understood the contents of a deed which he executed, the mere proof of its having been read over to him, unaccompanied with proper explanations, is not sufficient to satisfy the court that the person hearing it read understood it. *Hoghton* v. *Hoghton*, 15 Beav. 278 ; 21 L. J., Ch. 482 ; 17 Jur. 99.

—— **Onus of Proof—Solicitor and Client.**]—A deed prepared by an attorney and executed by his client, a young man, who had applied to him to procure a loan of money, settling the property of the client so as to restrict his power of dealing with it, and appointing the attorney the trustee, recited that the trusts of the deed were created at the desire of the client, and for the purpose of placing the property under the management of the attorney. The client, by his bill to set aside the deed, denied the truth of the recitals, and insisted that the settlement was made without his knowledge

—— **Denial of—Onus.**]—When a party has practised a deception, with a view to a particular end which has been attained by it, he cannot be allowed to deny its materiality. The onus probandi that the end was not so attained lies on the party who used the deception. *Smith* v. *Kay*, 7 H. L. Cas. 750 ; 30 L. J., Ch. 45.

Admissibility.]—Plaintiff having prevented the fulfilment of an agreement in favour of the defendant, for purchasing the assignment of a mortgage, by obtaining himself an advance after notice, not allowed to take advantage of it, being mala fides. Evidence, therefore, of a parol agreement read against him under these circumstances. *Scott* v. *Merry*, 1 Ves. 2.

Estate settled on marriage upon the husband and wife for their lives, remainder to such child or children as the husband, with the consent of the trustees, should appoint, and in default of appointment to the first and other sons in tail; the father, with the consent of the surviving trustee, appointed to his youngest son; bill by the eldest son to set aside the appointment, for misrepresentation and imposition on the trustee; the trustee's evidence read to prove imposition; but the father's evidence to prove no misrepresentation or imposition was rejected. *Scroggs* v. *Scroggs*, Amb. 272.

In an action for falsely representing that a good living might be got at a certain public-house, evidence that, a year or two before the plaintiff took to it, someone else found it impossible to get a living is admissible, the character of the house not having since changed. *Penn* v. *Steadman*, 2 F. & F. 546.

——**To reduce Damages.**]—In an action against a vendor of a public-house, for fraudulent misrepresentations of the business of the house: evidence of the actual value of the premises is admissible in reduction of damages, but not as a bar to the action. *Pearson* v. *Wheeler*, Ry. & M. 303.

—— **To prove Consideration.**]—Evidence is admissible to show valuable consideration beyond what appears on the face of the deed. *Townend* v. *Toker*, 35 L. J., Ch. 608 ; L. R. 1 Ch. 446 ; 12 Jur. (N.S.) 477 ; 14 L. T. 531 ; 14 W. R. 806.

—— **Admissions.**]—In a suit for the delivery up by holders of notes fraudulently negotiated, admissions of the negotiator, made whilst the notes were in his possession, may be read. *Claughton* v. *Harrison*, C. P. Cooper, 498.

—— **Declarations and Admissions.**]—In an ejectment brought by a person claiming under a post-nuptial settlement against a subsequent purchaser from the husband, declarations and admissions by the husband that he had received valuable consideration from the purchaser are not admissible. *Doe* d. *Sweetland* v. *Webber*, 3 N. & M. 586 ; 1 A. & E. 733; 3 L. J., K. B. 208.

—— **Contemporaneous Documents.**] — The defendants sent to the plaintiff the prospectus of a company, for whom they acted as agents, on the faith of which the plaintiff took shares in the company. A few days afterwards the defendants sent the plaintiff a circular containing other statements concerning the company, but the plaintiff did not receive it till after he had taken the shares :—Held, that the circular could not be taken as a contemporaneous document with the prospectus, and could not be read for the purpose of explaining it. *Smith* v. *Chadwick*, 51 L. J., Ch. 597 ; 20 Ch. D. 27 ; 46 L. T. 702 ; 30 W. R. 661—C. A. Affirmed in H. L., infra, col. 413.

—— **Belief.**]—In an action against a vendor for misrepresentation on the sale of goods, if it is shewn that a material representation has been made by the vendor to induce the purchaser to buy, and that such representation is not true in fact, and it is proved that it was untrue to the vendor's knowledge, he cannot be asked in chief whether he believed the representation to be true. *Hine* v. *Campion*, 7 Ch. D. 344.

—— **General Credit.**]—In an action for fraudulently representing that W. was trustworthy, the defendant's shopman, who was conversant with the transaction between the plaintiff and W., was called to prove that at the time of the representation he believed W. to be trustworthy ; and, as to W.'s general reputation for solvency, two or three tradesmen proved that, in their belief, W. was trustworthy at the time in question :—Held, that the evidence was admissible. *Sheen* v. *Bumpstead*, 2 H. & C. 193 ; 32 L. J., Ex. 271 ; 10 Jur. (N.S.) 242 ; 8 L. T. 832 ; 11 W. R. 734—Ex. Ch.

—— **Similar Frauds.**] — In an action to recover money as obtained by a fraud, a statement to the effect that the defendant had pursued a similar course in various other cases is irrelevant, and, being scandalous and at the best only evidence, may be struck out, and such facts are not admissible in evidence. *Blake* v. *Albion Life Assurance Co.*, 45 L. J., C. P. 663 ; 35 L. T. 269 ; 24 W. R. 677 ; 14 Cox, C. C. 246.

In an action against a company to recover a sum of money obtained by them from the plaintiff, through a fraud of the defendants' agent committed with their knowledge and for their benefit, evidence of similar frauds committed on persons other than the plaintiff, by the same agent, in the same manner, with the knowledge, and for the benefit, of the defendants is admissible on behalf of the plaintiff. *Blake* v. *Albion Life Assurance Society*, 48 L. J., C. P. 169 ; 4 C. P. D. 94 ; 40 L. T. 211 ; 27 W. R. 321.

On a plea by a defendant of fraud and covin, it is only competent in him to give evidence of particular fraud practised upon him on a given occasion, and not that the transactions of the plaintiff are generally fraudulent with respect to society at large. *Green* v. *Gosden*, 4 Scott (N.R.), 13 ; 3 Man. & G. 446 ; 11 L. J., C. P. 4 ; 5 Jur. 1010.

In an action for false representation, other false statements than those laid may be proved and considered by the jury, with reference to the question whether those laid were made fraudulently ; but the declaration will not be amended by introducing them as distinct causes of action, at all events without allowing, if necessary, time for their consideration by the defendant. *Huntingford* v. *Massey*, 1 F. & F. 690.

—— **Similar Action.**]—In an action charging a defendant with having made a fraudulent representation as to the price which certain seedsmen in London would give for certain seed, whereby the plaintiff was induced to sell it for a lower price than he otherwise would have done, the defendant, who appeared as a witness, having, in his examination in chief, denied the

misrepresentation, was asked on cross-examination whether there had not been proceedings against him in a county court at the suit of A. in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury had notwithstanding found a verdict for the then plaintiff. It was objected by the defendant's counsel that the question relating to the contents of public judicial proceedings, which must be in writing, could not be asked, but that the record must be produced. The objection having been overruled, and the question allowed to be put:—Held, that the ruling was correct. *Henman* v. *Lester*, 12 C. B. (N.S.) 776; 31 L. J., C. P. 366; 9 Jur. (N.S.), 601.

Ambiguity.]—The plaintiff took shares in a company formed to buy up and carry on certain ironworks. The prospectus contained the following statement:—"The present value of the turnover or output of the entire works is over 1,000,000*l.* sterling per annum." The works never had produced an actual turnover or output to the value of 1,000,000*l.* in any year, nor were they producing at that rate at the date of the prospectus, but the machinery was capable of turning out produce to that amount per annum. The plaintiff was asked in interrogatories how he understood the above statement, and replied that he understood the meaning "to be that which the words obviously conveyed." No questions were asked as to this at the hearing in examination or cross-examination:—Held, that the plaintiff was not entitled to recover. *Smith* v. *Chadwick*, 53 L. J., Ch. 873; 9 App. Cas. 187; 50 L. T. 697; 32 W. R. 687; 48 J. P. 644—H. L. (E.)

Held, by Lord Selborne, L.C., Lords Blackburn and Watson, that the statement was ambiguous, and might refer to the output which the works were capable of producing; that, consequently, the burden lay upon the plaintiff to show that he understood it to refer to the actual output, and that he had failed to show this. *Ib.*

Held, by Lord Bramwell, that the statement could only refer to the actual output, and that the plaintiff had sufficiently shown that he so interpreted it, but that it was not made out that the statement was fraudulent on the part of the defendants. *Ib.*

Obligation to Answer.]—An assignment of all a trader's stock, nominally in consideration of a pretended debt, and a small additional advance, but really colourable and collusive, and with intent to defeat execution creditors, is fraudulent and void, under 13 Eliz. c. 5, as against judgment creditors, and the assignor being liable under that statute to criminal prosecution is not bound to answer questions as to the true object of the transaction. *Michael* v. *Gay*, 1 F. & F. 409.

Practice—Where Legal and Equitable Defences.]—A plaintiff in equity, having an equitable as well as a legal defence to an action (on a note obtained from him by undue influence by a person in a confidential relationship), and having filed his bill, was held not bound to go into evidence at the trial at law to establish his legal defence, but might rely on his defence in equity. *Billing* v. *Southee*, 9 Hare, 534; 21 L. J., Ch. 472; 16 Jur. 188.

Parol.]—If, by false and fraudulent representations, a party is induced to enter into a written agreement, and is thereby damnified, he may, in an action for the deceit, give parol evidence of the representations although they are not noticed in the written contract. *Dobel* v. *Stevens*, 5 D. & R. 490; 3 B. & C. 623; 3 L. J. (O.S.) K. B. 89.

—— **Mala fides.**]—Plaintiff having prevented the fulfilment of an agreement in favour of the defendant, for purchasing the assignment of a mortgage, by obtaining himself an advance after notice, not allowed to take advantage of it, being mala fides. Evidence, therefore, of a parol agreement, read against him under these circumstances. *Scott* v. *Merry*, 1 Ves. 2.

7. Relief, Mode and Terms of.

Ground of Relief.]—Mere folly in making an agreement without fraud is no ground for relief in equity. *Milnes* v. *Cowley*, 8 Price, 620.

Conveyance obtained by Misrepresentation—Ground for Setting Aside.]—Where a conveyance of a moiety of an estate was made by A. to B. upon a representation, first made to A. by B., that such moiety was to be the remuneration of the lawyer for recovering the estate, and upon a subsequent representation that such moiety had been made over to him, B., the circumstance that such representations as to the remuneration for professional services, and as to the transfer to B., were untrue, was held to be a ground for setting aside the conveyance. *Reynell* v. *Sprye*, 8 Hare, 222. Affirmed, 2 De G. M. & G. 660; 21 L. J., Ch. 633.

Knowledge of Defendant.]—Knowledge and non-communication of a fact which may influence the other party are not sufficient to rescind a contract. The fact must be, and be known by him who keeps it back to be, of sufficient importance to form a substantial element in the transaction, or there must be some active misrepresentation. *Thompson* v. *Lambert*, Ir. R. 2 Eq. 433; 17 W. R. 111.

Nature of Relief.]—In ordinary cases of fraud, equity undoes the whole transaction, and replaces the parties in their former situation. *Daubeny* v. *Cockburn*, 1 Mer. 644.

—— **Where Consideration Given.**]—No part of a fraudulent agreement can be supported, except where a consideration has been given, in consequence of which the parties cannot be replaced in the same situation. *Daubeny* v. *Cockburn*, 1 Mer. 643; 15 R. R. 174.

Setting aside Contract.]—Where a contract is founded on misrepresentation, a court of equity does not rectify it, but sets it aside, ab initio. *Rawlins* v. *Wickham*, 3 De G. & J. 304; 28 L. J., Ch. 188; 5 Jur. (N.S.) 278; 7 W. R. 145.

Rescission of Contract — Restitutio in Integrum.]—The respondent was induced by misrepresentations made without fraud by the appellants to become a partner in a business which either belonged to them or in which they were partners and which was in fact insolvent. The business having afterwards, owing to its own inherent vice, entirely failed with large liabilities:—Held, that the respondent was entitled to rescission of the contract and repayment of his capital, though the business which he restored to the appellants was worse than worthless, and that the contract being rescinded the appellants

could not recover against him for money lent and goods sold by them to the partnership. *Adams* v. *Newbigging*, 57 L. J., Ch. 1066 ; 13 App. Cas. 308 ; 59 L. T. 267 ; 37 W. R. 97—H. L. (E.)

—— **Partial Restitution.**]—If a person seeks to set aside a sale of various kinds of property, on the ground of fraud, the contract must be rescinded in toto or not at all ; and if the plaintiff is unable to restore any one of the kinds of property included in the contract, relief cannot be given. Secus, if the property be all of the same sort. Semble, where the property is of a perishable nature, the plaintiff is not bound to keep it in a state of preservation after bill filed. *Maturin* v. *Tredinnick*, 4 N. R. 15 ; 10 L. T. 331 ; 12 W. R. 740.

See also col. 364.

Deeds.] — Deeds entered into by fraud and imposition relieved against. *Bridgman* v. *Green*, 2 Ves. 627.

—— **Partial Setting Aside.**]—See *Myddleton* v. *Kenyon* (*Lord*), ante, col. 400.

See also col. 375.

Making Good.]—Liability of a party to make good the result of his misrepresentations. *Overbury* v. *Teale*, 1 W. R. 27.

Conveyance to stand as Security.]—Where articles and a conveyance are not obtained with the strictest fairness, a court of equity will set them aside, and order the conveyance to stand as a security only for the consideration money. *White* v. *Lightburne*, 4 Bro. P. C. 181.

Where conveyance is for an undervalue, court will not set it aside absolutely, but it shall stand a security for the money advanced. *Lane* v. *Page*, Amb. 235. And see *Addison* v. *Dawson*, 2 Vern. 678.

In 1817 a deed of rent-charge was granted by A. M. while in distressed circumstances, for inadequate consideration, to a person lately a subsheriff, and in liquidation of a balance alleged to be due for the satisfaction of executions lodged against A. B., and for poundage thereon. In 1831 A. B. filed his bill to have the deed set aside: —Held, notwithstanding the length of time, that the deed was impeachable on grounds of public policy ; and ought only to stand as a security for the money actually advanced with interest. *D'Arcy* v. *D'Arcy*, Hay. & J. 115.

Securities to stand for Balance Due.]—On the ground of fraud, general account was decreed ; and the securities to stand only for the balance, though the vouchers had been destroyed by general consent. *Wharton* v. *May*, 5 Ves. 27.

Mortgage to stand as Security for Sums actually Advanced.]—A married woman and her brothers, persons in a humble position, being entitled, in reversion expectant on the death of a tenant for life, to a sum of 1,500*l.* charged on land, purported to mortgage this interest to B. as security for 500*l.*, though 250*l.* only was actually advanced. B. subsequently advanced 150*l.* more, for which a further charge for 300*l.* on the same reversionary interest was taken as security. This deed of further charge contained recitals and clauses to the effect that the nature of the transaction was perfectly understood by the borrowers, and that the difference, between the sums actually advanced and the sums expressed to be secured, was considered reasonable remuneration for the delay that must occur before repayment, on account of the age of the tenant for life. The securities were prepared by B's. solicitor, acting for all parties, and the borrowers had no independent advice. Only one year's interest was ever paid. On the death of the tenant for life the 1,500*l.* was paid into court, and upon a petition by the reversioners to set aside these securities on the ground of fraud, and for payment out of the fund :—Held, that the mortgage and further charge could stand as security only for the sums actually advanced, with six years' arrears of interest only. *Slater's Trusts, In re*, 48 L. J., Ch. 473 ; 11 Ch. D. 227 ; 40 L. T. 184 ; 27 W. R. 448.

—— **Petition.**]—Semble, the court will, upon petition for payment out of court, hear and decide questions of this nature without directing the issue of a writ. *Ib.*

Bankruptcy — Proof only for Amount Advanced.]—Grant of annuity void for want of a memorial registered ; being charged on an estate of less annual value than the annuity ; the grantor being the grantee's attorney, preparing the security, and depositing the title deeds but misrepresenting the value of the estate ; proof admitted under his bankruptcy only for the money advanced, with liberty to file a bill for an equitable lien upon the fraud, and the deposit. *Wright, Ex parte*, 19 Ves. 255.

False Statement of Mortgage Debt—Redemption on Payment of Debt Stated.]—Lands in mortgage running through three descents, and the person entitled to redeem, not knowing how much was due for the interest, is informed by the heir of the mortgagor that it was considerably less than it really was, whereupon he settles it upon his marriage as subject only to so much ; those who derive under this settlement shall redeem accordingly, without being obliged to pay the sum concealed by the fraud. *Barret* v. *Wells*, Pre. Ch. 131.

Forfeiture.]—On a fraudulent alienation of lands, the offending parties forfeit a year's value of the estate, but not the consideration money named in the conveyance. *Butcher* v. *Harrison*, 4 B. & Ad. 129 ; 1 N. & M. 677 ; 2 L. J., K. B. 189. See *Doe* d. *Grimsby* v. *Ball*, 11 M. & W. 531 ; 12 L. J., Ex. 328.

Repayment.]—Agreement for the purchase of part of the profits of a patent, which turned out to be a mere bubble, set aside as having been obtained by fraud and misrepresentation, and so much of the purchase money as had been paid under the agreement ordered to be repaid. *Lovell* v. *Hicks*, 2 Y. & C. 481 ; 6 L. J., Ex. Eq. 85 ; 5 *Id.* 101.

—— **Bill against Executor.**] — Apothecary agreed to give his patient 50 guineas to receive 800*l.*, or an annuity of 100*l.* if he should survive a year, which he did ; bill against executors dismissed, as plaintiff could not succeed at law ; but without costs, on account of the money actually advanced, which must have been repaid, upon bill to set aside the agreement. *Priestley* v. *Wilkinson*, 1 Ves. J. 214.

Insufficient Security—Payment of Deficiency.] —Where, for providing for payment of bills, a

third person charged certain property for the benefit of acceptor by way of security, alleging it to be sufficient in value above encumbrances but which turned out to be otherwise:—Held, that the acceptor was entitled to have so much as he had paid, and interest, as the property was insufficient to pay, raised and paid out of the general estate of the deceased third person. *Ingram* v. *Thorp*, 7 Hare, 67.

Reimbursement for Improvements.]—Where the title is fraudulent, equity in giving relief will reimburse the party in possession for permanent improvements. *Shine* v. *Gough*, 1 Ball & B. 444.

Valuing Improvements.]—In estimating lasting improvements, old buildings pulled down, if incapable of repair, to be valued as old materials only. *Robinson* v. *Ridley*, 6 Madd. 2.

Purchase by Bankrupt's Assignee—Re-sale.] If an assignee purchase part of the bankrupt's estate, and improve, the estate must be resold, and put up at the price given by the assignee, adding the sum laid out in improvements. *Hewitt, Ex parte, Johnston, In re*, 2 Mont. & Ayr. 477.

Profits.]—The court only removes fraudulent conveyances out of the way; but will not decree profits back, against the original debtor and owner of the estate, received pendente lite, in favour of judgment creditors from the filing of the bill. *Higgins* v. *York Buildings Co.*, 2 Atk. 107.

Account for enhanced Price.]—If A. buy from B., a minor, under circumstances of distress, the reversion of a house worth 40*l*. a year for 100*l*., and sell it again in a few days for 200*l*., equity will compel him to account to B. for the difference. *Spencer* v. *Chase*, 9 Mod. 29.

Account to Parties to Fraud.] — Where a transaction is set aside on the ground of fraud, no account will be allowed, to the parties to the fraud, of what they have laid out or advanced or expended in the committing of that fraud. *Pinning* v. *Rushworth*, 2 L. J., Ch. 176.

Lease of Church Land—Refunding.]—A building lease is made of church lands, by a deceit put upon this court by the lessor, who takes a large fine from the lessee, though nothing of that was mentioned in the proposal laid before a master; the executor of the lessor was decreed to refund this money, to be laid out in a purchase for the benefit of the successors; but the lease was allowed to stand good, because it did not appear that the tenant was privy to the imposition upon the court. *Galley* v. *Baker*, Cas. t. Talbot, 199.

Lease—Mistake of Lessor—Repayment.]—On a proposal to borrow money on the security of a lease, which the borrower said he was entitled to have granted to him, the lender, on the assurance of a letter addressed to his solicitor by the defendant, saying that he was ready to grant the lease, advanced his money on the security of the lease, but it appeared that the lessor had previously granted a lease to another person: the court ordered the lessor to repay the moneys, although there was no evidence of deliberate fraud, his defence being that he had forgotten the previous lease. *Slim* v. *Croucher*, 2 Giff. 37. Affirmed, 29 L. J., Ch. 273; 6 Jur. (N.S.) 437; 2 L. T. 103; 8 W. R. 347—L.JJ.

—— **Making Good.**]—Circumstances under which, after a contract (to grant a lease) actually executed, the court held a contracting party liable to make good representations (a promise to allow a right of way), on the faith of which the contract was entered into. *Dendy* v. *Cary*, 9 Jur. (N.S.) 845.

Purchase by Company—Combination of Vendors—Rescission, Repayment, Reconveyance.]—A. having two parcels and B. one parcel of land, supposed to contain petroleum, it was agreed between them and C. that C. should pay them $10,000 for the land if he succeeded in forming a company for the purpose of working the oil springs, and in inducing such company to pay him $13,750 as the price of the land, out of which he was to keep for himself $3,750. B. accordingly, assuming the character of owner, gave to C. a conditional promise to sell all the land to him for $13,750, provided the offer was accepted within a certain time. A. wrote a letter, meant to be shown to, and which was shown to, persons intending to become members of the new company, and was proved to have influenced them, in which letter he recommended the purchase, not disclosing that he had any interest therein. A. and B. actively co-operated with C. throughout the whole transaction. The company, in ignorance of the combination, accepted the proposal, but, having discovered the fraud, sued for a rescission of the contract:—Held, that the contract must be wholly rescinded, the price repaid, and the land reconveyed. There being a doubt (owing to the expiration of the term for which the company had been constituted) whether the company was competent to receive the money and to execute a reconveyance, the order provided that the repayment should be made to the company, or to such other persons as were entitled in their right, on the reconveyance of the lands being made to the satisfaction of the colonial court. *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221; 22 W. R. 492.

Purchase declared a Trust—Payment of Accounts—Reconveyance.]—Bill to set aside a purchase made by the defendant, or to have same declared a trust of the plaintiff. By the decree, the plaintiff's right to have the purchase declared a trust was established, and certain accounts were directed: upon the taking of which it was ascertained that a sum of 5,162*l*. 11*s*. 8*d*. was due to the defendant; and under the final decree the plaintiff was ordered to pay same within six months, and that thereupon the estate should be reconveyed to the plaintiff. The plaintiff having failed to pay this sum within the appointed time, semble, that the proper remedy for the defendant, under such circumstances, was the dismissal of the bill. *Austin* v. *Chambers*, 1 Dr. t. Sugd. 85.

Reconveyance.]—Equity has power, by ordering a reconveyance, to vacate a fine fraudulently obtained. *St. John* v. *Turner*, 1 Eq. Abr. 258.

Where a deed is declared void in equity and cancelled, a reconveyance is not necessary; semble. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

Where deeds are set aside for fraud, but the

estate has been conveyed to a third person, who is merely instrumental to conveyance, and not privy to the fraud, or where they are set aside, on paying so much money, a reconveyance ought to be decreed. *Bates* v. *Graves*, 2 Ves. 295.

A purchase from an illiterate poor and old man, ill at the time, being set aside, the price being inadequate, the vendor having no professional advice, and the transaction being completed in great haste and on terms unduly advantageous to him, the proper form of decree is not to declare the deed void, but to direct it to be set aside and order a reconveyance. *Clark* v. *Malpas*, 4 De G. F. & J. 401 ; 8 Jur. (N.S.) 734 ; 10 W. R. 677.

Under a marriage settlement containing the usual powers of sale and exchange, with power to the trustees (of whom one was a minor), with the consent in writing of the wife, to lend the whole or part of the proceeds to the husband on his bond, the trustees, in order to make the loan, inconsiderately sold the estate under the power to the family solicitor, who, as owner thereof, raised a sum of money by way of mortgage, of which part was paid to the husband. The solicitor afterwards resold the estate, no money being paid to the husband, who, for valuable consideration, mortgaged it to other persons, and soon after became insolvent. On a bill filed by the infants interested under the settlement, impeaching the sale :—Held, they were entitled to have the inheritance reconveyed, free from encumbrance, to the uses of the settlement. *Robinson* v. *Briggs*, 1 Sm. & G. 188.

Agreement to Sell — Fraudulent Sale to Another—Cancellation.] — A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount of the purchase money, A. addressed a letter to C., a third person, stating that he would take a certain sum from B. for the premises, reserving a small portion of same for his sister if C. approved of it ; B. subsequently lodged the sum named by A. with C., of which lodgment C. made a memorandum on A.'s letter, with a remark that it was "a great price." During the period of this negotiation between A. and B., A. entered into a contract with D. for the sale of the same premises, and, although notice of the agreement between A. and B. was given to D., actually conveyed the premises to D. :—Held, that D. having had notice of the agreement between A. and B. the conveyance to him must be considered fraudulent, and should be delivered up to be cancelled, and that, the conduct of A. being very fraudulent, the costs of B. should in the first place be paid out of the funds lodged by him in the hands of C. *Field* v. *Boland*, 1 Dr. & Wal. 37.

Agreement obtained by Professional Advice—Cancellation.]—The owner of some leasehold tenements, being persuaded by a conveyancer that other parties were entitled to part of the estate, entered into an agreement by which the estate was to be sold, and all these parties were to share in the purchase money, and 40*l.* was to be paid to the conveyancer. The court, being of opinion that the agreement had been obtained by fraud, misrepresentation, and pressure, ordered it to be delivered up to be cancelled, with costs as against the conveyancer. *Brent* v. *Brent*, 10 L. J., Ch. 84 ; 4 Jur. 1027.

Delivery Up.]—The cases of fraud where a bill has been ordered to be given up are confined to those where the possession of the bill but for the fraud would be that of the plaintiff in equity. *Jones* v. *Lane*, 3 Y. & C. 281 ; 8 L. J., Ex. Eq. 41 ; 3 Jur. 265.

—— **Though Defence at Law.**]—The court will order a legal instrument to be delivered up where it would be inequitable to sue upon it, even though there may be a defence at law. *Cooper* v. *Joel*, 27 Beav. 313 ; 1 De G. F. & J. 240 ; 1 L. T. 351.

—— **Fraudulent Pledge.**]—Where mortgage deeds were put into B.'s hands, to receive principal and interest, who pawned them to defendant S., for 100*l.* :—Held, that, as the pawner must by the deeds appear to have no property, court would decree S. to deliver deeds to plaintiff, and leave the pawnee to his remedy at law against B. *Jackson* v. *Butler*, 2 Atk. 306 ; 9 Mod. 297.

A bill here for recovery of deeds proper, for in an action of trover the plaintiff could only have damages for the detainer. *Ib.*

—— **Bond.**]—In 1869, B. gave a bond to H. for payment of money in 1874, with interest in the meantime. B. and H. both admitted that the bond was satisfied in 1870, but before complete satisfaction H. had deposited the bond with his bankers, who claimed a lien, and expressed an intention of suing at law on the bond when it should become due. The bankers had given no notice to B. of the deposit until after the alleged satisfaction, but they charged collusion between B. and H. :—Held, in 1873, that a bill would not lie for delivery up of the bond. *Binns* v. *Fisher*, 43 L. J., Ch. 188.

Re-transfer.]—Where debtor combines with creditor in fraud upon others, and creditor breaks trust, there is no punishment, but goods fraudulently transferred ordered to be re-transferred for benefit of creditors. "Fraus non est fallere fallentem." *Woodford* v. *Multon*, Cary, 13.

Undertaking to Execute Deeds.]—Where a decree is made to set aside a conveyance, on the ground of ignorance on the part of the party executing it, and for want of professional advice, the court, in its discretion, may oblige the party to give an undertaking to execute proper deeds to be settled by the judge in chambers. *Cartledge* v. *Radbourn*, 14 L. T. 187 ; 14 W. R. 603.

Acknowledgment of Satisfaction.]—Acknowledgment of satisfaction decreed here on a judgment obtained against conscience. *Barnesly* v. *Powel*, 1 Ves. 289.

Setting off one Fraud against Another—Restraining Action.]—A plaintiff having been induced by his solicitor to execute a deed as absolute purchaser of an estate, on the understanding that he was acting as trustee for another person, the real purchaser was afterwards induced by the same solicitor to execute a mortgage of the property to the defendant. The deed contained a fictitious recital of an agreement for a loan from the defendant to the plaintiff, and a fictitious receipt of the mortgage money by the plaintiff from the defendant. It also contained a covenant on the part of the plaintiff to pay the

mortgage debt to the defendant. Afterwards, the security becoming doubtful, the defendant pressed the plaintiff for payment of interest, to which he answered that he had executed the deed as a mere trustee, and under the impression that he was to be freed from all pecuniary liability. Thereupon the defendant sued the plaintiff on his covenant, and the plaintiff filed a bill for an injunction. It turned out that the plaintiff's solicitor, being the defendant's debtor, and pressed by the defendant for further security, had offered the defendant the estate of his client, the plaintiff, as a security; so that the plaintiff was a necessary party to the mortgage, the solicitor being the real borrower; and, although the plaintiff had been guilty of a misrepresentation in the recitals and frame of the mortgage-deed, yet, as the defendant had been equally guilty of misrepresentation (no money having passed), one misrepresentation might be set off against the other, and the plaintiff was entitled to an injunction to restrain the action. *Greenfield* v. *Edwards*, 11 L. T. 663.

Restraining Proceedings.]—The court will restrain a party from enforcing a legal claim where promises have been made to the person legally liable not to enforce it, upon the faith whereof obligations have been entered into. *Money* v. *Jorden*, 21 L. J., Ch. 531.

—— **Restraining Execution.**]—In a suit for the cancellation of a deed on the ground of fraud, and for an injunction to restrain an action on an agreement contained in the deed, where the evidence was insufficient to enable the court to decide the question of fraud, and that question was raised by the pleadings in the action, the court refused to restrain the defendant from proceeding in the action to verdict and judgment, but did restrain him from suing out execution thereon, and from otherwise acting upon the deed until further order. *Leader* v. *McEwen*, 2 N. R. 474.

Husband and Wife.]—Though a husband have imposed on a wife by giving her bond void at law, yet the court will establish the agreement according to the intention of the parties. *Watkyns* v. *Watkyns*, 2 Atk. 97.

Gifts by Testator under Undue Influence—Recovery by Executor.]—Where a testator has during his life given away large sums under circumstances amounting to undue influence, his executors can recover the sums so paid, although the person to whom they were paid did not stand in any of the ordinary confidential relations to the testator. Where other persons have innocently received part of such sums from the person to whom the testator gave them, they can be compelled to repay them. *Huguenin* v. *Baseley* (14 Ves. 273; 9 R. R. 148, 276) followed. *Morley* v. *Loughnan*, 62 L. J., Ch. 515; [1893] 1 Ch. 736; 3 R. 592; 68 L. T. 619.

East India Bonds.]—Notwithstanding 51 Geo. 3, c. 64, which makes East India bonds pass by delivery merely without assignment, the court will restrain the company from paying to a person who has fraudulently obtained possession. *Glasse* v. *Marshall*, 15 Sim. 71.

Preventing Recovery.]—Tenant in tail prevented from completing a recovery by the fraud of a person whose wife is entitled in remainder. Relief in equity, treating the estate, even in favour of a volunteer, as if the recovery had been suffered. *Mestær* v. *Gillespie*, 11 Ves. 638; 8 R. R. 261.

Preventing Legacy.]—Devisee, preventing the testator from charging a legacy by undertaking to pay it, bound in equity, though not at law. *Ib.*

Fine Fraudulently Obtained.]—A., tenant for life, with remainder to B. in tail, by fraud gets B.'s authority to levy a fine; he sells the land and pays the purchase money in the funds, where it is clearly identified; B. has no lien on this money against the other creditors of A. *Newcombe* v. *Burdon*, 2 Anst. 343.

Bond by Lodger to Landlord.]—A plaintiff, while lodging at an hotel, and seriously ill, executed a bond to the landlord for 1,000*l.* payable at six months' date, to secure moneys paid and advanced for the plaintiff for hotel charges, the landlord undertaking to rectify all errors in the accounts; a court of equity restrained an action on the bond, the plaintiff giving judgment for the amount of the claim. *Edwards-Wood* v. *Baldwin*, 4 Giff. 613; 9 Jur. (N.S.) 1280; 9 L. T. 474.

Mortgagor and Mortgagee.]—Where mortgagee entitled to only 4½ per cent. had compelled mortgagor to turn interest into principal at 5 per cent. at the end of every six months, and at the time the mortgage was paid insisted on an advance of six months' interest over and above interest which was due: on bill for relief against mortgagee, and to set aside a grant to defendant of the place of steward to a manor of plaintiff's as obtained by fraud, plaintiff was relieved, both in respect to the transactions relating to the mortgage, and also in regard to the grant of stewardship. *Thornhill* v. *Evans*, 2 Atk. 330; 9 Mod. 331.

Delivery up of Grant.]—Defendant having abused the trust reposed in him, and manifestly intending to get the estate into his own hands, the grant of stewardship must be delivered up, and plaintiff must have the costs of suit. *Ib.*

Deed alleged Fraudulent as against Creditors—Injunction.]—A father and his son settled real estate to the use of the father for life, and after his death to the use of the son, if then living, in fee; and a power was reserved to the father and son of revoking the uses and appointing new uses. By a subsequent deed, the son being at the time insolvent, the father and son revoked the old uses in favour of the son, and appointed the estate to such uses as the father should appoint, and in default of appointment to the use of the son absolutely. The son was afterwards adjudicated a bankrupt, and a bill was filed by the creditors' assignees to set aside the latter deed as fraudulent. Upon a motion in the cause an injunction was granted restraining the father until the hearing from exercising his power under the deed in favour of a purchaser for value, but without interfering with the exercise of his power in favour of volunteers. *Beyfus* v. *Bullock*, L. R. 7 Eq. 391; 20 L. T. 166; 17 W. R. 526.

—— **Registration as lis pendens.**]—In such a case registration of the suit as a lis pendens, under

2 & 3 Vict. c. 11, would not be a sufficient protection to creditors. *Ib.*

Voluntary Conveyance.]—If voluntary conveyance is defeated by sale, it is void as to purchaser; and no satisfaction unless a covenant on which suit might be maintained. *Williamson* v. *Codrington*, 1 Ves. 516.

The court will not decree a voluntary conveyance to be delivered up to a purchaser for a valuable consideration unless obtained by fraud. *Oxley* v. *Lee*, 1 Atk. 625. And see *Doe* v. *Routledge*, Cowp. 705; *Walker* v. *Burrows*, 1 Atk. 94.

Voluntary Settlement.]—Where a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase money payable to the settlor. *Daking* v. *Whimper*, 26 Beav. 568.

Voluntary Deeds.]—A purchaser for value of real estate cannot come into the court of chancery to have a prior voluntary deed, void under 27 Eliz. c. 5, delivered up to be cancelled. The court, in such case, leaves both parties to their respective legal rights and remedies. *De Houghton* v. *Money*, 35 Beav. 98; 13 L. T. 447; 14 W. R. 159.

Partial Setting Aside—Form of Decree.]—Form of decree on setting aside deeds partially—viz. as against creditors only. *Bott* v. *Smith*, 21 Beav. 511.

Practice.] — The court assuming that the plaintiffs had lent A. B. money on the security; first, of a leasehold; secondly, of a policy; and, thirdly, of the written representation of his solicitor as to his solvency:—Held, that the plaintiffs could not make the solicitor liable for misrepresentation, without showing that they had taken proper steps to make the other securities available. *Whitmore* v. *Mackeson*, 16 Beav. 126.

—— **Fraud of Two—Single Bill against Both.**]—Where a person has been induced by a joint fraudulent scheme of two others to make sales to them at an undervalue, a single bill against both to set aside the sales, though they were entirely distinct transactions, is not multifarious. *Walsham* v. *Stainton*, 33 L. J., Ch. 68; 9 Jur. (N.S.) 1261; 9 L. T. 357; 3 N. R. 56; 12 W. R. 63—L.JJ.

8. Damages and Costs.

Measure of Damages—Action against Directors.]—At the trial the judge directed the jury that, if the real damage occasioned to the plaintiff by the defendants' fraud was the price he paid for the shares, he was entitled to recover that amount. The jury assessed the damages at the price paid by the plaintiff:—Held, that the direction was right, and that the shares taken by him being worthless he was entitled to recover the amount paid by him for them. *Twycross* v. *Grant*, 46 L. J., C. P. 636; 2 C. P. D. 469; 36 L. T. 812; 25 W. R. 701—C. A.

The proper mode of measuring damages in an action against directors of a company for false representation as to the affairs of the company, whereby they induced a party to purchase shares in the company, which were worthless, is to ascertain the difference between the purchase-money paid, and what would have been a fair price to be paid for the shares, according to the true circumstances of the company at the time of the purchase. *Huntingford* v. *Massey*, 1 F. & F. 690.

Loss of Profits.]—The defendants, warranting themselves as agents of L. & Co., sold to the plaintiff, in November, 1861, on behalf of L. & Co., certain cargoes of American wool, which were to arrive in England in the January following. L. & Co. having repudiated the contract, the plaintiff filed a bill in chancery against them for specific performance, which was dismissed with costs. He afterwards brought an action against the defendants for their breach of warranty:—Held, that the measure of damages should include first the difference between the contract price of the wool and the value of wool of similar quality at the time and place where the wool would have been delivered had the contract been binding; and, secondly, the costs of the chancery suit, taxed as between attorney and client. *Hughes* v. *Graeme*, 33 L. J., Q. B. 335; 12 W. R. 857.

The defendant, as agent of R., entered into a contract with the plaintiff for the purchase of a ship at a certain price. R., not having given the defendant authority, repudiated the contract, and the plaintiff sold the ship at a lower price. Both the contract price and the price on re-sale were the fair market value of the ship:—Held, that the plaintiff, in an action against the defendant for a breach of his contract, that he had authority as agent of R., could recover as damages the difference between the two prices. *Simons* v. *Patchett*, 7 El. & Bl. 568; 26 L. J., Q. B. 195; 3 Jur. (N.S.) 742; 5 W. R. 500.

Nominal Damages.]—Where a tenant from year to year, having no authority from his landlord to let in a new tenant, falsely represented to the plaintiff that he had, and thereby induced him to pay 100*l.* for allowing him to enter into possession, and also to take the stock at a valuation, but, the landlord refusing to accept him as tenant, he had to leave after a year's occupation, and it was left doubtful on the evidence whether on the whole the plaintiff had become a loser or a gainer, the jury, in an action for the false representation, were directed that they were at liberty, finding for the plaintiff, to give a sum less than the 100*l.*, or even nominal damages. *Cracknell* v. *Davy*, 1 F. & F. 57.

—— **Remoteness of Injury—Onus to show Actual Loss.**]—Costs incurred upon the discovery of the falsehood of a representation, in order to reverse the consequence of the representation, are too remote an injury to be included in a verdict upon an action of fraud. It devolves upon the plaintiff to show actual loss to himself in such an action, and, without proof of that loss, a verdict cannot be entered for nominal damages. *Hyde* v. *Bulmer*, 18 L. T. 293.

Natural Result.]—In an action for fraudulent misrepresentation, the plaintiff may recover damages for an injury which is the direct and natural consequence of his acting on the faith of the defendant's representations. *Mullett* v. *Mason*, 1 H. & R. 779; 35 L. J., C. P. 299; L. R.

1 C. P. 559; 12 Jur. (N.S.) 547; 14 L. T. 558; 14 W. R. 898.

Therefore, where a cattle dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and, the plaintiff having placed the cow with five others, they caught the disease and died:—Held, that he was entitled to recover as damages the value of all the cows. *Ib.*

—— **Costs of Action.**]—A plaintiff being desirous of purchasing a public-house, A. introduced him to C., who had one to dispose of, and who referred the plaintiff to her agent B. A. volunteered to see B. on the subject, and accordingly went to him, and afterwards told the plaintiff that B. represented the receipts of the house to average a certain sum daily, upon the faith of which statement the plaintiff bought the house for 400*l.* It turned out that the value of the business had been grossly exaggerated, and the plaintiff without any notice to A., and without making any inquiry, brought an action against C., charging her with a deceitful representation on the sale. B. swore at the trial that he never made any such representation as A. had stated, and the jury, being satisfied that A.'s statement was false, returned a verdict for the defendant. The plaintiff then sued A. for the damages he had sustained from his false representation, when the jury gave him 300*l.* (being the difference between the price he paid for the business and the sum for which he afterwards sold it), 100*l.* for loss of time, and 181*l.* 8*s.* 6*d.* the costs of the abortive action against C.:—Held, that the action was maintainable so far as related to the 300*l.* and 100*l.*, but that the costs of the first action were not, under the circumstances, the natural and proximate consequence of A.'s misrepresentation, and therefore were not recoverable. *Richardson* v. *Dunn*, 8 C. B. (N.S.) 655; 30 L. J., C. P. 44; 2 L. T. 430; 8 W. R. 582.

A person who bonâ fide, but without authority, pretends to act as agent for another, and makes a contract on his behalf with a third party, impliedly warrants to such a third party that he has authority to make the contract; and, when a suit in chancery was brought by such third party against the supposed principal to enforce a contract made by the alleged agent, and the latter, after notice, said he would be responsible if the suit failed for want of authority to contract, never withdrew the assertion that he was authorised to make the contract, and the bill was dismissed on the ground of such want of authority:—Held, that the third party might, in an action against the agent on the implied warranty of authority, recover as damages his costs of the chancery suit. *Collen* v. *Wright*, 8 El. & Bl. 647; 27 L. J., Q. B. 215; 4 Jur. (N.S.) 357; 6 W. R. 123—Ex. Ch.

A declaration alleging that the defendant falsely and fraudulently represented to the plaintiff that he was authorised by L. to order, and did order, certain quantities of stone for the building of a church to be charged to L. and others, and did falsely and fraudulently write to the plaintiff a letter, and that the plaintiff, relying on the representation of the defendant, supplied the stone, whereas the defendant had no authority to order it; and, L. refusing to pay for it, the plaintiff brought an action against him for the price and failed in it, and was obliged to pay L.'s costs and his own costs; this being sufficient to show a false representation and assumption of authority, the plaintiff is entitled to recover, by way of damages, not only the price of the stone supplied, but the costs which he had paid in the action against L. *Randell* v. *Trimen*, 18 C. B. 786; 25 L. J., C. P. 307. See also *Pow* v. *Davis*, 1 B. & S. 220; 30 L. J., Q. B. 257; 7 Jur. (N.S.) 1018; 4 L. T. 399; 9 W. R. 611, and *Hughes* v. *Græme*, 33 L. J., Q. B. 335; 12 W. R. 857.

Solicitor following Directions.]—An attorney's saying that he only followed directions in drawing deeds under fraudulent circumstances will not excuse him from paying costs. *Bennett* v. *Vade*, 2 Atk. 324; 9 Mod. 312.

Costs of Trustees and Infant.]—On setting aside a voluntary settlement made by a trader while insolvent, in favour of his wife and an infant child, the court, as to the costs of the trustees and infant:—Held, that the utmost it could do was to make the decree without costs. *Elsey* v. *Coe*, 26 Beav. 95.

Creditor found Guilty after Judgment.]—Where creditor, by judgment recovered, is afterwards found guilty of fraud, respecting the whole of his demand, he shall pay costs, both at law and in equity. *Lloyd* v. *Wynne*, 2 Bro. P. C. 374.

Irrelevant Charges of Fraud—Solicitor and Client Costs.]—Plaintiff having failed in proving an agreement, which he sought by bill to enforce, and his bill being dismissed with costs, he was ordered to pay the defendant's costs so far as they had been increased by the irrelevant charges of fraud as between solicitor and client. *Forester* v. *Read*, L. R. 6 Ch. 40.

V. RATIFICATION AND ACQUIESCENCE.

Generally.]—Though suggestions of fraud be probable and apparent, yet if the plaintiff acquiesces by his own solemn act, the court will not relieve him. *Lloyd* v. *Tym*, Colles, P. C. 14.

Laches—General Considerations.]—In ascertaining whether the plaintiffs, in an action to rescind an executed contract for the purchase of 70,000*l.* debentures on the ground of misrepresentation, are barred by laches, consideration is to be paid to the magnitude and difficulty of the interests and questions involved, and to the time that must necessarily elapse after an inquiry is commenced before the truth of the facts can be sufficiently established to justify them in bringing forward serious charges. *Imperial Ottoman Bank* v. *Trustees, Executors and Securities Insurance Corporation*, 13 R. 287.

Equitable and Legal Titles.]—Where facts constituting fraud are known, where no subsisting trust or continuing influence is proved, an equitable title is barred in the same manner as a legal title in a possessory action. *Medlicott* v. *O'Donnell*, 1 Ball & B. 166.

Confirmation—That Amounts to.]—Loose expression in a letter from a son:—Held, not to be a confirmation of bond obtained by parental influence. *Carpenter* v. *Heriot*, 1 Eden, 338.

Where a person entitled to impeach an instrument affecting his property makes a conveyance

of that property "subject to" the estate created by the impeachable instrument, this may amount to a virtual confirmation or not, according to the circumstances under which the latter deed is executed, the material point being whether he has, prior to the execution of the second deed, had his attention called to the question whether the first deed is valid. *Wright* v. *Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133; 25 L. J., Ch. 753; 2 Jur. (N.S.) 599; 4 W. R. 410.

Confirmation by Subsequent Deed.]—Where a settlor filed a bill to obtain the declaration of the court that a settlement executed by him eleven years previously was not binding upon him by reason of its being an unreasonable one, and of his having executed it in ignorance of its effect:—Held, that a subsequent deed executed by the settlor, reciting part of the former deed, and purporting to be in exercise of one of the powers therein contained, was an absolute confirmation of the whole, and was a bar to his suit, though the deed was one which, apart from lapse of time and subsequent confirmation, the court could not have upheld. *Jarratt* v. *Aldam*, 39 L. J., Ch. 349; L. R. 9 Eq. 463; 22 L. T. 192; 18 W. R. 511.

Abandonment of Fraud.]—An agreement rendered inoperative by a collateral fraudulent agreement cannot be made valid by the abandonment of the collateral agreement. *Moxon* v. *Payne*, 43 L. J., Ch. 240; L. R. 8 Ch. 881.

Must be Knowledge of Rights.]—Fraud cannot be condoned unless there is full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. *Moxon* v. *Payne*, 43 L. J., Ch. 240; L. R. 8 Ch. 881.

There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept, by the conduct of the party in whose favour it is made, unaware of the invalidity of the first transaction, and has not, at the time of the supposed ratification, the means of forming an independent judgment. *Savery* v. *King*, 5 H. L. Cas. 627.

Fiduciary Relation.]—Party acquiescing six years in a bond fraudulently obtained by party in fiduciary situation, his executor cannot object to it. *Walmesley* v. *Booth*, 2 Atk. 25; Barnard. 475.

Purchase by Solicitor from Client.]—In the case of a contract by a solicitor to purchase his client's property, a confirmation, to give a title to the solicitor to have the contract specifically performed, must be strong and plain, and with knowledge of the infirmity of the contract. *Cutts* v. *Salmon*, 4 De G. & Sm. 125. Affirmed, 21 L. J., Ch. 750; 16 Jur. 623.

In a cross suit by a solicitor, against the three vendors, to enforce specific performance of the contract of sale:—Held, that although there were acts of acquiescence which, in an ordinary case, might have entitled the purchaser to a decree, his relation to the vendors, as solicitor, disentitled him to such relief. *Ib.*

Purchase by Trustee.]—Purchase by a trustee from the cestui que trust established, under circumstances, with confirmation and acquiescence. *Morse* v. *Royal*, 12 Ves. 355; 8 R. R. 338.

Gift to Agent and Trustee.]—In a suit to impeach a deed of gift to an agent and trustee, it was held that, though it was voidable in its origin, and could not be sustained if it stood alone and had been impeached in reasonable time, yet the subsequent deliberate acts of the party impeaching it, assisted by his legal advisers, made it valid and binding on him. *De Montmorency* v. *Devereux*, 7 Cl. & F. 188; West, 64; 2 Dr. & Wal. 410; 4 Jur. 403.

Deposit by Wife—Acquiescence of Husband.]—Where wife made deposit as security, on part of husband, without his knowledge, but he subsequently acknowledged it as proper, from fraudulent conduct on part of husband, court would not decree deposit back again. *Naish* v. *East India Co.*, 2 Comyns, 462.

Family Arrangement.]—Various arrangements for the relief of the family from existing burdens, though the father obtained some advantages, were supported; on the ground that the effect of the transactions was known to the son, and even acquiesced in by him. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

Brother and Sister—Laches.]—In 1841, sisters voluntarily surrendered to their brother his promissory notes for money owing to them, but under such circumstances that the transaction could not be sustained if complained of in due time. One sister died in 1852, and the other in 1857, and the brother died in 1860. In the following year, a bill was filed by the representative of the sisters to set aside the transaction:—Held, that the plaintiff wholly failed, this being an attempt to rip up a transaction nineteen years old, when all the actors in it were dead, and which transaction they all understood at the time. *Mackintosh* v. *Stuart*, 36 Beav. 21.

Fine acquiesced in.]—A fine levied upon a possession acquired by the fraud of a tenant, but acquiesced in by the landlord, with notice of the fraud, will operate as a bar. *Conry* v. *Caulfield*, 2 Ball & B. 273.

Lease acquiesced in.]—Where tenant for life and remainderman joined in a lease for twenty-one years to the steward of the former, in which certain common rights of disputed title were omitted, but in respect of which, six years after, valuable allotments were made, and the reversioner afterwards accepted the rent for five years:—Held, that the lease could not, after so long acquiescence and many acts, be impeached for fraud, although, considering the relation of the parties, the transaction might have been questioned recently after. *Selsey* v. *Rhoades*, 1 Bligh (N.S.) 1; 30 R. R. 1.

Taking Shares.]—Where a person believes that he has been misled by representations which are false and deceptive into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay. *Venezuela Central Ry.* v. *Kisch*, 36 L. J., Ch. 849; L. R. 2 H. L. 99; 16 L. T. 500; 15 W. R. 821.

Statute of Limitations—Time from when Run-

ning—Concealed Fraud.]—In an action to recover by way of damages money lost by the fraudulent representations of the defendant, a reply to a defence of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years before action, and that the existence of such fraud was fraudulently concealed by the defendant until within such six years, was held good by the court of appeal (Holker, L.J., dissenting). *Gibbs* v. *Guild*, 51 L. J., Q. B. 313; 9 Q. B. D. 59; 46 L. T. 248; 30 W. R. 591—C. A.

—— **Person in a Fiduciary Position.**]—An action was brought by a company in 1879 against a former director to recover 250*l.* on the ground that the defendant had received it from a debtor to the company as a bribe, to induce him to use his influence to obtain favourable terms of compromise for the debtor. The allegations that this bribe had been given had in 1872 been brought before the directors at a board meeting, they had investigated it, and as it seemed came to the conclusion that the charge was unfounded, as no proceedings were taken, and it was not alleged that the other directors had been acting otherwise than bonâ fide in the matter:—Held, that the claim of the company was barred by the Statute of Limitations. *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; 43 L. T. 676; 29 W. R. 370—C. A.

——**Trustee and Cestui Que Trust.**]—Although, where a trustee receives money upon an express trust and wastes it, the Statute of Limitations does not run against the claim of the cestui que trust, yet, where a trustee receives money not belonging to the cestui que trust, but which the cestui que trust can claim on the ground that the receipt of it was a fraud upon him, the Statute of Limitations will run against the claim of the cestui que trust from the time when he discovers the fraud. *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; 43 L. T. 676; 29 W. R. 373—C. A.

Where Doubt as to Fraud.]—The right of a person dealing with a company to set aside (as against the company) a contract, founded on the latter's unintentional misrepresentation, may be waived or released, expressly or indirectly; but cannot be easily waived by anything the person does, or omits, while the falsehood of the misrepresentation remains doubtful. *Bank of Hindustan, China, and Japan, In re*, 42 L. J., Ch. 771.

Impeaching after Confirmation.]—An agreement confirmed, not to be impeached without clear proof of imposition. *Halhed* v. *Macke*, or *Marke*, 3 Swanst. 444.

Release of One of Several.]—Plaintiff having released the principal in a fraud cannot go on against the other parties though they would have been secondarily liable. *Thompson* v. *Harrison*, 2 Bro. C. C. 164.

Laches in enforcing Legal Right, no Defence.]—A specialty creditor brought an action to set aside a conveyance as fraudulent under 13 Eliz. c. 5, nearly ten years after the death of the grantor. The plaintiff had been aware of the facts during the whole of that period, and gave no satisfactory reason for his delay:—Held, that, as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defence, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds a deed which was valid at law. *Maddever, In re, Three Towns Banking Co.* v. *Maddever*, 53 L. J., Ch. 998; 27 Ch. D. 523; 52 L. T. 35; 33 W. R. 286—C. A.

Evidence—Onus.]—Fraud being established against a party, it is for him, if he alleges laches in the other party, to show when the latter acquired a knowledge of the truth, and prove that he knowingly forbore to assert his right. *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221; 22 W. R. 492.

VI. RIGHTS OF THIRD PERSONS.

Maintaining Fraudulent Act.]—Instruments obtained through fraud cannot be maintained by third persons, although not themselves parties to the imposition. *Bridgman* v. *Green*, 2 Ves. 627.

Persons Acquiring Rights.]—Though the persons who by their fraud induced a contract may not enforce it, other persons may, in consequence of it, acquire interests and rights, which they may enforce against the party who has been so induced to enter upon it. *Oakes* v. *Turquand*, 36 L. J., Ch. 949; L. R. 2 H. L. 325; 16 L. T. 808; 15 W. R. 1201.

Relief.]—Relief against a fraud by preventing the recovery, affecting the interests of third persons, not parties in the fraud. *Huguenin* v. *Baseley*, 14 Ves. 290; 9 R. R. 148; *Ib.* 276.

Particeps Criminis.]—Fraud affects only as far as it extends; the court will not say participes criminis shall have no benefit of the agreement in any part. *Lane* v. *Page*, Amb. 235.

By seeking to derive any benefit under a fraudulent transaction, or to retain any benefit resulting therefrom, a third person, however innocent of the fraud in its inception, becomes particeps criminis. *Scholefield* v. *Templer*, 1 Johns. 155; 28 L. J., Ch. 452; 5 Jur. (N.S.) 619; 7 W. R. 353. *S. C.*, on appeal, 4 De G. & J. 429; 7 W. R. 653.

Innocent Parties.]—Fraud vitiates a deed in toto, even against innocent parties. *Bennet* v. *Wade*, Dick. 84.

Where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless there has been some consideration moving from himself. *Scholefield* v. *Templer*, 1 Johns. 155; 28 L. J., Ch. 452; 5 Jur. (N.S.) 619; 7 W. R. 353. *S. C.*, on appeal, 4 De G. & J. 429; 7 W. R. 653.

A. authorised a stockbroker to purchase for him shares in a company, and paid the purchase money; and the shares were duly transferred to him by a deed or document, but his name was not registered. Afterwards the stockbroker, on a false pretence, prevailed upon A. to cancel his signature to the document of transfer, and to

sign a deed of transfer to him (the stockbroker); A. believing, as the stockbroker represented, that he was executing a fresh transfer to himself, in the place of that which had been cancelled. The fraudulent transferee subsequently transferred the shares to an innocent party, B., as a security for money lent to him by B. a short time before:—Held, upon a bill filed by A., that the original transfer to A. must have its effect, and that the shares were thereby vested in A., notwithstanding the cancellation and the subsequent transactions. *Donaldson* v. *Gillot*, L. R. 3 Eq. 274; 12 Jur. (N.S.) 959; 15 L. T. 382; 15 W. R. 166.

Creditors.]—One being, in an under manner, drawn in to execute a conveyance of his estate, afterwards makes his will, and thereby devises all his land to be sold for payment of his debts; his creditors may set aside the conveyance, having a right, in nature of an equity of redemption, as the testator himself had, though urged that it was but in nature of a chose in action, and not assignable. *Blake* v. *Johnson*, Pre. Ch. 142.

A., tenant for life, with remainder to B. in tail, by fraud gets B.'s authority to levy a fine; he sells the land, and invests the purchase money in the funds, where it is clearly identified. B. has no lien on this money against the other creditors of A. *Newcomb* v. *Burdon*, 2 Anst. 343.

Purchaser without Notice.]—One having a bond, receives the money due upon it, and afterwards assigns it for a valuable consideration, as unsatisfied, to another, who has no notice of the payment, yet the purchaser can have no avail of this bond. *Turton* v. *Benson*, 1 P. W. 497; 2 Vern. 764; Pre. Ch. 522; 10 Mod. 455; 1 Str. 240.

Fraudulent Dealing with Bond.]—A., together with B. and C., as his sureties, executed a bond to D. for securing 300*l.* and interest; the debt is paid by C. with the proper money of A.; but C. neglects delivering up the bond to A. to be cancelled. C. afterwards produces this bond, to be assigned as a collateral security for a debt of his own:—Held, that this assignment was a gross fraud in C., and a perpetual injunction was granted to restrain all further proceedings upon the bond. *May* v. *Harmer*, 4 Bro. P. C. 156.

Assignee of Term void under 27 Eliz. c. 4.]—The assignees of a term, void under 27 Eliz. c. 4, as against third parties, are in no better position than the persons in whose favour the term was created, although such assignees took without notice of the claims of those third parties. *Lloyd* v. *Attwood*, *Attwood* v. *Lloyd*, 3 De G. & J. 614; 29 L. J., Ch. 97; 5 Jur. (N.S.) 1322.

Purchaser from Voluntary Grantee.]—If a person grants a voluntary deed, enabling the grantee to raise money on it from a third person, the grantor cannot get back or set aside the deed without paying what is advanced upon it without fraud. *Aldborough* (*Earl*) v. *Trye*, West, 221; 7 Cl. & F. 436.

Minor Child of Purchaser.]—In a suit to set aside a conveyance for fraud after sixteen years, relief given against the purchaser not extended to his minor child claiming an equity under articles executed before the bill was filed. *Purcell* v. *Kelly*, Beat. 492.

A. L.

FRAUDS, STATUTE OF.

Agreements.]—*See* CONTRACT.

Leases.]—*See* LANDLORD AND TENANT.

Guarantee.]—*See* PRINCIPAL AND SURETY.

Sale of Goods.]—*See* SALE OF GOODS—AUCTION AND AUCTIONEER.

Sale of Lands.]—*See* VENDOR AND PURCHASER.

FRAUDULENT CONVEYANCES.

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FRIENDLY SOCIETY.

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A. SOCIETIES WITHIN THE ACTS.

Statutes.]—*Friendly Societies Act*, 1896 (59 & 60 Vict. c. 25), ss. 8—31, 101; *Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 & 60 Vict. c. 26).

What is a Friendly Society.]—A society is a friendly society under the Friendly Societies Act, 1875, s. 8, although it may not include in its objects all the objects there stated, provided its objects are substantially the same as those in the act. *Knowles* v. *Booth*, 32 W. R. 432.

Registration—Companies Act, 1862, s. 4.]—A society which has been registered under s. 8, sub-s. 5, of the Friendly Societies Act, 1875, pursuant to the special authority of the Treasury, is excepted from the provisions of s. 4 of the Companies Act, 1862. *Peat* v. *Fowler*, 55 L. J., Q. B. 271; 34 W. R. 366.

Whether a Charity.]—In 1862, on the occasion of an accident at the Hartley Colliery, in Northumberland, a fund was raised by voluntary subscriptions and vested in trustees for the relief of the sufferers and their families. There being an ultimate surplus, the managers of the fund proposed to apportion it among several mining districts, including South Durham, for the relief of suffering occasioned by colliery accidents in those districts, and in aid of relief funds already in operation there. By the rules of a Miners' Relief Fund Friendly Society, established in 1862 for certain counties, including the county of Durham, provision was made for raising funds by voluntary subscriptions among the members (required to be persons employed in coal and other mines), and by donations, for defraying the funeral expenses of members, supporting their families, assisting members disabled by accident, old age, or infirmity, and for payment of a sum at the death of a member:—Held, in an action by the surviving trustee of the Hartley Colliery Fund, that the friendly society was a "charity," and that that portion of the fund intended for the South Durham district might be applied cy-près by payment to four of the trustees of the friendly society, to be applied by them, according to the rules of the society, for the relief of suffering occasioned by colliery accidents in the South Durham district, and for no other purpose:—Held, also, that the Hartley Colliery Fund, being a fund arising wholly from "voluntary contributions," was exempted by s. 62 of the Charitable Trusts Act, 1853, from the operation of the act, and that, therefore, the consent of the Charity Commissioners to the action, under s. 17, was unnecessary. *Clark's Trust, In re* (45 L. J., Ch. 194; 1 Ch. D. 497; 24 W. R. 233), considered. *Pease* v. *Pattinson*, 55 L. J., Ch. 617; 32 Ch. D. 154; 54 L. T. 209; 34 W. R. 361. And see *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; and *Buck, In re, Bruty* v. *Mackey*, [1896] 2 Ch. 727. Infra, col. 449.

Raising Shares by Subscriptions—Selling Privileges.]—A society established for raising shares at stated periods by the subscriptions of its members, and enabling such members to receive the value of their shares in advance on payment of a bonus, and entering into security for the payment of the subscriptions, fines, forfeitures, and interest (the privilege of receiving such advances being put up to auction and sold to the highest bidder), was not a friendly society within 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40; and the words, "for any other purpose which is not illegal," in 4 & 5 Will. 4, c. 40, must be taken to relate to purposes ejusdem generis as those before enumerated. *Reg.* v. *Scott*, 13 L. J., M. C. 70; 8 Jur. 473. *S. C.*, nom. *Reg.* v. *Shortridge*, 1 New Sess. Cas. 56; 1 D. & L. 855.

Visionary Scheme.]—A society based upon irrational principles, and seeking to realise a visionary and an unattainable object under Mr. Owen's system, is not founded for the propagation of irreligious and immoral doctrines, so as to prevent a creditor recovering his debt. *Pare* v. *Clegg*, 29 Beav. 589; 30 L. J., Ch. 742; 7 Jur. (N.S.) 1136; 4 L. T. 669; 9 W. R. 795.

Trade Unions—Before 39 & 40 Vict. c. 22.]—When a friendly society was established for the purposes which, in the main, were the purposes of a trades union, it was not entitled to the protection of the Friendly Societies Act. *Hornby* v. *Close*, 8 B. S. 175; 36 L. J., M. C. 43; L. R. 2 Q. B. 153; 15 L. T. 563; 15 W. R. 336; 10 Cox, C. C. 393.

Such society was illegal in the sense of being void. *Ib.*

Encouragement of Men on Strike—Relief to Sick Members.]—A society which, in addition to rules for the bonâ fide mutual relief of sick members, and for other ordinary purposes of a friendly society, included also rules for the encouragement, relief, and maintenance of men on strike, is not a friendly society within 18 & 19 Vict. c. 63, ss. 9, 44; first, because such last-mentioned purposes are not analogous to those of friendly societies properly so called; and, secondly, because such purposes are those of a trades union, and are illegal as being in restraint of trade; and consequently, therefore, the summary jurisdiction given to the justices by s. 24 does not apply to cases of fraud or misappropriation of the funds of such a society on the part of any of its members. *Ib.*

A mutual society which, in addition to rules for the bonâ fide relief of sick members, and for other ordinary purposes of a friendly society, includes also rules for the encouragement, relief, or maintenance of men on strike, is not a friendly society. *Farrer* v. *Close*, 10 B. & S. 533; 38 L. J., M. C. 132; L. R. 4 Q. B. 602; 20 L. T. 802; 17 W. R. 1129.

By one of the rules of the Amalgamated

Society of Carpenters and Joiners, it was provided that any free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council, should be entitled to 15*s.* per week:—Held, per Cockburn, C.J., and Mellor, J., that this rule being ambiguous, and being, in their opinion, according to the evidence in the case, construed and applied by the society so as to render the funds of the society available for the purpose of supporting strikes, the society was not within the protection of the 18 & 19 Vict. c. 63. Held, per Hannen and Hayes, JJ., that the rule was not ambiguous but perfectly plain and lawful, and that, as in their opinion the evidence in the case did not show any illegal action under it, the society was within the protection of the enactment. *Ib.*

And see *Warburton* v. *Huddersfield Industrial Society*, 61 L. J., Q. B. 422; [1892] 1 Q. B. 817; 67 L. T. 43; 40 W. R. 346; 56 J. P. 453—C. A.

Rules in Restraint of Trade.]—A society formed for purposes which are primâ facie lawful and beneficial, but having rules in restraint of trade, is not on that ground deprived of the protection of the criminal law, but may prefer an indictment against a servant for embezzling the moneys of the society. *Reg.* v. *Stainer*, 39 L. J., M. C. 54; L. R. 1 C. C. 230; 21 L. T. 758; 18 W. R. 439.

Loan Society.]—A loan society established pursuant to 5 & 6 Will. 4, c. 23, became entitled to the benefit of those provisions upon its rules and regulations being certified by the barrister appointed for that purpose, and before enrolment at the sessions. *Bradburne* v. *Whitbread*, 5 Man. & G. 439; 6 Scott (N.R.) 283; 12 L. J., C. P. 218; 7 Jur. 629.

Evidence—Rules Conclusive.]—The rules of a society as certified by the barrister are to be treated as conclusive as to the character of the society. *Pare* v. *Clegg*, supra.

B. RULES.

1. VALIDITY.

Statute.]—Act of 1896, ss. 9, 13, 14, 15, 17, 18.

Illegal Rules—Restraint of Trade.]—Where the general objects of a society are legal, as in the case of a provident society the object of which is the relief of members when disabled by age or accident or when out of employment, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society, or prevent a member from recovering a sum of money payable to him under a rule of the society which is not illegal. Rules made for the bonâ fide purpose of protecting the funds of such a society from claims, which may be avoided, are not illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable and necessary for that purpose. *Swaine* v. *Wilson*, 59 L. J., Q. B. 76; 24 Q. B. D. 252; 62 L. T. 309; 38 W. R. 261; 54 J. P. 484—C. A.

Alteration of Rules—Members in Receipt of Benefit—Diminution of Security for Benefit.]—The rules of a friendly society made under the Friendly Societies Act, 1855, do not cease to exist because that act has been repealed. Where a member joined a friendly society on the basis that the rules might be altered, and became entitled to a benefit in the society, the subsequent alteration of a rule which diminished his security for that benefit is not ultra vires. *Smith and Galloway, In re*, 67 L. J., Q. B. 15; [1898] 1 Q. B. 71; 77 L. T. 469.

Rules containing no Provision for Alteration—Registration of Amended Rules — Society formed before 1850.]—Sect. 6 of the Friendly Societies Act, 1875, does not impliedly re-enact s. 27 of the Friendly Societies Act, 1855, and thus empower societies formed prior to 1850 to alter their rules. Unless, therefore, the rules make provision for their alteration, they cannot be altered except by consent of all the members. The mere fact that amended rules have been registered does not preclude the court from inquiring into the power of a society to make such amendments. *Souter* v. *Davies*, 15 R. 261.

Altering Place of Meeting.]—A friendly society was established in 1832. In 1851 its rules were amended, and were certified by the registrar under 18 & 19 Vict. c. 63. Rule 1 mentioned its name and place of business at No. 106, Duke Street, Liverpool. By r. 92 no new rule should be made, nor any of the rules amended, allowed, or rescinded, unless with the consent of a majority of the members present at a general meeting of the society specially called for the purpose. By r. 93, in case of any alteration in the place of meeting, written notice should be sent to the registrar of friendly societies. In 1865 the annual general meeting of the society was held in Manchester, and on the same day, and at the same place, a special general meeting was held for the purpose of rescinding the existing rules and making new ones. These meetings were convened by the president and secretary. Resolutions were passed at the special general meeting rescinding the existing rules, and making new rules, by one of which the committee was empowered to change the principal office of the society, either occasionally or permanently, should the interest of the society seem to require it. Upon an application for a rule for a mandamus to the registrar of friendly societies to certify the new rules, he stated that he refused, because he was of opinion that until the place of meeting of the society was by a resolution of the society at a proper meeting called for that purpose changed from Liverpool, no meeting of the society elsewhere than in Liverpool could conformably to law make new, or alter the existing, rules of the society; and that, in the notice convening the meeting, and the rules passed there, divers matters seemed to him in point of law objectionable, and he referred to them:—Held, that the alteration in the place of meeting could only be made at a meeting of the society legally convened, and therefore the rules made at the meeting summoned by the president and secretary at Manchester were void. *Reg.* v. *Tidd Pratt*, 6 B. & S. 627.

Meeting not duly Summoned.]—In an action by the trustees of a friendly society against the treasurer to recover money in his hands, it ap-

peared that he had been appointed under the old rules of the society; that new rules were made in 1853, by which it was declared that three trustees should be appointed, one of whom should be treasurer, in whose names the funds of the society should be invested; and that the treasurer should invest the unappropriated stock exceeding 50*l.* as the board of management should direct, and pursuant to 13 & 14 Vict. c. 115. The three plaintiffs were elected trustees, but a fourth person was elected treasurer. The new rules received the barrister's certificate, under 4 & 5 Will. 4, c. 40, s. 4, but they had been passed at a meeting not duly summoned in pursuance of s. 9 of 10 Geo. 4, c. 56:—Held, first, that the new rules were valid. *Dewhurst* v. *Clarkson*, 3 El. & Bl. 194; 2 C. L. R. 1143; 23 L. J., Q. B. 247; 18 Jur. 693; 2 W. R. 199.

Held, secondly, that the plaintiffs had no right to maintain the action, inasmuch as the new rules had not been pursued; and the treasurer was to hold the money until it was invested, pursuant to 13 & 14 Vict. c. 115, s. 12. *Ib.*

The provision of 10 Geo. 4, c. 56, s. 6, did not apply to societies established before the passing of that act. *Rex* v. *Somersetshire JJ.*, 4 B. & Ad. 549; 1 N. & M. 252; 2 L. J., M. C. 40.

Compliance with—Necessity of, for Proceedings.]—C., the husband of the respondent, was a subscriber in the appellant friendly society. By the rules of the society a subscription for a period of twenty-six weeks entitled the subscriber to a "half-benefit," and it was the duty of the collecting agent of the society to collect subscriptions from the members. C. subscribed for eleven weeks, from 17th Jan., 1881, and then changed his residence, and the collector did not call for his weekly payments. No further sums were ever paid by C. down to 29th Sept., 1881, when he died. His widow, the respondent, claimed 11*l.* 5*s.* as half-benefit; and on the society refusing to pay it, preferred a complaint to a police magistrate for the metropolitan district, who made an order upon the society to pay the amount claimed. The society appealed:—Held, on appeal, that the magistrate was wrong, and that the non-compliance with the rules of the society on the part of the person represented by the respondent was a bar to the recovery of the sum claimed, and that the alleged default on the part of the appellant society could not cure the defect in the title of the claimant. *Taylor* v. *Collins*, 46 L. T. 168.

—— **When Unnecessary.**]—Moneys borrowed for a friendly society and applied for its benefit, constitute a valid debt against the society, although the formalities required by its rules have not been followed. *Pare* v. *Clegg*, 29 Beav. 589; 30 L. J., Ch. 742; 7 Jur. (N.S.) 1136; 46 L. T. 669; 9 W. R. 795.

Inrolment—Necessity of.]—The court refused to issue a mandamus to justices to hear the complaint of a member of a friendly society, which had been acting on rules not inrolled for upwards of 30 years, on the doubt entertained as to the existence of the society in such a case, although the original inrolled rules had never been repealed. *Reg.* v. *Godolphin*, 3 N. & P. 488; 7 L. J., M. C. 104. *S. C.*, nom. *Rex* v. *Cambridgeshire JJ.*, 8 A. & E. 338; 1 W. W. & H. 451; 2 Jur. 613.

2. Proof.

Benefit Society.]—An order of justices requiring the stewards of a benefit society to re-admit A., who had been expelled, recited that it had appeared to the justices that the rules of the society had been inrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order:—Held, that the recital was not evidence of the inrolment of the rules. *Rex* v. *Gilkes*, 8 B. & C. 439; 3 Car. & P. 52; 2 M. & R. 454; 6 L. J. (O.S.) M. C. 118.

Loan Society.]—To give evidence of the transcript of the rules of a loan society, inrolled at the office of the clerk of the peace, by proof of an examined copy of it, the witness who examined the copy with the transcript must prove that he examined the copy of all the rules with the transcript. *Reg.* v. *Boynes*, 1 Car. & K. 65.

Friendly Society.]—In an action on a promissory note by the treasurer of a friendly society, the declaration alleged, that the rules of the society were filed before the making of the promise at the trial. It appeared that the rules were not filed until after the making of the note, but before it became due:—Held, no variance. *Margett* v. *Parkes*, 1 D. & L. 582; 13 L. J., Ex. 87.

By 33 Geo. 3, c. 54, s. 2, it was provided, that the rules of every society should be exhibited in writing to the justices at sessions, to be by them confirmed; after which they should be signed by the clerk of the peace, and a duplicate deposited with and filed by him at such sessions; and that no such society should be deemed to be within the act, till good rules for its government should have been so confirmed and filed. By s. 15, if any member of such society established by virtue of the act, should think himself aggrieved by any act of such society, two justices of the county should determine the matter in a summary way, according to the rules of the society, confirmed pursuant to the act, and make such order therein as they should think just. There was no mention of filing in this section. On an indictment for disobeying an order so made to re-admit a member:—Held, to be no objection that the clerk of the peace signed the rules exhibited to the justices, but not the duplicates deposited with him. *Rex* v. *Wade*, 1 B. & Ad. 861; 9 L. J. (O.S.) M. C. 113.

3. Effect of Rules.

Contracts by Committee—With Sick Member.]—By one of the rules of a benefit society, the committee was to meet "for the purposes of examining candidates for admission, and to settle and determine any matter relating to the breach or non-observance of the articles of the society by any of its members, and their exclusion in consequence thereof, and to settle and determine any other matter or thing relating to the society, subject nevertheless to the confirmation of the society at their next quarterly meeting":—Held, that the latter words were to be considered in conjunction with, and as qualified by, the preceding portion of the rule, and that they did not authorise the committee to enter into a contract

which was in violation of the other rules of the society. *Tyrrell* v. *Woolley*, 2 Scott (N.R.) 171; 1 Man. & G. 809; 10 L. J., C. P. 5.

The other rules established a graduated scale of allowance to sick members, regulated by the state of the funds of the society, and by the period that the members continued a charge upon it; and prohibited them from working while they received such allowance; and also provided for the payment of certain sums on the death of a member, or of a member's wife:—Held, that the committee was not authorised in making a contract with a sick member (who had met with an accident which disabled him from working at his trade), allowing him a fixed weekly sum for life, with permission to attend to any business that he might be able to transact, in consideration of his giving up all further claim upon the society during his life and at his decease. *Ib.*

Sickness—What is.]—By the rules of a friendly society, established under 18 & 19 Vict. c. 63, s. 9, after payment of a year's subscription, "any member shall receive 8*s.* per week during any sickness or accident that may befall him, unless by rioting or drunkenness":—Held, that insanity was sickness within the meaning of the rules. *Burton* v. *Eyden*, 42 L. J., M. C. 115; L. R. 8 Q. B. 295; 28 L. T. 408; 21 W. R. 593.

—— Member not entitled to Sick Pay if in Workhouse or Asylum.]—The rules of a friendly society provided that when a member was entitled to sick pay, he should cease to be so entitled when he became an inmate of a workhouse or a lunatic asylum. Guardians of the poor having relieved a member as a pauper lunatic:—Held, that their claim under section 23 of 39 & 40 Vict. c. 61, had been excluded by the above rule. *Caistor Union* v. *Cleaver*, 56 J. P. 503.

—— Old Age—Natural Decay.]—The respondent over 80 years of age, belonged to a friendly society, one of the rules of which provided that every member, after paying a certain amount of contributions, falling sick, lame, or blind, or otherwise disabled from work, should be entitled to receive a certain weekly amount from the funds of the society for sixteen weeks, if his illness continued so long, and half pay for the remainder; and another provided that where a member falls sick, lame, or blind, he is to give notice to the stewards, with a certificate from the surgeon of the society stating the cause of his indisposition. The surgeon of the society certified to the appellants (stewards of the society) that the respondent "continued unable to work by reason of natural decay." The respondent drew sick pay for some weeks; then the appellants refused to allow him any more, holding that the certificate did not entitle him to receive it:—Held, that incapacity to work arising from natural decay, as the result of old age, did not entitle the respondent to sick pay under the society's rules. *Dunkley* v. *Harrison*, 56 L. T. 660; 51 J. P. 788.

Death of Member Intestate — Payment of Death Allowance—Right of Administrator to Recover.]—The deceased, a member of an unregistered friendly society, had, upon making his application for admission to the society, signed a declaration agreeing to be bound by the rules of the society, and authorising the deduction from his wages of the sum specified in the rules for securing to himself, or to his representatives in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered and authorised the committee to pay the allowance to such person or persons as in their discretion they might think fit; and it further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it had been bequeathed; that, where there were no surviving relatives and no special bequest, only the funeral expenses should be defrayed by the society, and that where the allowance had been once paid neither the committee nor the society should be liable to any further claim in respect of it. Upon the death of the member intestate the society paid the amount of the death allowance to the defendant, his sister. The plaintiff, as administrator of the deceased, having brought an action against the defendant to recover the money so paid to her:—Held, that the rule constituted the contract between the member and the society as to the payment of the money; that the death allowance was not the property of the member during his life, and in the absence of a bequest by will was not assets for the payment of his debts, and that therefore the plaintiff could not recover. *Ashby* v. *Costin*, 57 L. J., Q. B. 491; 21 Q. B. D. 401; 59 L. T. 224; 37 W. R. 140; 53 J. P. 69.

Appointment of Treasurer.]—Where, by the articles of a benefit club, the society was empowered to appoint a treasurer:—Held, that an appointment of two persons to be treasurers was within the power. *Sharp* v. *Warren*, 6 Price, 131.

Stamping Securities.]—The 18 & 19 Vict. c. 63, s. 37, does not exempt from stamp duty securities on which the funds of a friendly society are invested. *Royal Liver Friendly Society, In re*, 39 L. J., Ex. 37; L. R. 5 Ex. 78; 21 L. T. 721; 18 W. R. 349. And see *Bradburne* v. *Whitbread*, supra, col. 435.

Exemption from Stamp Duty.]—See Act of 1896, s. 33.

Assurance on Lives.] — A society enrolled under 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, cannot legally grant assurances on lives, notwithstanding rules authorising them to do so have been certified and allowed. *Kelsall* v. *Tyler*, 11 Ex. 513; 25 L. J., Ex. 153.

A person under 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, effected a policy of assurance on his life in 499*l.* 19*s.*, payable on his decease to his widow; and if none, to his executors, administrators, or assigns. All previous acts relating to friendly societies were repealed and consolidated by 13 & 14 Vict. c. 115, s. 2, and assurances in favour of relations were limited to 100*l.*, but the rights of parties under former acts were preserved. The testator paid the premiums till his decease, and died indebted, leaving his widow surviving:—Held, that the policy was good, though it exceeded 100*l.*, and that the widow was entitled to the sum assured. *Owen, In re, Clayton* v. *Owen*, 31 Beav. 285; 31 L. J., Ch. 825; 8 Jur. (N.S.) 1117; 6 L. T. 802; 10 W. R. 770.

C. RIGHTS AND LIABILITIES OF MEMBERS.

1. To whom Property Entrusted.

Statute.]—Act of 1896, ss. 49—51.

Treasurer—Who may be.]—An incorporated banking company cannot be the treasurer of a friendly society within the meaning of the Friendly Societies Act, 1875. *West of England and South Wales District Bank, In re, Swansea Friendly Society, Ex parte*, 48 L. J., Ch. 577; 11 Ch. D. 768; 40 L. T. 551; 27 W. R. 596.

—— **Liability.**]—The 10 Geo. 4, c. 56, ss. 20, 22, had not the effect of increasing the responsibility of a treasurer of such a society beyond that of a bailee, in respect of the loss of money immediately after its receipt. *Walker* v. *British Guarantee Association*, 18 Q. B. 277; 21 L. J., Q. B. 257.

—— **Penalties.**]—To render the treasurer of a friendly society liable to the penalties imposed by 18 & 19 Vict. c. 63, s. 24, for withholding or misapplying moneys of the society which have come to his hands as treasurer, it must be shown that he has been guilty of some fraud or misrepresentation. Mere inability to pay over the money to the trustees is not enough. *Barrett* v. *Markham*, 41 L. J., M. C. 118; L. R. 7 C. P. 405; 27 L. T. 313.

—— **With another Person.**]—An officer of a friendly society, entrusted with moneys of the society jointly with another person, who is a member but not an officer of the society, was not within the summary remedy provided by 33 Geo. 3, c. 54, s. 8. *Heanor Friendly Society, In re*, 1 Beav. 509.

—— **When Association not Registered.**]—An association not registered and without rules held meetings at the house of G., and, appointing him their treasurer, placed money in his hands. A majority of the association afterwards removed the meetings from his house, whereupon he resigned, but refused to deliver up the money. The association was afterwards registered without the concurrence of G., and proceeded against G. under 18 & 19 Vict. c. 63, s. 24:—Held, that he was not liable under that act, as he was not a party to the registration. *Patrick* v. *Gilbert*, 18 W. R. 315.

—— **Money for use of Doctor.**]—By the rules of a friendly society, a medical attendant was entitled to 3*s.* per annum from every member; and a committee of the society was authorised to settle all disputes, grievances, &c., relative to the affairs of the society, subject to an appeal to two magistrates. The plaintiff, who had been duly appointed medical attendant, was dismissed by the committee without any meeting of the society at large, and another appointed; upon an application to magistrates, they recommended a public meeting, which being convened accordingly, a large majority of the members voted for the plaintiff, who thereupon sued the treasurer for the 3*s.* received for the use of the medical attendant:—Held, that he was entitled to recover, and that the treasurer was not exonerated by an order of the committee not to pay. *Garner* v. *Shelley*, 5 Bing. 477. *S. C.*, nom. *Garner* v. *Shelley*, 3 M. & P. 98; 7 L. J. (o.s.) C. P. 194.

Bankruptcy of Officer—Preferential Payment—Debt due to Society.]—Upon the bankruptcy of an officer of a friendly society, the trustees are, under s. 15, sub-s. 7 of the Friendly Societies Act, 1875, entitled to preferential payment of sums received by him in virtue of his office, notwithstanding that these sums cannot be specifically traced, and are not at the time of the bankruptcy in his actual possession. *Edmonds, Ex parte, Atkins, In re* (51 L. J., Ch. 406), approved. *Official Receiver, Ex parte, Miller, In re*, 62 L. J., Q. B. 324; [1893] 1 Q. B. 327; 4 R. 256; 68 L. T. 367; 41 W. R. 243; 10 Morrell, 21; 57 J. P. 469—C. A.

See now Act of 1896, s. 35.

Section 15, sub-s. 7, of the Friendly Societies Act of 1875, entitles the trustees of a friendly society upon the bankruptcy of the financial secretary of the society—who was by the rules entitled to receive certain of the moneys due to the society, though bound to hand them over at once to the treasurer—to be paid out of his estate, in preference to other creditors, the balance due from him to the society in respect of moneys which he had properly received by virtue of his office; such moneys, though he ought to have handed them over to the treasurer, are in his possession by virtue of his office. *Welch, In re, Oddfellows Trustees, Ex parte*, 63 L. J., Q. B. 524; 10 R. 140; 70 L. T. 691; 42 W. R. 320; 1 Manson, 62.

Under the Friendly Societies Act, 1875, s. 15, sub-s. 7, the trustees of the society are entitled to preferential payment out of the estate of a bankrupt treasurer in respect of money received by him by virtue of his office, notwithstanding the fact that the debtor's assets consist only of stock in trade, furniture, and other property, which cannot be considered as specifically belonging to the society. *Edmonds, Ex parte, Atkins, In re*, 51 L. J., Ch. 406; 46 L. T. 240; 30 W. R. 432.

On the appointment of the bankrupt as treasurer of a friendly society, it was agreed that for the funds then in hand she was to pay interest for 120*l.*:—Held, that this was not to be considered as a loan to her; but that it was in her hands and possession by virtue of her office of treasurer within 4 & 5 Will. 4, c. 40, s. 12; and that the assignees must pay over the amount to the society. *Ray, Ex parte*, 3 Deac. 537; 1 Mont. & C. 50.

A treasurer of a friendly society established under 4 & 5 Will. 4, c. 40, and 10 Geo. 4, c. 56, paid himself a debt due from a third party, out of the moneys of the society, and took for the secretary of the society a very insufficient mortgage from his debtor, which mortgage two of the trustees of the society were induced to execute, they not knowing the contents of it:—Held, upon the bankruptcy of the treasurer, that this was money due and owing from him to the society at the time of his bankruptcy, within the meaning of the above act; and that the society were entitled to be paid in full, in priority to other creditors of the bankrupt. *Burge, Ex parte, Baker, In re*, 1 Mont. D. & D. 540; 10 L. J., Bk. 30.

Where an officer of a friendly society has received, as such officer, moneys belonging to the society, and afterwards executes an assignment for the benefit of his creditors, and his assignees are possessed of enough of his estate and effects to repay the amount of such moneys, but the specific moneys so received by the officer are not

traced to the assignees, the assignees are not liable to the provisions of 18 & 19 Vict. c. 63, s. 24, if they refuse to repay to the society the amount of such moneys. *O'Donnell, Ex parte*, 35 L. J., M. C. 99 ; L. R. 1 Q. B. 274 ; 14 W. R. 83.

The 18 & 19 Vict. c. 63, s. 23, requires the assignees of the officers of such societies, "upon demand in writing," to pay the debts due from such officers in priority to their other creditors :—Held, that a bill filed to recover the amount is a sufficient demand in writing. *Absolom* v. *Gething*, 32 Beav. 322 ; 32 L. J., Ch. 786 ; 9 Jur. (N.S.) 1263 ; 8 L. T. 132 ; 11 W. R. 332.

The treasurer of a benefit building society held not to be a "person appointed to or employed in any office in any society established under any of the acts relating to friendly societies," within the meaning of s. 167 of the Bankrupt Law Consolidation Act. *Bailey, Ex parte, Barrell, In re*, 5 De G. M. & G. 380 ; 23 L. J., Bk. 36 ; 18 Jur. 988 ; 2 W. R. 401.

Sect. 12 of the Friendly Societies Act, 4 & 5 Will. 4, c. 40, and s. 4 of the Benefit Building Societies Act, 6 & 7 Will. 4, c. 32, are repealed by the Bankrupt Law Consolidation Act. *Ib.*

The preference given to friendly societies by the stat. 33 Geo. 3, c. 54, s. 10, over other creditors, is confined to debts in respect of money in the hands of their officers, by virtue of their offices, and independent of contract ; therefore, it does not extend to money held by the treasurer upon the security of his promissory note payable with interest upon demand. *Stamford Friendly Society, Ex parte*, 15 Ves. 280. S. P., *Buckland Ex parte*, Buck, 214.

Preference by bankrupt laws given to friendly societies in case of bankruptcy, &c., does not extend to debts due from their officers individually, and not in their official characters. *Amicable Society of Lancaster, Ex parte*, 6 Ves. 98.

No Treasurer appointed.]—A person in the habit of receiving money of a friendly society, having no treasurer appointed, upon notes carrying interest payable a month after demand, is not an officer of the society, so as to entitle them to a preference under 33 Geo. 3, c. 54, s. 10. *Ashley, Ex parte, Corser, Ex parte*, 6 Ves. 441. S. P., *Ross, Ex parte, Ib.* 802.

—— **Bankers.**]—By the rules of a friendly society it was provided that there should be appointed a treasurer or treasurers, in whose hands should be deposited all the cash belonging to the society until the same should be placed out at interest, and that, as soon as a sufficient sum should be collected, it should (after leaving in the club-box a sufficient sum to pay the sick and other expenses of the society) be deposited in the hands of the treasurer or treasurers of the society, and that the clerk and two stewards should take the same to the bank. No formal appointment of treasurer was made, but the moneys of the society were paid into a bank :—Held, that the bankers were not "employed" as officers of the society so as to entitle the society upon their bankruptcy to payment in full. *Orford* or *Oxford, Ex parte, Rufford, In re*, 1 De G. M. & G. 483 ; 21 L. J., Bk. 31 ; 16 Jur. 851. And see *Whipham, Ex parte*, 3 Mont. D. & D. 564.

The rules of a friendly society provided that the treasurer retaining upwards of 10*l.* more than seven days after he was required to pay it over should be excluded from the society. They also provided that a particular firm should be the bankers of the society, with power for a general meeting to appoint other bankers :—Held, that the bankers for the time being were not officers, so as upon their bankruptcy to entitle the society to payment in full. *Harris, Ex parte, Clarke, In re*, 1 De G. 162 ; 14 L. J., Bk. 25.

Default by Trustee.]—One of two trustees absconding, other ordered to transfer fund into his own name, and that of another appointed. *Friendly Society, In re*, 1 Sim. & S. 82.

Petition under 33 Geo. 8, c. 54, s. 10, in consequence of bankruptcy of trustee, should, it seems, be entitled in bankruptcy only, and not in matter of the society. *Anon.*, 6 Madd. 98.

Surviving Trustee—Order to Transfer Funds.]—The defendant was the surviving trustee of an association for the relief of orphans and widows. A schism took place among the members, and a portion of them caused the society to be registered under the 13 & 14 Vict. c. 115. The defendant was removed from the office of trustee by a meeting acting in compliance with the regulations prescribed by the rules, and new trustees appointed. The bill was filed by the plaintiffs, on behalf of themselves and all other persons interested in the trust fund, to compel the defendant to transfer stock standing in his name to the new trustees ; and he resisted the application, on the ground, amongst others, that he was a trustee not only for the members of the registered society, but also for those subscribers of the old association who had been excluded from the new society. The court, looking at the original rules, and the rules which had been certified :—Held, that the societies were identical, and that no persons claiming to be cestuis que trust, could object to the frame of the suit ; the object of placing the fund in the hands of the proper trustee being common to all ; that the power given to meetings, by the Friendly Societies Act and rules, of appointing new trustees, from time to time, included the power of removing trustees ; that the Friendly Societies Act did not oust the jurisdiction of the Court of Chancery ; that where a society has been registered under the act, *Clough* v. *Ratcliffe* (1 De G. & Sm. 164) does not apply ; that the court would be unwilling to consider a society for the benefit of widows and orphans illegal under the 39 Geo. 3, c. 79, but would take the registrar's certificate to be conclusive as to the society being in conformity with, and therefore entitled to the benefit of the 21st section of, the 13 & 14 Vict. c. 115. *Hodges* v. *Wale*, 2 W. R. 65. And see *Norrish, Ex parte*, Jacob, 162.

The committee of a benefit club, which was not registered, advanced some of the club money on the security of a deposit of a lease. Afterwards the surviving members of the club formed a new society, under a different name, which succeeded to the funds of the old club. The new society was duly registered under the 10 Geo. 4, c. 56 :—Held, that the equitable mortgage would not vest in the public officer of the new society without a legal transfer. *Davies* v. *Griffiths*, 1 W. R. 402.

Power of Court to compel Members to restore Money of Society.]—Powers of the Court of Chancery under the act 10 Geo. 4, c. 56, to compel two members of a friendly society to restore

money belonging to the society which had been received by them. *Briton Friendly Society, In re*, 1 W. R. 50.

Master—Expulsion of Lodge.]—A district Odd Fellows society, after expelling a lodge of the society for non-payment of subscriptions and fines, was registered as a friendly society pursuant to 13 & 14 Vict. c. 115, under a name which, upon an objection of the certifying barrister, was altered from the original name. Some deposit notes of a banker's, with whom a portion of the subscriptions were deposited, remained in the hands of the grand master of the expelled lodge, and were demanded from him by the trustees of the registered society:—Held, that whether the expulsion of the lodge had been proper or not, he was bound to deliver up the notes to the trustees, and he was ordered to pay the costs of a suit instituted by the trustees against him for their recovery. *Yeates* v. *Roberts*, 7 De G. M. & G. 227; 3 W. R. 461. Affirming 3 Drew. 170; 1 Jur. (N.S.) 319.

Ordinary Member.]—An action for money had and received may be maintained against one who had been a member of a benefit club, for money intrusted to his keeping by the rest of the society, in the name of the officers properly appointed for managing their affairs under the articles. *Sharp* v. *Warren*, 6 Price, 131.

Available Securities.]—A bond given to the plaintiff as the treasurer of a friendly society, for the use of the society, is an available security at common law, though the rules and regulations of the society have not been confirmed at the quarter sessions, in pursuance of 33 Geo. 3, c. 54, s. 2. *Jones* v. *Woollam*, 1 D. & R. 393; 5 B. & Ald. 769; 2 Chit. 322.

Box to be Delivered to Committee—Condition in Bond.]—Where the landlord of a public-house had given a bond to deliver to the committee of a friendly society the box at all times when required by a majority of the society at one of their annual or quarterly meetings, "or by their committee for the time being," and likewise to render a just and true account, "according to the rules, orders, and regulations of the society, and of the act of parliament, and of the bond":—Held, that the latter words did not qualify the power of the committee to demand the box, &c., and that a refusal to comply with their request to do so was a breach of the condition, it having been shown that such committee had been duly elected by a majority of the society at their annual meeting. *Wybergh* v. *Ainley*, M'Cle. 669.

Theft by Third Person.]—By 18 & 19 Vict. c. 63, s. 18, the property and moneys of the society are vested in the trustees. A resolution of a meeting of one of these societies directed that 40*l.* should be sent to a bank, and that the prisoner, one of the trustees, should take it. The money was handed by the treasurer's clerk to the prisoner, who misappropriated it:—Held, that he could not be convicted as a bailee, or under a common count for larceny, of stealing the 40*l.* as the money of the treasurer. *Reg.* v. *Loose*, Bell, C. C. 259; 29 L. J., M. C. 132; 6 Jur. (N.S.) 513; 2 L. T. 254; 8 W. R. 422; 8 Cox, C. C. 302.

Property withheld or misapplied—Criminal Proceedings.]—Where an officer of a friendly society is entrusted with property for the value of which he has to account, and a deficiency exists which cannot fairly be attributed to depreciation and waste, this constitutes a primâ facie case for the granting of a summons under s. 16, sub-s. 9, of the Friendly Societies Act, 1875. *Reg.* v. *Bennett*, 63 L. J., M. C. 181; 10 R. 456.

—— **Conviction and Order for Repayment—Imprisonment in Default—Subsequent Civil Proceedings.**]—Where a person who has under s. 16, sub-s. 9, of the Friendly Societies Act, 1875, been convicted of withholding the moneys of a society, and ordered to pay a penalty and repay the moneys, and in default to be imprisoned, and has, in default of repaying the moneys or of paying the penalty, suffered imprisonment, he cannot afterwards be sued for the moneys in a civil action. *Vernon* v. *Watson*, 60 L. J., Q. B. 472; [1891] 2 Q. B. 288; 64 L. T. 728; 39 W. R. 520; 56 J. P. 85—C. A.

Sum paid for Funeral Expenses of Child under Ten Years of Age—Production of Certificate of Death.]—A society, whose registration under the Friendly Societies Act had been cancelled, and which was registered under the companies acts, did not issue policies of assurance, but collected and entered upon a contribution card fortnightly contributions from its members, and was liable to pay sums of money upon the death of a member for funeral expenses. The society was convicted under s. 28 of the Friendly Societies Act, 1875, for having paid such a sum on the death of a child under the age of ten years without the production of a certificate of death:—Held, that the words in s. 2 of the Life Assurances Companies Act, 1870, "who issue, or are liable under, policies of assurance upon human life," must be excluded from the definition of "society" in s. 28 of the Friendly Societies Act, 1875, as being inconsistent with the context; and that the society fell within that definition, and the conviction was right. *Newbold Friendly Society* v. *Barlow*, 62 L. J., M. C. 124; [1893] 2 Q. B. 128; 5 R. 435; 68 L. T. 798; 41 W. R. 543; 57 J. P. 565.

Embezzlement—Rules in Restraint of Trade.]—An officer of a friendly society, some of whose rules were in restraint of trade, embezzled their money:—Held, that rules in restraint of trade are not criminal, although they may be void as being against public policy, and that societies having such rules are entitled to the protection of the criminal law for their funds, and consequently, that he might properly be convicted of embezzlement. *Reg.* v. *Stainer*, 10 B. & S. 553; 39 L. J., M. C. 54; L. R. 1 C. C. 230; 21 L. T. 758; 18 W. R. 439. See *Farrer* v. *Close*, 38 L. J., M. C. 132; L. R. 4 Q. B. 602; 20 L. T. 802; 17 W. R. 1129.

And see CRIMINAL LAW.

Reg. v. *Tyree*, 38 L. J., M. C. 58; L. R. 1 C. C. 177; 19 L. T. 657; 17 W. R. 334; 11 Cox, C. C. 241.

Reg. v. *Proud*, L. & C. 97; 31 L. J., M. C. 71; 8 Jur. (N.S.) 142; 5 L. T. 331; 10 W. R. 62; 9 Cox, C. C. 22.

Reg. v. *Bren*, L. & C. 346; 33 L. J., M. C. 59;

9 L. T. 452; 12 W. R. 107; 9 Cox, C. C. 398.

Reg. v. *Diprose*, 19 L. T. 292; 17 W. R. 180; 11 Cox, C. C. 185.

Larceny.]—Where a friendly society had appointed a treasurer and two trustees, one of the trustees was held guilty of larceny in stealing the money of the society. *Reg.* v. *Cain*, 2 M. C. C. 204; Car. & M. 309.

As to Member Obtaining Money on False Pretence.]—*See* CRIMINAL LAW.

Reg. v. *Dent*, 1 Car. & K. 249.

As to Forgery of Authority to Receive Money Deposited in a Bank by a Friendly Society.]—*See* CRIMINAL LAW.

Reg. v. *Harris*, 2 M. C. C. 267; 1 Car. & K. 179.

2. CONVENTION OF MEETINGS.

Requisition to call Meeting.]—The secretary or other officer of a friendly society being served with a requisition, duly signed, under 10 Geo. 4, c. 56, s. 9, to call a meeting for the purpose of altering or rescinding the rules, could not, in the exercise of his discretion, refuse, but is bound to convene such meeting. *Reg.* v. *Bannatyne*, 17 Q. B. 524; 20 L. J., Q. B. 210; 15 Jur. 1035.

—— **Mandamus.**]—A mandamus to the officer to sign the notice for convening a meeting under 10 Geo. 4, c. 56, s. 9, would not be granted unless it appeared that the requisition provided for by the section had been made within a year. *Reg.* v. *Aldham and United Parishes Assurance Society*, 2 W. R. 456.

3. RE-ADMISSION OF MEMBERS.

Indictment.]—An indictment lies against the president and stewards of a friendly society, for disobeying an order of justices addressed to them, to re-admit a member, though it is sworn that the power of doing so is not in the president and the stewards, but in a committee. *Rex* v. *Wade*, 1 B. & Ad. 861; 9 L. J. (o.s.) M. C. 113. And see *Rex* v. *Gilkes*, supra, col. 438.

4. REMOVAL OF OFFICERS.

Meeting not Legally Constituted.]—At a meeting of a committee of a friendly society, the majority of such committee removed A. from the office of treasurer, and appointed B. in his stead. It appeared, however, that C., one of the members of such committee, did not attend the meeting, and had not been summoned thereto:—Held, that such meeting was not legally constituted, and that an amotion and appointment made thereat were, therefore, invalid. *Roberts* v. *Price*, 4 C. B. 231; 16 L. J., C. P. 169; 11 Jur. 352.

—— **Waiver or Recognition of Validity.**]—Held, also, that the fact of C. not having attended the meetings of the committee, or taken any part in the business of the society for a twelvemonth, did not amount, on his part, to a waiver of notice. *Ib.*

Held, thirdly, that the fact of A. being present at such meeting, and demanding a poll upon the question whether he should be removed from the office of treasurer, did not amount to a recognition on his part of the validity of the meeting. *Ib.*

Mandamus to Restore Secretary.]—A rule nisi granted for a mandamus requiring the trustees of a friendly society, registered under the Joint Stock Companies Act, to require them to restore one, who had been secretary, to his office. *Reg.* v. *Hearts of Oak Friendly Society*, 13 W. R. 724. And see *S. C.*, 14 L. T. 360.

Collector Wrongfully Dismissed—Property in Collecting Books.]—The defendants were a friendly society, and the plaintiff was one of some 1,300 persons employed by them, at a remuneration fixed by the committee of management, to collect the weekly premiums of the members of the society. Rule 16 of the society's enrolled rules provided (inter alia) as follows: "The society shall have an unlimited number of collectors. The collectors shall be furnished with books at the society's expense (the said books to be the property of the society), in which they shall enter the names, ages, residences, date of entrance and premiums of all the members they may collect from .... If any collector resign or be dismissed, he shall deliver up all .... collecting books .... being the property of or belonging to the society, to the treasurer, agent, or any other person or persons duly authorised to receive the same." It was the usual practice for a person desiring to become a collector of the society to purchase the collecting book of a collector desiring to resign, and the bargain between them for the sale and purchase of the book, though made outside the society, was recognised by the society. In accordance with the said practice the plaintiff purchased for 135*l.* the collecting book of one J., a collector, and paid that sum to J. with the knowledge and approval of the society's secretary, and was thereupon appointed a collector in J.'s place and district. A few months afterwards, with their knowledge and approval, he purchased and paid 50*l.* for the collecting book of K., another collector. In the first page of each book was the usual printed notice, "The collector shall be furnished with books at the society's expense. Such books to be the society's property," and on the back of each book, as was the usual practice, there was printed the plaintiff's name, "M. Ellwood," and also the defendants' name. The plaintiff was subsequently dismissed from his office of collector, and in an action by him in the Liverpool passage court to recover damages from the defendants for wrongful dismissal and the detention of his collecting books, the jury found that he was rightfully dismissed and that he had an interest in the books amounting to 50*l.*, whereupon judgment was entered for the defendants on the claim for wrongful dismissal, and for the plaintiff as to the books for 50*l.*, damages 1*s.* On appeal from the finding and judgment in favour of the plaintiff, it was held, by the exchequer division (Kelly, C.B., and Stephen, J.), overruling that finding and judgment, that the books were the property of the society, and that the plaintiff had never had any property or any interest whatever in them recognisable by law or giving him any right of action against the defendants, and that the question of his interest in the books ought not to have been left to the jury. *Ellwood* v.

Liverpool Victoria Legal Friendly Society, 42 L. T. 694 ; 44 J. P. 508.

Per Stephen, J.: Had the plaintiff been wrongfully dismissed, the fact of his having paid money for the books, in order to obtain the appointment of collector, might have been a matter to go to the jury for their consideration with regard to the amount of damages for wrongful dismissal. *Ib.*

5. OTHER CASES.

Right of Sole Surviving Member.]—The rules of a private society in the nature of a friendly society, the funds of which were furnished partly by the members, and partly by non-members, provided that the interest of the funds should alone be applied towards its purposes. No provision was made for the ultimate distribution of the capital. A sole surviving member of the society filed a bill for payment to her of the capital of the fund. It was ordered that the income of the fund should be paid to her during her life, with liberty to apply at her death, and notice of the application to be given to the attorney-general. *Spiller* v. *Maude*, 10 Jur. (N.S.) 1089 ; 11 L. T. 329 ; 13 W. R. 69.

Notice of Withdrawal of Member.]—By the rules of a mutual guarantee society, notice of the withdrawal of any of the members was required to be given, but no particular form of notice was required, nor was it stated to whom the notice should be given :—Held, that parol notice of withdrawal given by a member to the agent through whom the original contract with the society was made was sufficient. *Hawthorne, Ex parte, Solvency Mutual Guarantee Society, In re*, 31 L. J., Ch. 625 ; 8 Jur. (N.S.) 934 ; 6 L. T. 574 ; 10 W. R. 572.

Failure of Objects of Society—Undisposed-of Fund—Charity.]—A society formed for the sole purpose of raising by the subscriptions of its members, and the fines and forfeitures imposed by its rules, a fund to provide annuities for the widows of deceased members of the society, and subsequently brought under the provisions of the Friendly Societies Act, 1829 (10 Geo. 4 c. 56), is not a charity, and its funds cannot, on the failure of the objects of the society, be administered cy près. *Cunnack* v. *Edwards*, 65 L. J., Ch. 801 ; [1896] 2 Ch. 679 ; 75 L. T. 122 ; 45 W. R. 99—C. A.

The members of such a society are not in the position of cestuis que trust as regards the society, but are persons who have entered into a contract with the society that on their making certain payments their widows should receive certain benefits out of the funds of the society, and that being the only destination of the funds of the society there cannot, on the failure of the objects of the society, be any resulting trust of the funds remaining unexpended in favour of the representatives of the deceased members, and such funds must go to the crown as bonâ vacantia. *Ib.*

—— **Application of Bequest—Cy près.**]—A friendly society formed to provide a fund for sick and distressed members, their widows and children, and receiving voluntary donations, is a charity, where the rules show that poverty is a necessary ingredient in the qualification of applicants for the benefits of the society. *Buck, In re, Bruty* v. *Mackey*, 65 L. J., Ch. 881 ; [1896] 2 Ch. 727 ; 75 L. T. 312 ; 45 W. R. 106 ; 60 J. P. 775.

If a legacy is given to such a society which has not ceased to exist at the date of the testator's death, but which has only one amply secured annuitant with a claim upon its funds, such legacy will not lapse, but will be applied cy près. *Cunnack* v. *Edwards*, supra, distinguished. *Ib.*

And see *Pease* v. *Pattinson*, 32 Ch. D. 154, supra, col. 433.

Indorsed Receipt by Friendly Society.]—T. mortgaged his property first to a friendly society and then to a bank. Afterwards T. applied to a building society for an advance. The building society, without notice of the second mortgage, paid off the first mortgage, and made a further advance to T. The friendly society reconveyed the property to T. by means of a regular conveyance, and on the same day T. executed a mortgage to the building society :—Held, that the building society was entitled to the legal estate and to priority over the bank for the whole advance. *Pease* v. *Jackson* (37 L. J., Ch. 725) ; and *Robinson* v. *Trevor* (53 L. J., Q. B. 85), distinguished. *Carlisle Banking Co.* v. *Thompson*, 28 Ch. D. 398 ; 53 L. T. 115 ; 33 W. R. 119.

Discharge of Mortgage by Receipt Indorsed.]—*See* Act of 1896, s. 53.

D. ARBITRATIONS.

Statute.]—Act of 1896, s. 68.

Dispute between Society and Members.]—A claim by an administrator on a policy of life insurance granted to the intestate by a society enrolled under 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, is not "a dispute between the society and a member, or person claiming on account of a member," within 10 Geo. 4, c. 56, s. 29, which requires such disputes to be determined by arbitration. *Kelsall* v. *Tyler*, 11 Ex. 513 ; 25 L. J., Ex. 153.

Before July, 1855, when the 18 & 19 Vict. c. 63 came into operation, the treasurer of a friendly society received, as such, certain moneys, the balance of which he failed to pay over to the society's trustees, and to recover which they after that date brought an action :—Held, that whether the case was governed by 10 Geo. 4, c. 56, or by 18 & 19 Vict. c. 63, the action lay for that their claim was not a dispute between the society and the treasurer in his capacity as an individual member of it, which disputes alone were required by either statute to be dealt with under the society's rules, and otherwise than by action, *Sinden* v. *Bankes*, 3 El. & El. 623 ; 30 L. J., Q. B. 102 ; 7 Jur. (N.S.) 910 ; 3 L. T. 775 ; 9 W. R. 415.

Expelled Members.]—Where deposits are made in a savings bank by a benefit society, of whom a part has since been expelled by an order of a magistrate who had no authority to interpose, the managers of the bank are not compellable, upon the application of the members so illegally expelled, to appoint an arbitrator to settle disputes as between such managers and the depositors. *Rex* v. *Witham Savings Bank*, 3 N. & M. 416 ; 1 A. & E. 321 ; 3 L. J., M. C. 85.

Trustees.]—Since 9 Geo. 4, c. 92, an action does not lie against a trustee of a benefit society. In case of disputes, the only mode of proceeding is by arbitration. *Crisp* v. *Bunbury*, 8 Bing. 394; 1 M. & Sc. 646; 1 L. J., C. P. 112.

Counsel.]—It is competent to arbitrators under the Friendly Society Act to decline to hear counsel. Semble, that all arbitrators have a like discretion. *Macqueen* v. *Nottingham Caledonian Society, In re*, 9 C. B. (N.S.) 793.

Arbitration Clause—Dispute between Members—Right to bring Action.]—A rule of a registered friendly society provided for a reference to arbitration of all disputes which might arise between any member or person claiming under or on account of any member, and the trustees, treasurer, or other officer of the committee thereof:—Held, that this did not include the case of a member who had been expelled (as he alleged wrongfully) from membership of a friendly society, and who had in consequence commenced an action in the high court with the view of being reinstated as a member of the society. *Willis* v. *Wells*, 61 L. J., Q. B. 606; [1892] 2 Q. B. 225; 67 L. T. 316; 41 W. R. 64; 56 J. P. 775.

Exclusion of Member—Member "who has for not more than six months ceased to be a member."]—The addition of the words "or any person aggrieved who has for not more than six months ceased to be a member of a registered society, or any person claiming through such person aggrieved," inserted by s. 10, sub-s. 1 of the Friendly Societies Act, 1895, in s. 22 of the Friendly Societies Act, 1875, does not bring within the scope of the last-mentioned section any disputes which were not previously within it, but only enlarges by six months the time for the decision of disputes within the meaning of the section. A dispute, therefore, as to whether a person aggrieved is a member of a registered society is not within s. 22 of the Friendly Societies Act, 1875, as amended by s. 10, sub-s. 1, of the Friendly Societies Act, 1895—repealed by s. 107, but re-enacted by s. 68 of the Friendly Societies Act, 1896—so as to require to be decided in manner directed by the rules of the society, but remains within the jurisdiction of the courts of law. *Willis* v. *Wells*, supra, and *Prentice* v. *London* (44 L. J., C. P. 353; L. R. 10 C. P. 679: 33 L. T. 251) approved. *Palliser* v. *Dale*, 66 L. J., Q. B. 236; [1897] 1 Q. B. 257; 76 L. T. 14; 45 W. R. 291—C. A.

Motion to Set Aside Award—Jurisdiction of High Court.]—The appellant, a member of a friendly society, having met with an accident, applied to his society for relief. His claim was refused, and under the rules of the society the dispute was referred to arbitrators, who decided against him:—Held, that the high court had no jurisdiction to interfere in the matter. *Gollings and Tradesmen's Friendly Society, In re*, 64 L. T. 775.

Misconduct of Arbitrators—Jurisdiction of Justices.]—The rules of a friendly society provided that all disputes between a member and the society should be decided by an arbitration committee, subject to an appeal to district arbitrators, and a further appeal to final arbitrators, whose decision should be binding and conclusive on all parties without further appeal. A dispute arose which was referred to the arbitration committee. The arbitration committee made an award, but were guilty of misconduct in the course of the arbitration:—Held, that justices had no jurisdiction to deal with the matter, as it could not be said that there had been "no decision" within the meaning of s. 22 (*d*) of the Friendly Societies Act, 1875. *Reg.* v. *Grant* (14 Q. B. 43) distinguished. *Bache* v. *Billingham*, 63 L. J., M. C. 1; [1894] 1 Q. B. 107; 9 R. 79; 69 L. T. 648; 42 W. R. 217; 58 J. P. 181—C. A.

Stay of Proceedings—Second Wife of Member.]—Where the rules of a friendly society provide that "if any dispute shall arise between any member or person claiming through or under a member and the officers of the society, it shall be referred to arbitration," proceedings in an action for a declaration that the wife of a member is entitled to be enrolled on the books of the society and for an injunction to restrain the society from paying away its funds in a manner contrary to the rules of the society, will be stayed by the court. *Stone* v. *Liverpool Marine Society*, 63 L. J., Q. B. 471; 10 R. 592. Affirmed in C. A.

Jurisdiction of Magistrates.]—Where the treasurer of a benefit society brought an action against a magistrate for issuing a warrant of distress against him, upon a previous order of two magistrates, for the relief of a member, in pursuance of 33 Geo. 3, c. 54, s. 15:—Held, that the action could not be maintained; it appearing on the face of the order that the treasurer made no defence, and the magistrate's jurisdiction not having been questioned at the time, and the treasurer having neglected to present to his notice a rule of the society which directed all disputes between its members to be referred to arbitration; and which rule was confirmed by s. 16, whereby the award was made conclusive, without being subject to the control of the magistrates. *Pike* v. *Carter*, 10 Moore, 376; 3 Bing. 78; 3 L. J. (O.S.) C. P. 169.

—— Maintenance of Pauper.]—*See* POOR LAW. *Reg.* v. *Richardson*, 63 L. J., M. C. 212; [1894] 2 Q. B. 323; 10 R. 338; 70 L. T. 805; 42 W. R. 540; 58 J. P. 640.

See infra, JURISDICTION OF JUSTICES.

E. ACTIONS BY AND AGAINST.

1. WHO MAY SUE AND BE SUED.

Statute.]—Act of 1896, s. 94.

Trustees.]—Where trustees of a friendly society, established under 13 & 14 Vict. c. 115, were appointed after 18 & 19 Vict. c. 63 had become law:—Held, that it was not necessary to send to the registrar the resolution appointing the trustees; and that such trustees were liable to be sued for the debts of the society incurred before their appointment. *Beckett* v. *Willetts*, 5 W. R. 622.

Trustees of a friendly society may sue in a superior court to recover from the treasurer of the society moneys received by him and not paid over, and they are not confined to the summary procedure before justices, provided by 18 & 19 Vict. c. 63, s. 40. *Sinden* v. *Bankes*, 3 El. & El. 623; 30 L. J., Q. B. 102; 7 Jur. (N.S.) 910; 3 L. T. 775; 9 W. R. 415.

Stewards.]—The stewards of a friendly society who were in fact, but not in name, trustees of the society, allowed to petition under the 33 Geo. 3, c. 54 Act by the description of trustees. *Heanor Friendly Society, In re*, 1 Beav. 508.

Secretary.]—By the Friendly Societies Act (18 & 19 Vict. c. 63), s. 19, the trustees of any society are authorised to bring or defend any action, suit or prosecution in law or equity, touching or concerning the property, right or claim to property of the society. By 21 & 22 Vict. c. 101, s. 7, in any proceeding under this act or the above act against a society, it shall be sufficient to make the secretary or other officer of the society, at the time of the plaint or complaint, the defendant. Proceedings having been taken by a member of a society in a county court to enforce a claim against the society, a compromise was come to between the plaintiff, the solicitor of the member, and the society, by which the society promised to pay the plaintiff certain costs and charges. These costs and charges not having been paid, the plaintiff sued the secretary of the society in a superior court :—Held, that this was a proceeding within s. 19, touching the right of the society, and was properly brought against the secretary under s. 7. *Roberts* v. *Page*, 45 L. J., Q. B. 601 ; 1 Q. B. D. 476 ; 35 L. T. 325.

On Expulsion of Lodge.]—Disputes arising in a friendly society, consisting of several lodges, whose rules directed the expulsion of any brother who should for a given time neglect to pay his dues, all the members of one of the lodges refused to pay, and in consequence the lodge was expelled, but the legality of their expulsion was in question. The remaining members, afterwards duly registered but under a new name, appointed trustees :—Held, that for the purpose of holding the funds of the society, the members so registering were the society, and that the trustees were entitled to delivery by the grand master of the expelled lodge of funds in his hands. *Yeates* v. *Roberts*, 3 Drew, 170 ; 1 Jur. (N.S.) 319 ; 3 W. R. 315. Affirmed, 7 De G., M. & G. 227 ; 3 W. R. 461.

Action by Annuitants.]—Society for raising an annuity fund for the members, the rate of subscription being too low, though the subsisting fund was equal to the annuities then payable, and no adequate remedy by the articles, inquiries were directed, first, to ascertain the state of the society, the defect of the plan, &c. ; secondly, to provide a remedy, viz. by additional subscription adequate to the object, by paying the arrears, and providing for the present and future annuities. *Pearce* v. *Piper*, 17 Ves. 1 ; 11 R. R. 1.

The Association called Odd Fellows.]—Bill by certain members of a lodge of the association called Odd Fellows, against the chief officers of the association, the grand master and secretary of the district, some members of the lodge who had differed from the plaintiffs, and the lodge trustees, who had in their hands a sum of money arising from the subscriptions ; stating that they, the plaintiffs, had been improperly excluded from the society, and praying for a declaration that such exclusion was void, and for a determination as to their rights to the money in the hands of the trustees, was demurred to for want of equity. Demurrer allowed. *Clough* v. *Ratcliffe*, 1 De G. & Sm. 164 ; 16 L. J., Ch. 476 ; 11 Jur. 648.

Injunction.]—Injunction granted to restrain payments by friendly society founded on erroneous principles tending to exhaust their funds. *Reeve* v. *Parkins*, 2 J. & W. 390.

—— **Motion to Commit Trustees.**]—An injunction was granted against certain trustees of a friendly society by name, restraining them from dividing 2,000*l.*, part of the society's funds, among its members. These trustees shortly afterwards retired, and others were appointed in their place. A fresh resolution was then passed by the society for dividing the 2,000*l.*, and this was carried out by the new trustees. One of the former trustees was present when the resolution was passed, and assisted in distributing the money. All received their shares of the money, but had repaid them. On motion to commit all the trustees, old and new, for contempt :—Held, on the evidence, that the new trustees had notice of the order ; that they and the old trustees, who actively assisted in dividing the money, must be committed to prison, and the costs of the motion must be paid by all. *Avery* v. *Andrews*, 51 L. J., Ch. 414 : 46 L. T. 279 ; 30 W. R. 564.

Usury.]—In 1845 a society, called the Frugal Investment Society, was established, and a book of rules was framed and approved of by the barrister appointed under the Friendly Societies Act. By these rules it was declared that the society should last for one hundred months ; that every member should pay 1*l.* a month in respect of each share held by him ; that members might be paid their shares in advance upon the terms of paying 8*s.* a month by way of interest in respect of each share so anticipated, in addition to the subscription, and giving security for such payments. All moneys which should be paid to the society, exclusively of the subscriptions, were to be divided among the members every year. The society consisted of 180 members. A. took some shares in the society, and received the amount of them in advance, and made a mortgage of real estate to the trustees of the society, for the purpose of securing the sums payable by him under the rules. A. paid sums to the society, to an amount, however, less than the sums so payable. He afterwards filed a bill against the trustees, praying that, accounting for the sums advanced to him and interest, the difference, if any, between this amount and the sums paid by him might be repaid to him by the trustees, and that the mortgaged property might be reconveyed to him :—Held, that A. had, on the bill, no right to relief. *Burbidge* v. *Cotton*, 5 De G. & Sm. 17 ; 21 L. J., Ch. 201 ; 15 Jur. 1070.

The above-mentioned loans made to A., under the rules of the society, were not usurious. *Ib.*

Whether the society came within the Friendly Societies Act, or whether it was an illegal one—Quære. *Ib.*

And see INDUSTRIAL SOCIETY.

2. LOAN SOCIETIES.

Statute.]—*Loan Societies Act*, 1840 (3 & 4 *Vict. c.* 110) *made perpetual by* 26 & 27 *Vict. c.* 56.

Action by Treasurer pro tem.]—Under 5 & 6

Will. 4, c. 23, s. 8, an action cannot be maintained by the treasurer for the time being on a note given in the form prescribed by the statue to secure a loan from the society. *Timms* v. *Williams*, 2 G. & D. 621 ; 3 Q. B. 413 ; 11 L. J., Q. B. 210 ; 6 Jur. 1012.

Payment can only be enforced by complaint to a justice of the peace. *Ib.*

Rule that Surety receive Notice of Default before Proceedings Commenced.]—To an action upon a note, the defendant pleaded that the plaintiffs were trustees of a loan society ; that he signed the note as surety for money lent by the society to T. ; that it was, at the time of lending the money and making the note, agreed in writing, between the plaintiffs, the defendant, T., and the society, that if T. should make default in payment, notice in writing should be given to the defendant before legal proceedings should be taken ; but that no notice had been given to him of T.'s default :—Held, that this plea was not supported by proof that a book containing the printed rules of the society (among others, one "upon default by the borrower, the sureties will be written to, and, if the money be not paid according to such letter, proceedings will be taken") was handed to T. (and 1*s.* deducted for it), at the time the money was lent, and before the defendant had signed the note, the book being unsigned and the note purporting to refer to it. *Brown* v. *Langley*, 5 Scott (N.R.) 249 ; 4 Man. & G. 466 ; 12 L. J., C. P. 62.

Plea of Fraud.]—To an action on a note, the defendant pleaded that the note was obtained from him by the plaintiffs and others in collusion with them by fraud, covin and misrepresentation, wherefore the note was void in law :—Held, that this plea was not sustained by evidence that the note was given by the defendant and another as sureties, for a sum advanced to a third person by the plaintiffs, who falsely held themselves out to the world as a society formed and acting under certain rules and regulations. *Green* v. *Gosden*, 4 Scott (N.R.) 13 ; 3 Man. & G. 446 ; 11 L. J., C. P. 4 ; 5 Jur. 1010.

Bond—Penalty—Fraction of Pound in Arrear.]—A bond to a loan society contained a covenant for payment, in case of default in the monthly instalments, of "the further sum of one shilling for each and every pound of the monthly instalments which should not have been paid on the day when such instalments became due" :—Held, that such penalty was not recoverable in respect of a fraction of a pound in arrear. *Three Towns Loan Society* v. *Doyle*, 13 C. B. (N.S.) 290 ; 7 L. T. 276 ; 11 W. R. 22.

Investment Unauthorised—Action, whether Maintainable.]—The trustees of a friendly society lent out of the surplus funds of the society a sum of 300*l.* to A. on the security of a joint and several promissory note made by A., and by B. and C. as his sureties. None of the makers was a member of the society. C. having died, the trustees claimed to prove against his estate on the note :—Held, by Fry, J., that the loan on personal security to a person not a member of the society was forbidden by the Friendly Societies Act, that the transaction therefore was illegal, and that as C. had not received any money of the society, and the society had no claim against his estate except under the contract, the proof must be rejected. But held, on appeal, that as it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorised ; that it was not competent to the makers of the note to allege by way of defence that the payees had no authority to lend the money, and that the proof, therefore, must be admitted. *Coltman, In re, Coltman* v. *Coltman*, 51 L. J., Ch. 3 ; 19 Ch. D. 64 ; 45 L. T. 392 ; 30 W. R. 342—C. A.

Note given to Two Members.]—Where a note is given to two members of a loan society, by name, to secure an advance made by the society, it is not necessary, in suing upon the note, to join the whole of the members of the society. *Bawden* v. *Howell*, 4 Scott (N.R.) 331 ; 3 Man. & G. 638 ; 6 Jur. 37.

Jurisdiction of Superior Courts—Joint and Several Note.]—The 5 & 6 Will. 4, c. 23, authorised the trustees to lend money under certain circumstances, and to take promissory notes in the name of the treasurer as security for repayment. The act authorised a justice of the peace upon complaint of the treasurer, to summon such party, and award payment to be enforced by distress :—Held, that the jurisdiction of the superior courts was not thereby taken away, especially in an action brought upon a note, which did not appear from the pleadings to have been given in respect of a loan. *Albon* v. *Pike*, 5 Scott (N.R.) 241 ; 4 Man. & G. 421 ; 11 L. J., C. P. 266.

One of the rules of a loan society directed that the payment of loans should be secured by the joint promissory note of the borrower and his sureties, but gave a form of note which was joint and several :—Held, that a joint and several note was a note made in pursuance of the rules of the society, so as to come within the exemption from stamp duty created by 5 & 6 Will. 4, c. 23, s. 7. *Ib.*

F. JURISDICTION OF JUSTICES.

Statute.]—Act of 1896, s. 68.

Jurisdiction to Enforce Rules.]—A society, some of the rules of which were substantially those of a friendly society, whilst others related to trade movements and strikes, was registered under the Trade Union Act, 1871. A member summoned the secretary, under s. 2 of the Friendly Societies Act, 1875, for non-payment of a weekly allowance of 12*s.* for sick benefit and relief, and the justices in petty session made an order for such payment :—Held, that the objects of the society were not wholly those of a friendly society, many of them being in restraint of trade. The express reservations in s. 4 of the Trades Union Act, 1871, were therefore applicable ; and accordingly the justices had no jurisdiction to make the order. *Old* v. *Robson*, 59 L. J., M. C. 41 ; 62 L. T. 282 ; 38 W. R. 415 ; 54 J. P. 597.

Change of Rules—New Rules Void.]—The rules of a friendly society established in 1817, were duly made and confirmed at the sessions under 33 Geo. 3, c. 54. Afterwards some new rules were made, but they were neither made nor confirmed in the manner required by s. 3. One of such new rules altered the amount of entrance money, and another the amount of weekly allowance to sick members. A sick

member who had entered the society since the making of the new rules, and had occasionally received relief under them, summoned the stewards to petty sessions for non-payment of a weekly allowance under the new rules. The justices dismissed the complaint, on the ground that the old rules had been abandoned, and that the new rules were void, and that the society therefore was no longer within the statute, so as to give them jurisdiction :—Held, that the new rules being void, the old rules were not affected by them, and that the justices had jurisdiction to order payment of a weekly allowance under to old rules, and this though the specific claim made by the summons was under the new rules, and the court made the rule absolute requiring them to hear and determine the case. *Reg.* v. *Cotton*, 15 Q. B. 569 ; 4 New Sess. Cas. 291 ; 19 L. J., M. C. 233 ; 14 Jur. 788.

Assignee of Treasurer.]—An officer of a friendly society, being indebted to the society for moneys received on their behalf, resigned his office, and made an assignment for the benefit of his creditors. The assignee received from the estate more than the balance due to the society, but refused to pay it over. No specific money belonging to the society was proved to have come to the hands of the assignee :—Held, that the assignee was not liable to be proceeded against before justices, under 18 & 19 Vict. c. 63, s. 24. *O'Donnell*, *Ex parte*, 35 L. J., M. C. 99 ; L. R. 1 Q. B. 274 ; 14 W. R. 83.

As to Locality.]—Though the meetings of the society were held at Leeds, yet as the society was open to country members, and A. himself resided at Wakefield, where the circumstance occurred which was the ground of his expulsion, the justices of the West Riding had, locally, jurisdiction to determine the matter. *Reg.* v. *Grant*, 14 Q. B. 43 ; 4 New Sess. Cas. 13 ; 19 L. J., M. C. 59 ; 13 Jur. 1026. And see *Sharp* v. *Aspinall*, 10 B. & C. 47 ; 5 Man. & Ry. 71 ; 8 L. J. (O.S.) M. C. 70.

Orders—In Excess.]—The 33 Geo. 3, c. 54, s. 15, which authorised justices, on complaint made on oath by any member of a friendly society, "to hear and determine in a summary way the matter of such complaint, and to make such order therein as to them shall seem just," gave them no jurisdiction beyond the actual matter of the particular complaint made. Therefore, where a sick member complained that the steward refused to pay him his arrears of allowance, and the justice ordered that the arrears and costs should be paid, and that the complainant should be continued a member :—Held, that the justices had exceeded their jurisdiction in making the latter part of the order, and that the stewards were not bound to obey it. *Rex* v. *Soper*, 5 D. & R. 669 ; 3 B. & C. 857.

—— **For Payment of Money.**]—An order of justices upon a party, requiring him to pay money to a person claiming it as member of a friendly society (under 49 Geo. 3, c. 125, s. 3), must find in direct terms that the person applying is a member, that he is entitled to the money, and that the party against whom the application is made is, at the time, an officer of the society. *Day* v. *King*, 5 A. & E. 359 ; 6 N. & M. 845 ; 2 H. & W. 178 ; 5 L. J., M. C. 130.

An order for payment by a justice of the peace, under 3 & 4 Vict. c. 110 must be for immediate payment ; he has no jurisdiction to order payment in a certain time from making the order. *Parker* v. *Boughey*, 3 B. & S. 43 ; 31 L. J., M. C. 272 ; 9 Jur. (N.S.) 118.

Distress Warrant.]—The steward of a friendly society, not having paid money in obedience to an order of two justices, under 10 Geo. 4, c. 56, s. 28, the justices, without further summons, issued a distress warrant, under which his goods were seized :—Held in an action of trespass, that the seizure was not justified by the statute. *Hammond* v. *Bendyshe*, 13 Q. B. 869 ; 3 New Sess. Cas. 619 ; 18 L. J., M. C. 219 ; 14 Jur. 62.

Power as to Statement of Case.]—When, by the rules of a friendly society, disputes between the society and a member are to be referred to justices, such justices have no power to state a case under 20 & 21 Vict. c. 43. Overruling *Reg.* v. *Lambard* (L. R. 1 Q. B. 388). *Callaghan* v. *Dolliven*, 38 L. J., M. C. 110 ; L. R. 4 C. P. 288 ; 21 L. T. 827 ; 17 W. R. 733.

Where, by the rules of a friendly society, disputes between the society and a member are to be referred to justices, pursuant to 21 & 22 Vict. c. 101, s. 5, such justices may be compelled to state and sign a case. *Watts* v. *Kent JJ.*, 35 L. J., M. C. 190 ; 14 L. T. 448. *S. C.*, nom. *Reg.* v. *Lambard*, L. R. 1 Q. B. 388 ; 14 W. R. 680.

Where the secretary of such a society is summoned as such secretary before justices to answer a complaint against the society, the society is substantially the appellant for the purpose of procuring a case to be stated. *Ib.*

—— **Finality of Decision.**]—The decisions of justices on disputes between members of friendly societies referred to them under 21 & 22 Vict. c. 101, s. 5, are final. *Callaghan* v. *Dolliven*, 38 L. J., M. C. 110 ; L. R. 4 C. P. 288 ; 21 L. T. 827 ; 17 W. R. 733.

Rules containing Power to Settle Disputes by Arbitration.]—The provisions of s. 30 of 38 & 39 Vict. c. 60, apply to all friendly societies, not only to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society. Consequently, though the rules of a friendly society provide for the settlement of disputes between the society and members by arbitration, a court of summary jurisdiction has notwithstanding, under sub-s. 10 of s. 30, jurisdiction to decide such disputes. *Holt*, *In re*, *United Patriots Benefit Society*, *In re*, 48 L. J., M. C. 55 ; 4 Q. B. D. 29 ; 39 L. T. 622 ; 29 W. R. 339.

—— **Appeal from Award.**]—On a dispute between the members of a friendly society and A., whom they had expelled, the arbitrators appointed by the rules of the society made an award that A. should be expelled the society. A. thereupon made a complaint to a justice of the peace, under 4 & 5 Will. 4, c. 40, s. 7, that he had been wrongfully expelled, and that arbitrators had been appointed who had neglected and refused to make any award. And two justices, by their order, after reciting the complaint, adjudged that "all and singular the allegations were true," and ordered that A. should be reinstated in the society :—Held, that the statement in the order that the arbitrators had

neglected to make an award was not conclusive, but that on motion to quash the order of justices, the circumstances under which the award was made might be gone into on affidavit. *Reg.* v. *Grant*, 14 Q. B. 43; 4 New Sess. Cas. 13; 19 L. J., M. C. 59; 13 Jur. 1026.

There were contradictory affidavits as to whether the arbitrators wrongfully refused to hear evidence on the part of A.:—Held, that there being sufficient evidence to warrant the conclusion at which the justices had arrived, it was to be presumed they were right as to the fact. *Ib.*

Held, also, that such fact warranted the statement, that the arbitrators had neglected to make an award, and that the order of the justices was therefore good. *Ib.*

—— **Where Award Conclusive.**]—The rules of a society enrolled under 10 Geo. 4, c. 56, provided for the election of nine arbitrators at the first meeting; and when a dispute should arise, the first five names drawn by the complaining party were to be the arbitrators, and their decision was to be final. In April, 1852, D. was expelled from the society. In June, in consequence of some of the arbitrators having refused to act, and others having left the neighbourhood, at a meeting duly called for the purpose nine new arbitrators were elected. In September, D. applied to have the question of his expulsion referred to arbitration. At a meeting for the purpose of the reference, in October, D. refused to draw five names, but offered to refer the dispute to five of the six arbitrators who were then present. This was assented to, and the arbitrators made an award confirming his expulsion. On the 18th of January, 1853, D. made an application for another reference, to which the society agreed. At the meeting held for that purpose on the 25th of February, when the names of the nine arbitrators last appointed were ready to be placed in a box that D. might draw out five, he refused to proceed with the reference. In March, 1853, he obtained a summons under 4 & 5 Will. 4, c. 40, s. 7, to have the dispute decided by justices. On the hearing, the jurisdiction of the justices was objected to on the ground of the former award and proceedings. D. contended that the existing arbitrators had not been legally appointed, and therefore that the justices had jurisdiction. The justices decided that they had jurisdiction, and made an order for the reinstatement of him as a member of the society:—Held, that the justices had no jurisdiction to make the order; that s. 27 of the 10 Geo. 4, c. 56, had been substantially complied with, on the appointment of the second set of arbitrators, who had authority to decide the dispute; and that their award in October, 1852, was, as against D., conclusive. *Reg.* v. *Evans*, 3 El. & Bl. 363; 23 L. J., M. C. 100; 18 Jur. 696.

Where a dispute between a friendly society and one of its members has been referred to arbitration under s. 7 of 4 & 5 Will. 4, c. 40, the award of the arbitrators is final, and a magistrate has no jurisdiction to hear the dispute unless it can be shown that such award is a nullity. *Long*, *Ex parte*, 3 W. R. 18.

—— **Objection not taken.**]—But when a dispute as to the payment of money having arisen between the representative of a member and the secretary of a friendly society, whose rules did not direct disputes to be referred to justices (there being a rule that such disputes should be finally decided by arbitrators appointed by the society), and the secretary of the society was summoned before a magistrate to answer the complaint of having unlawfully refused to pay the money, and the rules of the society were put in evidence, but the magistrate's attention was not called to the fact that the rules did not direct disputes to be referred to justices, and an order was made for the payment of the money, and a rule having been obtained for a certiorari to quash the order on the ground of want of jurisdiction:—Held, that the conduct of the appellant in not directing the magistrate's attention to the absence of any rule directing disputes to be referred to justices, disentitled him to the writ; and the rule was discharged with costs. *West London Philanthropic Burial Society, In re, Cordery* v. *Greaves*, 20 L. T. 972.

Refusal to Determine a Complaint.]—The court refused to grant a mandamus to compel a magistrate to determine a complaint by a loan society with duly certified rules; the magistrate having refused so to do because the secretary of the society refused to answer questions put by the magistrate to discover whether the society was formed for an object within the scope of 3 & 4 Vict. c. 110, s. 3. *Reg.* v. *Davis*, 13 L. T. 629; 14 W. R. 329.

G. JURISDICTION OF THE COUNTY COURT.

Statute.]—Act of 1896, s. 68.

According to District.]—A county court of any district in which any usual business of the friendly society is situated, and not only that in which its principal place of business is situated, has jurisdiction under 18 & 19 Vict. c. 63. *Shea* v. *United Sick and Burial Society of St. Patrick*, 37 L. J., C. P. 50; L. R. 3 C. P. 21; 17 L. T. 176; 16 W. R. 84.

Persons Interested.]—The trustees of a burial society, who by the constitution of the society are not and cannot be members, are not persons interested within s. 41 of 18 and 19 Vict. c. 63, so as to enable them of their own accord to institute proceedings against the society in the county court for the purpose of controlling them in the proposed alteration of their rules. *Hull* v. *M'Farlane*, 2 C. B. (N.S.) 796; 27 L. J., C. P. 41; 3 Jur. (N.S.) 1262.

Amalgamation—Dispute as to Provision.]—The committee of a friendly society having agreed for the amalgamation of the society with another company, summoned a general meeting in order to pass a special resolution for carrying the amalgamation into effect. Some of the members, who were dissatisfied with the provision proposed to be made for the satisfaction of their claims, filed a plaint in the county court to restrain the society from carrying into effect the amalgamation, and obtained a receiver of the assets of the society, although the resolution for amalgamation had not then been passed. The public officer of the society applied for a

writ of prohibition to restrain the proceedings in the county court:—Held, that the county court had no jurisdiction to interfere with the action of the society until the special resolution had been passed and confirmed, and a writ of prohibition was ordered to issue. *Jones* v. *Slee*, 55 L. J., Ch. 908; 32 Ch. D. 585; 55 L. T. 129; 34 W. R. 692; 51 J. P. 83—C. A.

Dispute—Society and Member—Appeal from Branch to Society.]—By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 22, disputes between members of a registered friendly society and the society are to be decided in manner directed by the rules of the society. By sub-s. (*d*), where no decision is made on a dispute within forty days after application to a society for a reference under its rules, the member or person aggrieved may apply to the county court, which may hear and determine the matter in dispute. A member of a branch of a friendly society, having been excluded therefrom by the branch committee, appealed, under the rules of the branch, to the general committee of the society, who failed to decide the dispute within forty days after application:—Held, that the appeal was a "reference" within the meaning of the subsection, and that a county court had jurisdiction to hear and determine the matter in dispute. *Reg.* v. *Cuttley*, or *Reg.* v. *Northampton County Court Judge*, 19 Q. B. D. 491; 57 L. T. 108; 35 W. R. 717; 52 J. P. 38.

—— **Committee and Members.**]—A county court has jurisdiction to determine a dispute between the committee of management of a friendly society and any of its members, as to the propriety of the mode of convening, and the manner and place of holding, special general meetings for the purpose of altering or amending the rules of the society. *Hoey* v. *M'Farlane*, 4 C. B. (N.S.) 718; 4 Jur. (N S.) 785.

—— **Members and Trustees.**]—Semble, that where a dispute has arisen between a member and the trustees of a friendly society, for the decision of which a specific tribunal is provided by the rules of the society, the jurisdiction of the county court is ousted by 18 & 19 Vict. c. 63, s. 4. *Denton* v. *Marshall*, 1 H. & C. 654; 32 L. J., Ex. 89; 9 Jur. (N.S.) 337; 7 L. T. 689; 11 W. R. 268.

Rules not Inrolled.]—A friendly society inrolled its rules in 1832, under 10 Geo. 4, c. 56, and shortly afterwards framed new rules, which were never inrolled or certified. In an action in a county court, by a member against the stewards, for sick pay:—Held, that the society was a subsisting society under the original rules, by virtue of the 18 & 19 Vict. c. 63, s. 2; and, consequently, that the county court had jurisdiction. *Meredith* v. *Whittingham*, 1 C. B. (N.S.) 216.

—— **Not Certified Rules.**]—Under 18 & 19 Vict. c. 63, s. 44, a county court has not jurisdiction where the rules of a society which have not been certified are deposited with the registrar after the dispute arose, but before the plaint is entered in the county court. *Reg.* v. *Trafford*, 7 El. & Bl. 339; 26 L. J., Q. B. 95; 3 Jur. (N.S.) 387; 5 W. R. 294.

When Reference to Members Compulsory.]—Where, by the rules of a friendly society, disputes between members and the trustees may be referred to the arbitration of a certain number of the committee, a dispute, which affects the interest of all the individual members of the society, arising between some of its members, who are also members of the committee, and the trustees, where the question is not one which necessarily requires that recourse should be had to a court of equity, such dispute cannot be referred to the judge of the county court under 13 & 14 Vict. c. 115, s. 22, but must be referred to other members of the committee. *Grinham* v. *Card*, 7 Ex. 833; 21 L. J., Ex. 321.

Where a dispute arose between two of the members of the committee of a friendly society and the trustees, touching the distribution of a fund in the hands of the latter, and by one of the rules of the society it was ordered that disputes were to be referred to such members of the committee as should not be personally interested in the matter:—Held, that the judge of the county court had no jurisdiction in such case, and the court granted a prohibition against further proceedings in a plaint issued out of the court over which he presided. *Ib.*

—— **Reinstatement of Member.**]—A rule of a friendly society provided that a dispute of any kind whatsoever, arising under the rules, should be referred to a committee. By another rule any member in the receipt of the gifts of the society being found imposing on the society was to be expelled. A member of the society, in the receipt of pay, was charged with receiving full when he was only entitled to half pay, and the matter being referred to a committee, he was expelled, but without being heard before the committee. The county court has jurisdiction, under 18 & 19 Vict. c. 63, ss. 41, 42, to order him to be reinstated, if he has been improperly expelled. *Wooldridge, Ex parte*, 1 B. & S. 844; 31 L. J., Q. B. 122; 8 Jur. (N.S.) 696; 5 L. T. 609; 10 W. R. 250.

—— **Winding-up—Right of Appeal—Rules.**]—In the case of an unregistered society under s. 30, sub-s. 10 of the Act of 1875 (explained by 42 Vict. c. 9), the right of appeal to a county court or court of summary jurisdiction overrides any rules of the society to the contrary. *Knowles* v. *Booth*, 32 W. R. 432.

Dissolution on Award of Chief Registrar—Jurisdiction of County Court to Vary or Set Aside.]—There is no jurisdiction in the county court by way of appeal on the merits, under s. 25, sub-s. 8, clause (*d*) of the Friendly Societies Act, 1875, from an award of the Chief Registrar of Friendly Societies dissolving a society:—Semble, the Treasury Regulations and forms framed under s. 38, so far as they assume the existence of jurisdiction in the county court, are ultra vires. *Wilmot* v. *Grace*, 61 L. J., Q. B. 498; [1892] 1 Q. B. 812; 66 L. T. 287; 40 W. R. 350; 56 J. P. 392.

Appeal—"Application to County Court."]—By s. 22 of the Friendly Societies Act, 1875, disputes between members of a friendly society and the society or its officers are to be decided in manner directed by the rules of the society, and by sub-s. (*d*), "where the rules contain no direction as to disputes, or where no decision

is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute" :—Held, that the application to the county court contemplated by sub-s. (*d*) must be taken to be an application in the form of an action commenced in the county court, and not a reference to the county court judge sitting as an arbitrator, and that there was an appeal from the decision upon such application to the high court. *Wilkinson* v. *Jagger*, 57 L. J., Q. B. 254 ; 20 Q. B. D. 423 ; 58 L. T. 487 ; 36 W. R. 169 ; 52 J. P. 533. See *Schofield* v. *Vause*, 36 W. R. 170, n.—C. A.

—— **Certiorari.**]—The provisions in the Friendly Societies Act, 1875 (ss. 22 (*d*) and 30, sub-s. 10), for the reference of all disputes between the society and its members to the county court, are permissive only, and not peremptory ; and therefore there is, in a proper case, jurisdiction to remove to the high court by certiorari proceedings in an action commenced against a friendly society by one of its members. *Royal Liver Friendly Society, In re*, 56 L. J., Ch. 821 ; 35 Ch. D. 332 ; 56 L. T. 817 ; 36 W. R. 7.

Scotch Friendly Society.]—By 18 & 19 Vict., c. 63, disputes are to be referred to the county courts, which are to make such orders as the Court of Chancery may make ; but in Scotch friendly societies the jurisdiction is given to the sheriff. Some members of a Scotch society having sought relief before the sheriff, the defendants pleaded to the jurisdiction, whereupon the sheriff directed a case to the Court of Chancery, under 22 & 23 Vict. c. 63, to ascertain whether the court had jurisdiction in such a case in England :—Held, that the case did not come within the statute, and the court declined to express its opinion. *Brodie* v. *Johnson*, 30 Beav. 129.

H. WINDING UP.

Statute.]—Act of 1896, ss. 78—83.

By Consent.]—Under 10 Geo. 4, c. 56, s. 26, a friendly society may be dissolved, with the consent in writing of five-sixths in value of the members, without convening a general meeting, as required by s. 9, for the alteration or repeal of any of the rules. *Eclipse Mutual Benefit Association, In re*, 1 K. & J. 30 ; 2 Eq. R. 221 ; 23 L. J., Ch. 279 ; 2 W. R. 113.

A petition cannot be presented under this act for the purpose of appointing a person to assign, in the name of a trustee, property belonging to a friendly society which has been dissolved. *S. C.*, Kay, App. xxx ; 2 Eq. Rep. 318 ; 23 L. J., Ch. 280 ; 2 W. R. 311.

The court will not enjoin a society from dissolving itself where a great majority of its members agree to such dissolution, notwithstanding a rule, that if "three agree to hold the society it shall not been dissolved." *Waterhouse* v. *Murgatroyd*, 9 L. J., (o.s.) Ch. 272.

Infant Members—Right to Dissolve—Consent of Governing Committee.]—A friendly society was formed as a juvenile branch of another society under the Friendly Societies Act, 1855, and consisted entirely of infants between the ages of six and eighteen. Rule 3 of the society placed its government in the hands of a committee of management appointed by the parent society. The members of the juvenile society being reduced to six in number, signed through their guardians an instrument of dissolution with a view of dividing the assets :—Held, that r. 3 was not a mere rule of management, but precluded the members of the society from dissolving without the consent of the committee, which had not been obtained : Held, also, that the trustees of the society could, under s. 21, sub-s. 1, of the Friendly Societies Act 1875, maintain an action for declaring the instrument of dissolution void. *Rudd* v. *James*, 65 L. J., Ch. 781 ; [1896] 2 Ch. 554 ; 74 L. T. 714 ; 60 J. P. 628—C. A.

Jurisdiction — County Court.] — A friendly society must first be registered under 25 & 26 Vict. c. 87, and then wound up in a county court. *Midland Counties Benefit Building Society, In re*, 4 De G. J. & S. 468 ; 33 L. J., Ch. 520, 739 ; 12 W. R. 661.

Compulsory Winding-up Under Companies Act.]—The court has jurisdiction, under s. 199 of the Companies Act, 1862, to wind up compulsorily, as an unregistered company, a society registered under the Friendly Societies Acts, but not registered under the Companies Act, 1862. *Independent Protestant Loan Fund Society, In re, Morton, Ex parte*, [1895] 1 Ir. R. 1.

Right of Members to obtain Winding-up Order.]—Members of a friendly society who have given notice of withdrawal of deposits are not in the same position as outside creditors, and are not entitled ex debito justitiæ to obtain an order for winding-up ; but where the circumstances, in the opinion of the court, make it just and equitable so to do, the court will order such a society to be wound up. *Ib.*

Loan Society.]—A loan society held to be within the Winding-up Act, 1849. *Sherwood Loan Society, In re*, 1 Sim. (N.S.) 165 ; 20 L. J., Ch. 177. But see *Crown and Cushion Loan Fund Society, In re*, 14 Jur. 874.

On a creditor's petition for the winding-up of an unregistered loan society, formed under 3 & 4 Vict. c. 110, the members of which formerly exceeded seven in number, but were now only four :—Held, that, having regard to ss. 199 & 200 of the Companies Act, 1862, a winding-up order could not be made when the number of members had at the date of the petition fallen below seven. *Bolton Benefit Loan Society, In re, Coop* v. *Booth*, 49 L. J., Ch. 39 ; 12 Ch. D. 679 ; 28 W. R. 164.

—— **Liability of Shareholders—Set-off.**]—The plaintiff, the official liquidator of a co-operative loan society, registered under the 3 & 4 Vict. c. 110, which had been ordered by the Master of the Rolls to be wound up as an unregistered company under the Companies Acts, 1862 and 1867, and the proceedings transferred to the county court, brought an action in the county court against the defendant, who had been a shareholder in the society, for 14*l.*, the balance due

upon a bond or note, repayable by weekly instalments. By one of the rules of the society it was provided that members who were borrowers could not withdraw their deposits until the loan was repaid. Before the date of the loan the defendant had given the notice required by the rules of the society to withdraw money paid by him into the funds of the society amounting to 21*l.* 13*s.* The notice having expired, and the directors being unable to pay in accordance with the notice, they granted the loan of 15*l.* to the defendant. The defendant sought to set off the sum of 21*l.* 13*s.* against the sum sued for, on the ground that having given a proper notice, according to the rules, he was entitled to receive his money prior to the loan being made, and had a right of action against the society which entitled him to set off that amount against the amount sued for:—Held, that the defendant was not entitled to set off this sum. That the deposits had become a portion of the funds of the society, and were not specifically applicable to the repayment of the defendant's deposits merely by reason of the notice. That it was not, in any sense of the expression, a debt due to the defendant, but assets of the society in the winding-up. Further, that the defendant was precluded from setting off this sum under the provisions of the Companies Act, 1862. *Phillipson* v. *Hale*, 43 L. T. 507; 45 J. P. 39.

Parties—Recovery of Moneys.]—It having been found necessary to wind up the affairs of a friendly society and distribute its funds, pursuant to the trusts of the deed constituting it, several of its members were appointed trustees for that purpose; the moneys to be paid to the trustees, of whom the plaintiff was the survivor, were to be deposited with certain bankers and carried to the account of the society; the bankers were to pay such sums as the two solicitors F. and W., by their respective cheques on the bankers, countersigned by two members of the society named, should require to be paid. The principal part of the fund was distributed in that manner, and the balance in the bankers' hands was irregularly drawn out and invested in the names of F. and W., and the two members appointed to countersign the cheques. On a bill being filed by the last survivor of the trustees of the fund against F. and W., and the personal representatives of the two members appointed to countersign the cheques, praying the restoration of the fund by F. and W., with a view to its future administration, but not seeking the administration of it by the court, an objection for want of parties taken by F.'s answer, on the ground that all the members of the society ought to be before the court, was disallowed. *Horsley* v. *Fawcett*, 11 Beav. 568; 16 L. J., Ch. 457.

Society for relief in sickness, etc., by means of a fund raised by subscription of the members, considered merely as a partnership, having no corporate character. In a suit, therefore, against the trustees by some members for an account, alleging a dissolution contrary to the articles, all other members must be parties. *Beaumont* v. *Meredith*, 3 Ves. & B. 180.

In consequence of the failure and insolvency of a benefit society, there was no officer or board in existence who could be made parties to a suit by a creditor to obtain payment out of the company's property. The plaintiff having made the trustees and one of each class of members parties:—Held, that the suit was properly constituted. *Pare* v. *Clegg*, 29 Beav. 589; 30 L. J., Ch. 742; 7 Jur. (N.S.) 1136; 4 L. T. 669; 9 W. R. 795.

Bequest—Cy-près.]—A friendly society is not a charitable institution, and therefore the doctrine of cy-près will not, on the society being voluntarily dissolved, be applied to a bequest made to it in aid of its funds, but the same will fall into the residuary estate of the testator. *Clark's Trusts, In re*, 45 L. J., Ch. 194; 1 Ch. D. 497; 24 W. R. 233.

Branch Seceding—Rules—Regularity of Procedure.]—A branch friendly society having resolved to secede from the parent society, and the grand secretary having refused without any reason to grant a certificate of secession, the branch society appealed against this refusal:—Held, that notice of the proposed secession need not be given to members who joined the branch after the resolution to secede; that the assent of the central body was not necessary to the holding of the branch society's special meeting; that the majority of the branch members must assent, and also the majority at the special meeting must assent, to secession; that in settling accounts, the funds of the branch meeting were not to be divided as in the case of being wound up. *Sheffield Order of Druids Society, In re*, 66 J. P. 613.

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W. A. G. W.

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What are.]—Grouse are not birds of warren. *Devonshire* (*Duke*) v. *Lodge*, 7 B. & C. 36; 9 D. & R. 875; 5 L. J. (O.S.) K. B. 319; 31 R. R. 143. And see *Att.-Gen.* v. *Parsons*, 2 C. & J. 279; 2 Tyr. 223; 1 L. J., Ex. 103.

Trespass on a free warren will not lie for shooting grouse. *Ib.*

An action will not lie for disturbing a rookery; on the ground that rooks are a species of birds feræ naturæ, of a destructive nature, not known as an article of food, and not protected by any statute; and therefore a person cannot have any property in them, or establish any legal right to cause them to resort to his trees. *Hannam* v. *Mockett*, 4 D. & R. 518; 2 B. & C. 934.

Property in Game Killed.]—Game started and killed wrongfully by one person on the land of another becomes the absolute property of the owner of the land, and not of the captor, though it is killed and carried away in one continuous act. *Blades* v. *Higgs*, 20 C. B. (N.S.) 214; 11 H. L. Cas. 621; 34 L. J., C. P. 286; 11 Jur. (N.S.) 701; 12 L. T. 615; 13 W. R. 927.

The plaintiff's dogs having hunted and caught on the defendant's land a hare, started on the land of another, the property is thereby vested in the plaintiff, who may maintain trespass against the defendant for afterwards taking away the hare. And so it would be, though the hare, being quite spent, had been caught up by a labourer of the defendant for the benefit of the hunters. *Churchward* v. *Studdy*, 14 East, 249; 12 R. R. 513.

Following Game.]—One who finds game on his own ground cannot pursue it in the land of another. *Deane* v. *Clayton*, 7 Taunt. 489; 2 Marsh. 577; 1 Moore, 203; 18 R. R. 553.

Deer—Property in.]—Deer in a park, when reclaimed, become personal chattels, and cease to be parcel of the inheritance. *Ford* v. *Tynte*, 2 Johns. & H. 150; 31 L. J., Ch. 177. And see *Davis* v. *Powell*, 7 Mod. 260.

And the court of chancery will not interfere to restrain waste in not keeping up the herd. *Ib.*

Evidence upon which deer in a park will be considered tame. *Ib.*

Deer in a park (though an ancient and legal park) may be so tame and reclaimed from their natural wild state as to pass to executors as personal property. *Morgan* v. *Abergavenny* (*Earl*), 8 C. B. 768.

The servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may not have been chasing the deer at the moment when it was shot, if the chasing of the deer and the shooting of the dog were all one and the same transaction. *Protheroe* v. *Mathews*, 5 Car. & P. 581.

B. RIGHTS OF SPORTING.

1. GRANT, RESERVATION BY DEED, &C.

Presumption of Grant.]—Action for breaking and entering a close, parcel of Forton Farm; plea, that J. W., as whose tenant the defendant justified, was seised in fee of 50 acres of land adjoining the close, and that by deed of 1736, between C. who was seised in fee of the close, and R. W. who was seised in fee of the 50 acres, C. granted to R. W., his heirs and assigns for the time being, owners in fee of the 50 acres, the privilege of hunting for game in the close. Proof that by deed of the same date R. W., who was seised in fee of the manor of Middleton, conveyed Forton Farm to C. in fee, retaining all royalties; that from 1753 the gamekeepers of the lords of the manor were accustomed to sport over Forton Farm, with the knowledge of the plaintiff and his landlords, the owners of Forton Farm; that, about 14 years ago, the plaintiff, by desire of his landlord, gave notice to the gamekeeper of the lord of the manor not to trespass, but he continued to sport there, by the order of the lord of the manor, without further interruption:—Held, that, upon such evidence, the jury could not presume a grant. *Pickering* v. *Noyes*, 7 D. & R. 49; 4 B. & C. 639; 4 L. J. (O.S.) K. B. 10; 28 R. R. 430.

Reservation — Equity of Redemption.] — A plea of justification in an action for hunting and shooting over the plaintiff's lands stated that A. was entitled to the equity of redemption, and subject thereto, that B. and C. were seised in fee, and that they, by lease and release, granted the premises, excepting and reserving to A. and his heirs a free liberty of hawking and hunting:—Held, that, as A. had no legal interest in the land, but a mere equity of redemption only, there could be no reservation to him, and consequently that the plea was bad in substance, as the title was in itself defective, and not a title defectively set out. *Moore* v. *Plymouth* (*Earl*), 3 B. & Ald. 66.

—— **New Grant.**]—By deed, A. and B. conveyed to D. and his heirs lands, excepting and reserving to A., B. and C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl:—Held, that this was not in law a reservation properly so called, but a new grant by D. (who executed the deed) of the liberty therein mentioned, and therefore it might enure in favour of C. and his heirs, although he was not a party to the deed. *Wickham* v. *Hawker*, 7 M. & W. 63; 10 L. J., Ex. 153.

Grant—Licence of Profit.]—The grant to a person, his heirs and assigns of "free liberty,

with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a licence of profit, and not of a mere personal licence of pleasure; and therefore it authorises the grantee, his heirs and assigns, to hawk, hunt, fish, and fowl, by his servants, in his absence. Such a liberty is therefore a profit à prendre within the Prescription Act (2 & 3 Will. 4, c. 71), s. 2. *Ib.* *See next case.*

—— **Interest in Land.**]—The right of hunting, shooting, fishing, and fowling, is an interest in the realty, and a grant of it is a licence of a profit à prendre. *Ewart* v. *Graham*, 7 H. L. Cas. 331; 29 L. J., Ex. 88; 5 Jur. (N.S.) 773; 7 W. R. 621.

A grant of a right to shoot over land and to take away a part of the game killed is a grant of an interest in land, and within the Statute of Frauds. *Webber* v. *Lee*, 51 L. J., Q. B. 485; 9 Q. B. D. 315; 47 L. T. 215; 30 W. R. 866; 47 J. P. 4—C. A.

—— **Of Soil and of Franchise.**]—A grant by the owner both of the soil and of the franchise, of all that warren of coneys, with all and singular the rights, members, and appurtenances whatsoever in B., and that lodge thereupon built, and also that warren of coneys, with all the rights, &c., in R., both of which warrens of coneys are known by the name of B. warren, and do extend themselves in and over the wastes of B., F., S., and A., does not by its terms necessarily pass more than the franchise. *Beauchamp* (*Earl*) v. *Wynn*, L. R. 6 H. L. 223; 22 W. R. 193. Affirming 38 L. J., Ch. 556; 21 L. T. 253.

—— **Free Warren.**]—Free warren cannot be parcel of a manor, and therefore will not pass by a grant of the manor, with the appurtenances, though it is held with the manor. *Morris* v. *Dimes*, 3 N. & M. 671; 1 A. & E. 654; 3 L. J., K. B. 170.

A warren can be appertaining to a manor only by prescription. *Ib.*

Free warren in gross, of which a grantor is seised, will not pass by a grant of a manor and the appurtenances. *Ib.*

Nor by a grant of a manor and all free warren (or other term comprehending free warren) "belonging to or in anywise appertaining to the manor, or therewith or at any time theretofore usually held, and occupied and enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof." *Ib.*

A right of free warren is divisible. *Beauchamp* (*Earl*) v. *Winn*, supra.

A. being possessed of lands, granted the same for a term of years to B., "excepting, and always reserving to himself, all royalties whatsoever to the premises belonging or appertaining." There was also a proviso in the deed, that it should be lawful for A., during the demise, to lay informations, in the name of B. or his tenants, being occupiers, against all persons trespassing upon the land, by means of hunting, coursing, shooting or sporting thereon, A. paying all the costs of such proceedings:—Held, that, under this deed, A. had no rights to enter upon the lands for the purpose of killing birds of free warren. *Pannell* v. *Mill*, 3 C. B. 625; 16 L. J., C. P. 91; 11 Jur. 109.

To an action of trespass for entering a close, a plea that R. W., who was seised in fee of the close by indenture of 1736, granted to C., his heirs, &c., the close, reserving all royalties, deducing title in the royalties from R. W. to J. W., and justifying as tenant to J. W. Replication, that the defendant did not enter the close to exercise the said royalties:—Held, that, upon this issue, the defendant was bound to prove, first, that he had a right of free warren; and secondly, that, at the time of the supposed trespass, he was in the due exercise of it. *Pickering* v. *Noyes*, 7 D. & R. 49; 4 B. & C. 639; 4 L. J. (O.S.) K. B. 10; 28 R. R. 430.

Lease not mentioning Right of Sporting.]—By the Scotch law if an agricultural lease is silent as to hunting, shooting, fishing, or other similar sports, the right to these enjoyments does not pass to the lessee, but remains in the landlord, by law, without any express or special reservation. *Copland* v. *Maxwell*, L. R. 2 H. L. (Sc.) 103.

Colourable Conveyance.]—Bill, for relief on loss of conveyance executed to give colourable qualification to kill game, retained for a year with liberty to bring an action. Quære, whether such a conveyance, executed by father and kept in his possession for life, without being used or made known to son, is valid. *Cecil* v. *Butcher*, 2 Jac. & Walk. 565; 22 R. R. 213.

A conveyance executed for purpose of giving grantee a colourable qualification to kill game, remains without being made use of in grantor's hands, and after his death, in his son's. Grantee afterwards obtaining possession of it by deceit, and bringing action at law on it, court of equity refused to relieve either party. *Brackenbury* v. *Brackenbury*, 2 Jac. & Walk. 391; 22 R. R. 180.

A person executing a deed for the purpose of defrauding the law, cannot come into equity for the purpose of setting it aside, even though the instrument has never been made use of; and therefore if A. convey an estate to B., as a qualification to kill game, equity will not compel a reconveyance. *Roberts* v. *Roberts*, Dan. 143; 18 R. R. 733.

What Included in Reservation.]—Where there was a clause in a deed bearing date 1655 (at which time shooting was not in use), reserving a right of hawking and hunting:—Held, that it did not include the liberty of shooting feathered game with a gun. *Moore* v. *Plymouth* (*Earl*), 1 Moore, 346; 7 Taunt. 614; 18 R. R. 604.

A reservation in a lease of the right of shooting and sporting over the land demised is not limited to game strictly so called, but reserves to the lessor the exclusive right to follow and shoot such animals as are in common parlance understood to be the subject of sport. *Jeffryes* v *Evans*, 19 C. B., (N.S.) 264; 34 L. J., C. P. 261; 11 Jur. (N.S.) 584; 13 L. T. 72; 13 W. R. 864.

B. having demised to A. lands, "excepting and reserving to himself the exclusive right of hunting, shooting, and sporting on and over the same," subsequently demised to C. the exclusive right of shooting and sporting over and taking the game and rabbits upon the land. In an action for the breach of a covenant for quiet enjoyment contained in the demise to C.:—Held, that rabbits were within the reservation contained in the lease to A., and that B. was therefore not liable for A.'s act in killing them. *Ib.*

A. devised real estate to trustees in strict settlement, with a proviso that it should be lawful for the trustees for the time being, if they or he should think proper, to permit the person or

persons who might, under the trusts of his will, be entitled to a life or other greater estate in the respective portions of his S. estate, to occupy the mansion house, gardens, "and premises," without paying any rent or compensation for the same, and without such person or persons being obliged, at his expense, to keep the same in repair, or being at any other expense than paying the rates and taxes. The word "premises" held to comprise a park attached to the mansion house; but, having regard to the construction put by the court upon that word, the occupation of a farm-house contiguous to the park, but separated by it from the mansion house, and the right of sporting over portions of the adjacent property, were afterwards held not to be included in the devise. The right to the sporting was held to be in the trustees. *Lethbridge* v. *Lethbridge*, 3 De G. F. & J. 523; 8 Jur. (N.S.) 856; 10 W. R. 449.

The mortgagees of land, consisting of copses and of a farm which was let without the shooting or the timber, gave notice to the tenant of the farm to pay the rent to the mortgagees, and afterwards moved to restrain the mortgagors from cutting the timber:—Held, that though the mortgagees had become mortgagees in possession of the farm, they had not become mortgagees in possession of the shooting, the copses, or the timber, so as to be liable to account for default. *Simmins* v. *Shirley*, 46 L. J., Ch. 875; 6 Ch. D. 173; 37 L. T. 121; 26 W. R. 25.

Interference with Right by Landlord.]—The right of shooting is the right to shoot over the lands as they may happen to be at the time, the landlord, of course, not doing anything for the express purpose of destroying the right. Semble, *Gearns* v. *Baker*, 44 L. J., Ch. 334; L. R. 10 Ch. 355; 33 L. T. 86; 23 W. R. 543.

The owner of a farm of 180 acres, subject to a right of shooting, which had been demised for a term to P., staked out a road across the farm, pulling down two hedges for the purpose, and put up the farm for sale by auction in thirteen lots, some of which were described as eligible for building purposes. The particulars mentioned the right of shooting, and stated that the sale was subject to such right. On a bill for injunction by P. to restrain the sale:—Held, that it did not appear that the sale must inevitably result in an injury to the plaintiff's right of shooting, and that accordingly the bill must be dismissed. *Pattisson* v. *Gilford*, 43 L. J., Ch. 524; L. R. 18 Eq. 259; 22 W. R. 673.

A landlord was restrained by injunction from interfering with his tenant in the exercise of the exclusive right of sporting, and killing game, according to an agreement not under seal, until a lease should be executed, under seal according to such agreement, pursuant to the decree in the cause. *Frogley* v. *Lovelace* (*Earl*), 1 Johns. 333.

Under an ordinary grant of the exclusive right of shooting over an estate, the tenant has no right to prevent the landlord from cutting down trees in the proper course of management of the estate, even though the result of the cutting will be prejudicial to the shooting. *Gearns* v. *Baker*, 44 L. J., Ch. 334; L. R. 10 Ch. 355; 33 L. T. 86; 23 W. R. 543.

2. COVENANTS RELATING TO, IN LEASES.

What is Reservation of Game.]—An agreement under which a tenant held contained a stipulation that he would not destroy any game, and would endeavour to preserve all game bred and being on the farm. He was convicted under 1 & 2 Will. 4, c. 32, s. 12, that he being the occupier of land, the right of killing the game on such land being reserved to his landlord, did unlawfully kill upon such land game:—Held, that the stipulation in the agreement could not be construed as a reservation of game to the landlord, and that the conviction ought to be quashed. *Coleman* v. *Bathurst*, 40 L. J., M. C. 131; L. R. 6 Q. B. 366; 24 L. T. 426; 19 W. R. 848.

To leave "well-stocked with Game."]—C. demised to the defendant, for a term of years, the exclusive right and licence to shoot, kill and take game upon certain of his lands, together with the use of a cottage for the occupation of a keeper. There was a covenant by the defendant that he should leave the estate as well stocked with game in all respects as the same was at the time of the commencement of the term. The defendant entered upon the occupation and occupied for the term, during which C. assigned his reversion to the plaintiff. The plaintiff having brought an action against the defendant in respect of a breach of the covenant to leave the estate well stocked with game:—Held, that the demise was a demise of an incorporeal hereditament; that the covenant was one which would pass to the assignee of the reversion; and that the action would lie at the suit of the plaintiff. *Hooper* v. *Clark*, 8 B. & S. 150; 36 L. J., Q. B. 79; L. R. 2 Q. B. 200; 16 L. T. 152; 15 W. R. 347.

To keep down Game.]—A farmer being in treaty for a lease of a farm, declined to take it on account of the quantity of game. The lessor promised that he would kill down the game, and would not let the shooting, but refused to allow the promise to be inserted in the lease. The tenant accordingly executed a lease prepared by the lessor's solicitor, in which the right to kill game was reserved to the lessor, his friends and servants. The lessor afterwards let the shooting, and did not kill down the game:—Held, that there was a binding collateral agreement to kill down the game, and that the tenant was entitled to compensation for damage done by the same. *Erskine* v. *Adeane*, 42 L. J., Ch. 849; L. R. 8 Ch. 756; 29 L. T. 234; 21 W. R. 802.

A declaration stated that the plaintiff and other persons by deed, demised to the defendant the lands of the plaintiff, and also the sole right of shooting in, upon, and within all his lands for twenty-one years, and the defendant covenanted that he would not permit the rabbits to become so numerous as to cause damage to any of the farm tenants of the lands. Breach assigned, that he did permit the rabbits to become so numerous as to cause damage to the farm tenants, whereby they were injured, and the plaintiff became liable to them for such damage. A plea, that parts of the lands in, upon, and within which the plaintiff and the other persons demised to the plaintiff the sole right of shooting were held by and in the possession of certain persons, as tenants to the plaintiff and the other persons, without there being reserved to the plaintiff and the other persons the right of shooting, or otherwise killing rabbits in, upon, or within the same, and the plaintiff and the other persons had not any right or power to demise to the defendant

the right of shooting rabbits on those parts of the lands; and that the defendant has never been able to enjoy the right of shooting rabbits in, upon, or within these lands, and has been prevented by the tenants from shooting rabbits in, upon, or within the same; and that the breaches of covenant assigned are breaches arising from and consequent upon rabbits being permitted, by the tenants of the lands, to become so numerous as to cause the damage alleged, and not from any default by or on the part of the defendant, is a good plea to the action. The plaintiff not having, in the leases to his tenant, reserved the right of shooting over the lands, had no power to authorise the defendant to enter thereon for the purpose of shooting, and so was himself the cause of the breach of covenant, by having rendered it impossible for the defendant to enter upon the lands for the purpose of performing it. *Cornewall* v. *Dawson*, 24 L. T. 664.

Declaration, that the defendant became tenant to the plaintiffs upon the terms that the defendant would keep such a number only of hares and rabbits as would do no injury to the trees of the plaintiffs, or to the crops of their tenants, and that in case he should keep such a number of hares and rabbits as should injure the trees or crops, he would pay to the plaintiffs or their tenants a fair and reasonable compensation for such injury. Breach, that he did keep such a number of hares and rabbits as did injury to such trees and crops, and had not paid a fair and reasonable or any compensation. Plea, that one of the terms of the tenancy was that in case any such injury should be done "the defendant would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred" to arbitration, and that a difference arose as to the amount of compensation, but no arbitrator had been appointed nor any award made:—Held, that the plea was bad, for the stipulation as to compensation and reference, though in the form of one sentence, contained in reality two covenants, and such covenants were distinct and independent. *Dawson* v. *Fitzgerald* (*Lord Otho*), 45 L. J., Ex. 893; 1 Ex. D. 257; 35 L. T. 220; 24 W. R. 773—C. A.

Implied as to Cultivation of Land.]—Where a right of shooting over land is demised, there is no implied covenant that the surface of the land, or the course of cultivation, shall remain unchanged. *Jeffryes* v. *Evans*, 19 C. B. (N.S.) 264; 34 L. J., C. P. 261; 11 Jur. (N.S.) 584; 13 L. T. 72; 13 W. R. 864.

Rabbits — Meaning of "Thousand."]—In a lease of a rabbit warren, the lessee covenanted that, at the expiration of the term, he would leave on the warren 10,000 rabbits, the lessor paying for them 60*l*. per thousand:—Held, in an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, that parol evidence was admissible to show that by the custom of the country where the lease was made, the word "thousand," as applied to rabbits denoted 1,200. *Smith* v. *Wilson*, 3 B. & Ad. 729; 1 L. J., K. B. 194.

Damages — Covenantee not Damaged.] — A lease was made between the plaintiff and defendant by which the plaintiff granted exclusive rights of sporting over his estate to the defendant, who covenanted that he would during the term keep down and destroy the rabbits on the estate, so that no appreciable damage might be done to the crops thereon. Appreciable damage was done to the crops of an occupier of the land by rabbits on the estate, but the plaintiff never was under any liability to compensate the occupier for any such damage, and paid him no sum whatever in respect thereof. In an action for breach of covenant:—Held, that the plaintiff having suffered no damage himself and not being in the position of a trustee for the occupier, was entitled only to nominal damages. *West* v. *Houghton*, 4 C. P. D. 197; 40 L. T. 364; 27 W. R. 678.

3. Under Inclosure Allotments.

Right of Sporting.]—An act for allotting the land of a stinted pasture of a manor for the purposes of improvement (in which manor there was no right of free warren), declared all the allotments freehold to all intents and purposes. It then reserved to the lord the right to mines, and the right to get the minerals, making compensation for damage to the herbage; it declared the allotment to him to be "in full recompense and satisfaction for all his right and interest as lord of the manor in and to the residue of" the stinted pasture. It provided that he should enjoy seigniories, royalties, &c.; "also the right of hunting, shooting, fishing, and fowling in, through, and over the stinted pasture. and every part and allotment thereof, and all other seigniories to the lords of the manor belonging (except those barred) by the act, in as full and ample a manner as if the act had not been passed":—Held, that the lord still possessed the exclusive right of hunting, shooting, fishing, and fowling over the allotments. *Ewart* v. *Graham*, 7 H. L. Cas. 331; 29 L. J., Ex. 88; 5 Jur. (N.S.) 773; 7 W. R. 621.

The plaintiff was lord of a manor in which there was a stinted pasture, called Bretherdale Bank, divided by a fence from the other lands of the manor, the fence being maintained and repaired by the owners of cattle-gates to which Bretherdale Bank was subject. These cattle-gates were holden of the lord, as customary estates of inheritance, by payment of fine, rents, and services; they descended, on the death of the owner, to the heir-at-law, who was admitted at the lord's court, and paid a fine; they also passed by customary deed, followed by admittance on payment of a fine, the deed being brought into court by the alienee, and presented by the homage. There were eighty cattle-gates, and each of them conferred on its owner rights of depasturing cattle upon Bretherdale Bank. The owners appointed a frithman and a herd to attend to the land and the cattle; they had once changed the time of stinting, and they had the right to cut turf for consumption within the manor, if they were owners of houses within the manor. An act of parliament gave power to the father of the plaintiff, who was lord of the manor, to enfranchise any copyhold or customary messuages, cottages, lands, tenements, or hereditaments, parcel or reputed parcel of the manor. Several cattle-gates had been enfranchised under this act, but appeared to have been enjoyed in the same way as the customary cattle-gates. The lord was entitled to seize quousque for non-payment of fines, and the plaintiff was the owner of one which had been so seized by his predecesso r.

The plaintiff, his father, and their predecessors, lords of the manor, had always pursued and killed grouse on Bretherdale Bank without obstruction from the cattle-gate owners, and they had since 1819 preserved the game there. No person, except by stealth, or with the permission of the lords of the manor, had been accustomed to search for or kill game, and only one cattle-gate owner had asked for and obtained leave to shoot grouse there. In 1852 the defendant became owner of four cattle-gates, which were described in the conveyance as "all the four cattle-gates or beast-grasses in, upon, and over the close of pasture-ground called Bretherdale Bank," and he was admitted before the steward of the manor out of court. In respect of these cattle-gates he claimed a right to shoot game over Bretherdale Bank, and did kill four grouse there. The lord having brought an action for doing so:—Held, that he was in possession of the soil, the defendant having only a right, as owner of the cattle-gates, to the feeding of his beasts upon Bretherdale Bank, without any right to the soil itself, and therefore that the lord had a right to maintain trespass against him for killing the grouse. *Lonsdale (Earl)* v. *Rigg*, 1 H. & N. 924; 26 L. J., Ex. 196; 3 Jur. (N.S.) 390; 5 W. R. 355—Ex. Ch.

Held, also, that the facts stated did not show an exclusive right in the lord to shoot on Bretherdale Bank. *Ib.*

By an inclosure act, directing the allotment of certain common and waste lands, a portion was allotted to the lord of the manor as full compensation for his right in the residue, save and except as thereinafter excepted. The mines, &c., were not to be taken into the valuation of the allotments, they being reserved to the lord. It was provided that nothing in the act contained should defeat the lord's right to the seigniories, &c., belonging to the manor, but that he should have, &c., all rents, &c., piscaries, fishing, hunting, hawking, and fowling, and all beasts and birds considered as game, &c., and all other royalties, &c., and appurtenances (except such as were taken away by the act), in the same and as full a manner as they were then or had been enjoyed by the then present or any lords. It reserved to the lord all mines, &c., under the lands to be allotted, and gave powers for searching for and working the same. Before the passing of the act the lord had the right of shooting over the waste lands as owner of the soil, but had no right of free warren over them:—Held, that the act reserved to the lord the exclusive right of sporting over the allotments. *Leconfield (Lord)* v. *Dixon*, 37 L. J., Ex. 33; L. R. 3 Ex. 30; 17 L. T. 288; 16 W. R. 157—Ex. Ch.

A manor was vested in trustees for the benefit of the freeholders of the manor. By a provisional order, confirmed by act of parliament, a moor, a portion of the manor, was converted into a stinted pasture. The order provided that the right of all manner of game upon the lands should not be in any way affected or interfered with by the inclosure, and that all persons entitled to such game should have the same rights of entry and other rights as theretofore enjoyed:—Held, that the right of shooting was severed from the right to the soil, and became a right in gross, and was therefore not to be taken into account in estimating the value at which the stinted pastures were rateable to the poor. *Hilton Overseers* v. *Bowes Overseers*, 35 L. J., M. C. 137; L. R. 1 Q. B. 359; 13 L. T. 512; 14 W. R. 368.

By an inclosure act, the commissioners were authorised to apportion to the lord of the manor, in satisfaction for his right and interest as such lord, a certain quantity of the waste in cattle-gates. By a subsequent section—reciting that the waste was of such small value as not to bear the expense of being allotted—the commissioners were empowered to set it out in one inclosure, and to regulate the stint among the owners of land entitled to rights of common, awarding them sheep gates in proportion to their several rights. The proprietors, or persons entitled to the greater part of the sheep gates, were then empowered, with the consent of the lord, to appoint commissioners to divide the stinted pasture into allotments "to and amongst the proprietors of the said common or waste land, in proportion to their respective rights and interest therein." A further section reserved to the lord the right "to enjoy, search for, and work all mines, minerals, and other rights and privileges in the said waste (except the right to the soil thereof, for which a compensation was thereinbefore directed to be made), in as full, ample, and beneficial a manner as if the act had not been made":—Held, that the effect of the act was, to take from the lord his right to the soil of the waste, and with it the exclusive right of sporting thereon. *Robinson* v. *Wray*, L. R. 1 C. P. 490; 14 L. T. 434.

The lords of a manor in which there was waste land were the owners of the soil, subject to rights of common. As an incident to the ownership of the soil, they had the right to take the game. Under the powers conferred by 8 & 9 Vict. c. 118, and 11 & 12 Vict. c. 99, the waste lands of the manor were inclosed and portions allotted to M. The commissioners made a provisional order, and declared as one of the conditions on which they were of opinion that the inclusure should be made, "that one-sixteenth part in value of the lands be allotted under the provisions of the act to the lords of the manor, in lieu of their right and interest in the soil of the lands, exclusively of their right and interest in the game, and in all mines, minerals, stone, and other substrata under the lands." A person, by the authority of M., killed game upon the land allotted to him:—Held, that the commissioners had power to impose the condition that the right to the game should be in the lord, that the language used by them was sufficient, and that consequently the right of taking the game was in the lord, who might maintain an action against the party for killing game on the allotment. *Musgrave* v. *Forster*, 40 L. J., Q. B. 207; L. R. 6 Q. B. 590; 24 L. T. 614; 19 W. R. 1141.

An inclosure act directed the commissioners to allot to the lady of the manor, her heirs and assigns, a certain proportion in value of the lands to be inclosed in lieu of, and as a full compensation for, the right and interest of such lady of the manor, in and to the soil of the lands, and to allot the residue amongst the other persons entitled to rights of common; and it was enacted that the several allotments should be vested in the allottees in full bar and satisfaction of all rights of common and other rights and interests whatsoever in, over, and upon the lands (except such manorial rights as were thereinafter reserved to the lady of the manor, her heirs and assigns); and that all rights of common should cease over the lands. The reservation clause provided that nothing in the act contained should

prejudice the right, title, or interest of the lady of the manor, her heirs and assigns, in or to the seigniory or royalties incident or belonging to the manor; but that she might hold and enjoy all rents, quit-rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites, and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the manor, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons or deodands, royalties, jurisdictions, franchises, matters, and things whatsoever to the manor, or to the lord or lady thereof, incident or belonging, or which had been theretofore held and enjoyed by the lady of the manor or any of her ancestors (other than and except such common right as could or might be claimed by the lady of the manor as owner of the soil and inheritence of the commons or waste grounds) :—Held, that the act did not reserve to the lady of the manor the right of shooting which she formerly possessed over the lands allotted under the act by virtue of her ownership of the soil. *Sowerby* v. *Smith*, 43 L. J., C. P. 290; L. R. 9 C. P. 524; 31 L. T. 309; 23 W. R. 79—Ex. Ch.

4. By Parol Agreement.

Rights Under.]—Where there was an agreement in writing, but not under seal, to let a messuage, together with full and free and exclusive licence, and leave to hunt, hawk, course, shoot, and sport over a manor, and the tenant entered and was possessed during the term granted :—Held, in an action on the agreement for rent, that not being by deed the agreement was void, because an incorporeal hereditament was agreed to be let, and that the plaintiff was not entitled to recover in respect of the actual enjoyment of the premises let by the defendant, of which he had taken possession. *Bird* v. *Higginson*, 2 A. & E. 696; 4 N. & M. 505; 1 H. & W. 61; 4 L. J., K. B. 124. See *Ewart* v. *Graham*, and *Webber* v. *Lee*, ante, col. 469.

Declaration on a written agreement (not under seal) by the plaintiff to let land to the defendant for two years, and by the defendant to make satisfaction for damage done to tenants by game on their farms, over which he was to be at liberty to preserve game; the amount of damage to be settled by two referees, one chosen by each party, or by their umpire in case of disagreement. Averment, that the defendant entered and enjoyed the exclusive right of shooting during the whole term agreed upon. Breach, that although within a reasonable time W. M. was chosen and nominated on the plaintiff's behalf, and notice given to the defendant, who was requested by the plaintiff to give the name and address of a referee on his behalf to act with W. M. within ten days, or that in default W. M. would assess the damage done, yet the defendant did not nor would give notice to the plaintiff of any person chosen or nominated on his behalf, nor ever made any satisfaction for the damage done; that, accordingly, W. M. alone assessed the damage, and that the defendant had not paid any compensation to the plaintiff :—Held, that the agreement to make compensation was not void, although the right of shooting, being an incorporeal hereditament, did not pass by it. *Thomas* v. *Fredericks*, 10 Q. B. 775; 16 L. J., Q. B. 393; 11 Jur. 942.

Held, also, that as the defendant was stated to have enjoyed the right of shooting during the whole period agreed for, the absence of an averment of a grant of such right as a condition precedent did not render the declaration bad. *Ib.*

—— **Trespass by Licensee.**]—See *Jones* v. *Williams*, post, col. 483.

—— **Injunction Restraining Interference, until Lease Executed.**]—See *Frogley* v. *Lovelace* (*Earl*), ante, col. 471.

—— **Compensation under Lands Clauses Act.**]—B., by an agreement in writing (not under seal), was entitled to the right of sporting over lands for a term of three years. A company, under the powers of its act of parliament, purchased some of this land from the owner, and constructed their line over the land :—Held, that B. had no interest in the land sufficient to entitle him to claim compensation from the company under the Lands Clauses Act in respect of the damage to the right of sporting. *Bird* v. *G. E. Ry.*, 19 C. B. (N.S.) 268; 34 L. J., C. P. 366; 11 Jur. (N.S.) 782; 13 L. T. 365; 13 W. R. 989.

5. Exercising and Enjoying Right.

With Friends.]—In a demise, the lessor granted to the lessee the right of sporting over the land demised, and certain other lands, "in common with the lessor, his heirs and assigns, and any friend of his or them" :—Held, that the exercise of the privilege was not confined to a single friend at a time. *Gardiner* v. *Colyer*, 10 L. T. 715; 12 W. R. 979.

If the plaintiff is tenant of A., and has agreed that A. shall give three persons licence to sport over the lands, and the defendant has such a licence from A., such licence will not support the plea of leave and licence by the plaintiff. *Hayward* v. *Grant*, 1 Car. & P. 448.

—— **Damages done by Hunting.**]—In an action by a farmer against a gentleman who was member, not master, of a hunt, who had taken the shooting on the plaintiff's farm, for trespass in hunting :—Held, that the defendant was not liable for damage caused by the horses of other members of the hunt. *Paget* v. *Birkbeck*, 3 F. & F. 683.

Extent of Right.]—A person having an agreement for shooting over a farm has only a right to do so in the usual and reasonable way, and not to tread over fields of standing crops at a time when it is not usual or reasonable. *Hilton* v. *Green*, 2 F. & F. 821.

Right to Turn down Rabbits or Birds.]—A tenant of shooting having a licence to lay down some game is not liable for damage done by rabbits or birds, unless he has laid down an unreasonable and excessive number. *Paget* v. *Birkbeck*, 3 F. & F. 683.

He has no right to turn rabbits on to the farm, without express leave to do so, and he is liable to the occupier for damage done to the crops by rabbits, or the progeny of rabbits, thus turned on by his express or implied authority, and without the occupier's licence. *Hilton* v. *Green*, 2 F. & F. 821.

A demise of the exclusive right of sporting over a farm does not justify the lessee in turning out on it game not bred thereon in the ordinary

way. Semble also, that in such a case the lessor is justified in keeping down the excess. *Birkbeck* v *Paget*, 31 Beav. 403.

Where land is let to a tenant reserving the the right of shooting over the land, the tenant may maintain an action against the persons entitled to the right of shooting for overstocking the land with game so as to cause damage to the tenant's crops. *Farrer* v. *Nelson*, 54 L. J., Q. B. 385; 15 Q. B. D. 258; 52 L. T. 786; 33 W. R. 800; 49 J. P. 725.

An infant tenant in tail, for purposes of shooting, turned loose a large number of rabbits upon the farms of his tenants, who held their lands from year to year under a verbal agreement that the shooting should be preserved. The rabbits occasioned considerable damage to the crops, and the tenants claimed to have the amount of the damage deducted from their rent; but, pending the consideration as to how much should be deducted, the tenant in tail died. After his death his personal representative refused to allow the tenants' claim:—Held, that the claim could not be sustained. *Harrington* v. *Harrington*, 20 L. T. 512.

Breaking up Rabbit Warren.]—To break up a rabbit warren, unless a warren by charter or prescription, is not waste at common law, and the court will not grant an injunction to prevent it. *Lurting* v. *Conn*, 1 Ir. Ch. R. 273.

6. Ground Game.

Letting of Sporting Rights to Tenant—Agreement by Tenant to Let to Third Party Sole Right to Ground Game.]—The Ground Game Act, 1880, does not prevent the tenant of a farm over which he has the sole right of shooting and of killing and taking ground game, otherwise than in pursuance of the statute, from entering into a valid agreement with a third person to let to him, for a valuable consideration, the "sole right of shooting and killing all winged game, hares and rabbits" on such farm. Section 3 is only directed to preventing landlords and tenants from combining to defeat the objects of the act. *Morgan* v. *Jackson*, 64 L. J., Q. B. 462; [1895] 1 Q. B. 885; 15 R. 411; 72 L. T. 593; 43 W. R. 479; 59 J. P. 327.

Right Vested in Person other than Occupier.]—When at the date of the passing of the Ground Game Act, 1880, land is in the occupation of a tenant with a legal interest, as tenant from year to year, expiring after the commencement of the act, but also with an equitable interest under an agreement prior to the act for a lease for fourteen years, to commence from the expiration of the legal interest, and reserving to the landlord the right to the ground game on the land, such right in the landlord as against the tenant is preserved by the provisions of the saving clause of the act (s. 5); the phrase "is vested" not being confined to an actual legal vesting a lease in possession, but including an equitable vesting of the right under an agreement for a lease, contract of tenancy, or other contract bonâ fide made for valuable consideration. *Allhusen* v. *Brooking*, 53 L. J., Ch. 520; 26 Ch. D. 559; 51 L. T. 57; 32 W. R. 657.

By lease dated 4th September, 1865, H. demised to L. the shooting and game of the lands of P. for twenty years from the 1st November, 1863. In 1874 L. assigned to B. and W., who after the expiration of the lease continued to hold the right of shooting as tenants from year to year. By lease dated the 28th June, 1869, H. demised to C. the lands of P. for the term of sixty years, reserving to the landlord the game:—Held, that the case came within s. 5 of the Ground Game Act of 1880, and that C. was not entitled on the expiration of the lease of 1865 to take and kill ground game. *Hansard* v. *Clark*, 13 L. R., Ir. 391.

Spring Traps—Owner in Possession.]—By the 6th section of the Ground Game Act, 1880, no person having a right of killing ground game under this act or otherwise, shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding 2*l.*:—Held, that the section does not apply to an owner of land doing any of the acts prohibited therein upon his own land. *Smith* v. *Hunt*, 54 L. T. 422; 16 Cox, C. C. 54; 50 J. P. 279.

—— **Tenant with Right of Shooting.**] — A tenant of land who is under his agreement entitled to the game and right of shooting thereon, is liable to a penalty, under s. 6 of the Ground Game Act, 1880, for employing spring traps in the open for the purpose of killing ground game. *Saunders* v. *Pitfield*, 58 L. T. 108; 16 Cox, C. C. 369; 52 J. P. 694.

7. Trespassing.

Jurisdiction of Justices—Claim of Right.]—It is not sufficient to oust the jurisdiction of the justices in regard to a charge of trespass in pursuit of game under 1 & 2 Will. 4, c. 32, that there is an honest claim of right if such claim is absurd and impossible in point of law. The question is whether a reasonable claim of right is involved, and not one of mens rea, inasmuch as the statute is not a mere criminal statute, but is intended for the protection of the peculiar rights of persons entitled to shoot game. *Watkins* v. *Major*, 44 L. J., M. C. 164; L. R. 10 C. P. 662; 33 L. T. 352; 24 W. R. 164. S. P. *Legg* v. *Pardoe*, 9 C. B. (N.S.) 289; 30 L. J., M. C. 108; 7 Jur. (N.S.) 499; 3 L. T. 371; 9 W. R. 234.

An information was preferred against the appellant for killing a rabbit contrary to 1 & 2 Will. 4, c. 32, s. 30. At the hearing it was proved that E. claimed to be lord of the manor, and a witness stated that the manor had belonged to two persons, who were predecessors in title to E. A deputation was also produced, which appeared to have been duly enrolled by the clerk of the peace of the county, by which T. was appointed gamekeeper for and within the manor. The witness also stated that he had known the common for forty years, and had always believed it to be part of the manor, and that E. had allowed him to shoot over the common. The appellant went by direction of his father on to the common, and there shot a rabbit. The father had previously acquired a lease of some land near the common, and had built a house on it. He claimed in respect of this land, as one of the commoners, a right of killing

rabbits on the common, but no evidence was adduced that any of the commoners had ever claimed or exercised a right of killing rabbits on the common. The claim to kill rabbits was made by the appellant and his father bonâ fide, and the justices having convicted the appellant :—Held, first, that there was evidence that the manor existed, that the common was within it, and that E. was the lord of it. *Ib.*

Held, secondly, that as the appellant had given no sufficient evidence of a right justifying him in killing the rabbit, he was properly convicted, although he bonâ fide believed himself to be entitled to shoot the rabbit. *Ib.*

Appellant was summoned under 1 & 2 Will. 4, c. 32, s. 30, for trespassing in pursuit of game. At the hearing before the justices he set up a claim under a lease. The lease was produced by the respondent, when it was found that the locus in quo could not possibly be included in the land demised. The appellant contended that there was a mistake in the map annexed to the lease, and supported his claim to the locus in quo by evidence of acts of possession. The justices, while considering that his claim might be made bonâ fide, thought it an impossible and absurd one, and convicted him :—Held, that such conviction was right, and that they had not exceeded their jurisdiction. *Watkins* v. *Smith*, 38 L. T. 525 ; 26 W. R. 692. S. P., *Leatt* v. *Vine*, 30 L. J., M. C. 207 ; 8 L. T. 581.

M. laid an information against A. for trespassing in pursuit of game, under 1 & 2 Will. 4, c. 32 (Game Act), s. 30. At the hearing he gave evidence that the lords of the manor had, in 1815, granted the right of shooting, down to the present time, and that he was then renting the shooting of them. On A.'s part it was alleged that he had a lease from the lords of the manor of the lands said to be trespassed upon, dated 1859, in which there was no reservation of a right to the game, and that the alleged trespass was committed in the assertion of his right to the game. The justices having convicted A. :—Held, that, under the circumstances, the claim of right having been bonâ fide made, the jurisdiction of the justices was ousted. *Adams* v. *Masters*, 24 L. T. 502. S. P., *Reg.* v. *Cridland*, 7 El. & Bl. 853 ; 27 L. J., M. C. 28 ; 3 Jur. (N.S.) 1213 ; 5 W. R. 679 ; *Reg.* v. *Kayley*, 10 L. T. 339.

The tenant of a farm under a lease which reserved the game to the lessor, but did not expressly say that it did so exclusively, shot three hares in the presence of the keeper to assert his right. He set up this claim of right on the hearing of an information against him before the justices, and alleged that it ousted their jurisdiction. They found that the claim was not bonâ fide, because he had a copy of the lease, and convicted him :—Held, that this finding as to the bonâ fides was not conclusive, because there was no evidence that his claim was made malâ fide ; and that as he asserted his claim of right the magistrates had no jurisdiction to hear the information. *Lovesy* v. *Stallard*, 30 L. T. 792.

A trespasser in search of game set up as a defence, under 1 & 2 Will. 4, c. 32, s. 30, the leave and licence of the occupier under a parol lease. The occupier denied that the game was reserved ; evidence was given to show that it was :—Held, that the defence was not bonâ fide, and, therefore, the jurisdiction of the justices was not ousted. *Reg.* v. *Critchlow*, 26 W. R. 681.

Semble, that if there is any evidence to show that the game is reserved, it becomes a question of fact to be decided by the justices. *Ib.*

B. was charged with trespass in pursuit of game, under 1 & 2 Will. 4, c. 32, s. 30, and was proved to have shot game on glebe land over which the rector of the parish had always exercised the privilege of sporting. The defence of B. was that he was game watcher, employed by three gentlemen who were proved to rent shooting from the lord of the manor, and that the lord claimed the shooting over part of the glebe under an inclosure act. He proved that his employers ordered him to go upon this land, but he produced no evidence, although an adjournment was offered for that purpose, that the land upon which the alleged trespass was committed was included in the lands over which his employers' shooting extended, nor in the disputed part of the glebe. The magistrate decided that he had no bonâ fide claim of right to shoot on this particular land, and convicted him of the trespass :—Held, that, under the circumstances, the magistrate was justified in convicting. *Birnie* v. *Marshall*, 35 L. T. 373.

The title attempted to be set up must be in the defendant and not in a third person. *Cornwell* v. *Sanders*, 3 B. & S. 206 ; 32 L. J., M. C. 6 ; 9 Jur. (N.S.) 540 ; 7 L. T. 356 ; 11 W. R. 87.

B. was tenant of lands, there being no reservation of game by the landlord, and B. let the land to A. to get and cut the hay, and both B. and A. gave leave to P. to shoot game over the land. P. was convicted under 1 & 2 Will. 4, c. 32, s. 30, of trespassing in pursuit :—Held, that the justices were wrong, for the whole right to the game was in B. and A., and P. having the leave and authority of both had a good claim of right to the rabbits. *Pochin* v. *Smith*, 52 J. P. 4.

B.'s covert adjoined the field of P., and B. went on a public footpath in this field to shoot, directing his servant to beat B.'s own covert and hedge. B. on being charged with trespassing in pursuit of game under s. 30 of 1 & 2 Will. 4, c. 82, set up a claim of right, as the hedge was his :—Held, that the justices were wrong in allowing a claim of right, as no title to property was involved, and B. ought to have been convicted. *Philpot* v. *Bugler*, 54 J. P. 646.

Jurisdiction of Queen's Bench.]—The Court of Queen's Bench has no jurisdiction to direct the court of quarter sessions to rehear an appeal, on the ground of their having rejected evidence which was admissible, although the appeal was against a conviction under 1 and 2 Will. 4, c. 32, by which a certiorari is taken away. *Pratt, Ex parte*, 2 N. & P. 102 ; 7 A. & E. 27.

Evidence of.]—To sustain a charge of trespass in pursuit of game, brought under the 27 & 28 Vict. c. 67, the only evidence given on behalf of the complainants to prove the commission of the offence was, that the defendant, with two greyhounds, was trespassing on lands of the complainants where hares had been frequently seen, and that he went away on being called on to stop by a caretaker of the complainants. The caretaker deposed that he believed the defendant was beating for hares :—Held, that there was no evidence that the defendant had committed an offence under the statute. *Kingston (Countess)* v. *O'Neill*, L. R., 6 Ir. 101.

Damages for.]—In an action for breaking and

entering the plaintiff's closes, and sporting there, under circumstances of aggravation, the jury gave 500*l.* damages; the court refused to reduce them, though the plaintiff had sustained no actual pecuniary damage. *Merest* v. *Harvey*, 1 Marsh. 139; 5 Taunt. 442; 15 R. R. 548.

By Licensee.]—A landlord, who has verbally reserved the game to himself, has thereby a sufficient authority to give leave to a person to kill game on such farm, to prevent any such person from being a trespasser thereon in pursuit of game within s. 30 of 1 & 2 Will. 4, c. 32. *Jones* v. *Williams*, 46 L. J., M. C. 270; 36 L. T. 559.

Inducing others to Trespass.]—Where a person goes out sporting with his friends, and purposely leads them on to another's land, he is equally guilty of a trespass, although he may remain off the land whilst his friends go on it. *Hill* v. *Walker*, Peake's Add. Cas. 234.

If a gentleman sends out his hounds and his servants, and invites other gentlemen to hunt with him, although he does not himself go on the lands of another, but the other gentlemen do, he is answerable for the trespass they may commit in so doing, unless he distinctly desires them not to go on the lands. *Baker* v. *Berkeley*, 3 Car. & P. 32.

By Dog.]—Where, in an action of trespass, it appeared that the defendant was a qualified person, and had permission to sport on the right-hand side of a road; but his dog crossed over the road and ranged over a field on the other side; the judge left it to the jury whether the dog had crossed over by the incitement of the defendant or not. If the jury finds that the dog escaped against the defendant's will, and that he had no intention of sporting on the other side of the road, they must accordingly find a verdict for the defendant. *Dimmock* v. *Allenby*, 2 Marsh. 852.

An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence enters the plaintiff's wood and chases and destroys young pheasants which are being reared there under domestic hens. *Read* v. *Edwards*, 5 N. R. 48; 17 C. B. (N.S.) 245; 34 L. J., C. P. 31; 11 L. T. 311.

Hunting no Justification for Trespass.]—It is no justification of a trespass that it was committed in pursuit of a fox, where such pursuit is carried on as a sport. *Paul* v. *Summerhayes*, 48 L. J., M. C. 33; 4 Q. B. D. 9; 39 L. T. 574; 27 W. R. 215; 14 Cox, C. C. 202.

Semble, that the pursuit of a fox could not, under any circumstances, be a justification. *Ib.*

S. managed his father's farm, his father being an invalid, and while working in a field, part of the farm, forbade P., E. and others, who were out with the Taunton Vale foxhounds in pursuit of a fox, from entering that field. P. insisting upon riding into the field, S. turned his horse back. P. and E. then committed an assault upon S., for which they were summoned by S. before the justices and jointly charged in the information. The justices refused to allow P. and E. to sever their defence so that they might give evidence for each other, and convicted them both: —Held, that such conviction was right, s. 32 of 1 & 2 Will. 4 not applying to such a case. *Ib.*

A person may justify a trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox. *Gundry* v. *Feltham*, 1 Term Rep. 334; 1 R. R. 215.

If a hunted stag runs into a barn for shelter, the owner of the hounds and his servants have no right to enter the barn to take the stag; and if they do so they are trespassers. *Baker* v. *Berkeley*, 3 Car. & P. 32.

Frightening away Game.]—Firing at wildfowl to kill and make profit of them, by one who was at the time in a boat, on a public river or an open creek, where the tide ebbs and flows, so near to an ancient decoy on shore (about 200 yards), as to make the birds there take flight, the defendant having before fired at a greater distance from the decoy, which brought out some of the birds, though he did not fire into the decoy-pond, is evidence of a wilful disturbance of and damage to the decoy for which an action is maintainable by the owner. *Carrington* v. *Taylor*, 11 East, 571; 2 Camp. 258; 11 R. R. 270.

An action lies for discharging guns near the decoy-pond of another with design to damnify the owner by frightening away the wildfowl resorting thereto, by which the wildfowl is frightened away, and the owner damnified. *Keeble* v. *Hickeringill*, 11 East, 574, n.; 11 R. R. 273, n.

A person whose game is enticed away from his land by a neighbour, is liable to an action for exploding combustibles so as to be a nuisance to the latter, in order to frighten the game away from his land and prevent him killing them, and enticing other game. *Ibbotson* v. *Peat*, 3 H. & C. 644; 34 L. J., Ex. 118; 11 Jur. (N.S.) 394; 12 L. T. 313; 13 W. R. 691.

Power of Police to Apprehend.]—A policeman has no power, under 25 & 26 Vict. c. 114, to apprehend persons whom he may suspect of coming from land where they have been unlawfully in pursuit of game, and such persons may lawfully resist and use such violence as is necessary to prevent their apprehension. *Reg.* v. *Spencer*, 3 F. & F. 854.

A warrant for neglecting to appear to a summons for trespass in search of coneys, under 1 & 2 Will. 4, c. 32, s. 30, was issued against C., directed to all the peace officers in the county. A peace officer in the county met C. and said he apprehended him under this warrant, but the warrant was not in his possession at the time. C. resisted, and, having severely injured the officer, escaped, but afterwards surrendered himself. The justices fined him 10*s.* for the trespass, and sentenced him to six months' hard labour for assaulting the officer in the execution of his office:—Held, that the arrest under the circumstances would not have been in the execution of the constable's office, and that the conviction for assault must be quashed. *Codd* v. *Cabe*, 45 L. J., M. C. 101; 1 Ex. D. 352; 34 L. T., 453; 13 Cox, C. C. 202.

Poaching—Suspicion.]—A constable saw H. with a gun poaching in a field, and then saw him on the highway, where he stopped and searched him, saying that he suspected H. of coming from land where he had been unlawfully searching for game. H. assaulted the constable, and was summoned for the assault:—Held, that the jus-

tices were wrong in dismissing the charge for the reason they gave, viz. that as H. had been seen poaching he could not have been suspected of poaching *Hall* v. *Robinson*, 53 J. P. 310.

Trespassing in Pursuit of—Actually seen on Land—Legal Evidence.]—G. was charged under 1 & 2 Will. 4, c. 32, s. 30, with unlawfully trespassing in the daytime in pursuit of game. A report of a gun was heard proceeding from the land which was a wood, and G. was seen almost immediately to come out of the wood with a gun and three dogs, and run off. There was no direct evidence that he was seen in the wood in actual pursuit. The justices refused to commit, holding the evidence not to be legal :—Held, the justices were wrong, and that there was legal or admissible evidence. *Burrows* v. *Gillingham*, 57 J. P. 423.

Night Poaching.]—B. was caught with rabbits at night in a field forming part of a farm over which H. had the right of sporting. The justices found as a fact that this field was not a warren or ground used for the breeding or keeping of hares or rabbits within the 17th section of the Larceny Act, 1861, and convicted B. of night poaching under 9 Geo. 4, c. 69, s. 1 :—Held, that it was a question of fact whether the place was within this description ; and that upon this finding the conviction was right. *Bevan* v. *Hopkinson*, 34 L. T. 142.

And see CRIMINAL LAW (*Poaching*).

Conviction—When Irregular.]—After a conviction by two justices under 1 & 2 Will. 4, c. 32, s. 30, and before any formal conviction had been drawn up, one of such justices changed his mind, and together with a third justice who had not heard the case, but without the concurrence of the other justice who had convicted, reversed such conviction :—Held, that such reversal was irregular, but that as no conviction had been drawn up there was no good conviction existing, and the whole proceeding was a miscarriage. *Jones* v. *Williams*, 46 L. J., M. C. 270 ; 36 L. T. 559.

Taking or Killing on Sunday.]—A. was convicted for that he, on the 15th of August (being Sunday), did use snares for the purpose of killing game. He set the snares on the 13th and 14th of August, and on the 15th the snares were seen set ready to catch game, and two dead grouse were found caught in snares :—Held, that a snare was an engine or an instrument within 1 & 2 Will. 4, c. 32, s. 3, and that putting down a snare on a day before Sunday, for the purpose of killing game, and keeping it set on Sunday, was using an engine or an instrument on Sunday. *Allen* v. *Thompson*, 39 L. J., M. C. 102 ; L. R. 5 Q B. 336 ; 22 L. T. 472 ; 18 W. R. 1196.

At petty sessions an information was laid against two persons charging that they did use a gun and kill two pheasants contrary to 1 & 2 Will. 4, c. 32, s. 3 ; each claimed to be tried separately in order to call the other as a witness ; the justices refused, and heard the charge against both together, and convicted them, and a conviction was drawn up separately against each of them imposing a penalty of 3*l*. :—Held, that it was in the discretion of the justices whether they would hear the charge separately or not ; that, as the penalty was imposed on every person acting in contravention of the statute, each was separately liable to the whole penalty, and that separate convictions were right. *Reg.* v. *Littlechild*, *Reg.* v. *Heslop*. 40 L. J., M. C. 137 ; L. R. 6 Q. B. 293 ; 24 L. T. 233 ; 19 W. R. 748.

C. CERTIFICATES.

Setting Trap for Game.]—A person who in March sets a trap for the purpose of taking partridges or pheasants, not having a game certificate, is liable to the penalty imposed by 1 & 2 Will. 4, c. 32, s. 23, upon any person who sets any instrument for the purpose of taking game, such person not being authorised so to do for want of a game certificate, although s. 3 imposes a penalty upon any person killing or taking partridges between the 1st of February and the 1st of September, or pheasants between the 1st of February and the 1st of October, since the two offences are distinct, and the penalties imposed by the two sections are cumulative. *Sanders* v. *Baldy*, 6 B. & S. 791 ; 35 L. J., M. C. 71 ; L. R. 1 Q. B. 87 ; 12 Jur. (N.S.) 334 ; 13 L. T 322 ; 14 W. R. 177.

Killing Game—With Gun.]—Proof that the defendant did "keep and use a gun to kill and destroy the game" was sufficient evidence to support a conviction under the game laws, though the witness had his reasons for believing "that the gun was fired by the defendant, who was walking about a piece of ground at H. with that apparent intent." *Rex* v. *Davies*, 6 Term Rep. 177.

—— **Accidentally.**]—If a person not qualified to kill game killed a pheasant or other game by accident, he could not take it away, or he was subject to the penalty. *Molton* v. *Cheeseley*, 1 Esp. 123.

—— **Take, kill, and pursue — If three Offences.**]—J. was charged under 23 & 24 Vict. c. 90, s. 4, with taking, killing, and pursuing game without a licence. Objection being taken that these were three separate offences, the justices dismissed the information :—Held, that the justices were wrong, and that only one offence was charged. *Laxton* v. *Jefferies*, 58 J. P. 318.

Penalties and Convictions.]—In an action to recover penalties under the game laws, the plaintiff can recover but one penalty under the 5 Anne, c. 14, s. 4, for the same act. *Ib.*

On an information charging a defendant with keeping and using a dog, and also a gun, on the same day, he could only be convicted in one penalty. *Rex* v. *Lovett*, 7 Term Rep. 152.

But a defendant might be convicted of several offences in the same conviction. *Rex* v. *Swallow*, 8 Term Rep. 284.

And two persons could not be convicted in separate penalties under 5 Anne, c. 14, s. 4, for using a greyhound to destroy game. *Rex* v. *Bleasdale*, 4 Term Rep. 809.

The 1 & 2 Will. 4, c. 32, s. 3, subjects a person killing or taking birds of game during certain seasons of the year to a penalty not exceeding 1*l*. for every head of game killed or taken. Sect. 23 subjects persons killing or taking game, or using any dog for the purpose of searching for or killing or taking game, without a certificate, to a penalty not exceeding 5*l*. :—Held, that the penalties in the two sections are cumulative, and,

therefore, a person using an instrument for taking a bird of game without a certificate out of season, was liable to a penalty under s. 23. *Sanders* v. *Baldy*, 6 B. & S. 791 ; 35 L. J., M. C. 71; L. R. 1 Q. B. 87 ; 12 Jur. (N.S.) 334 ; 13 L. T. 322 ; 14 W. R. 177.

Killing game without a game certificate is not an offence against the game laws. *Stevens* v. *Copp*, 38 L. J., Ex. 31 ; L. R. 4 Ex. 20 ; 19 L. T. 454 ; 17 W. R. 166.

Unqualified Person in Company.]—An unqualified and unlicensed person may join the sport with a person lawfully entitled to kill game, if he merely joins in the sport, and is not himself a principal, or using his own dogs. *Molton* v. *Rogers*, 4 Esp. 217.

But in an action on 5 Anne, c. 14, if the defendant set up a defence that he joined in the sport as a servant of another, he must have given strict evidence that the person by whose orders he acted was himself qualified to kill game. *Clarke* v. *Broughton*, 3 Camp. 328.

An unqualified servant going out with his qualified master and shooting game in his presence, and for his use, was liable to a penalty under 5 Anne, c. 14, for keeping and using a gun to kill game. *Rex* v. *Sylvester*, 4 M. & Ry. 5 ; 9 B. & C. 61 ; 7 L. J. (O.S.) M. C. 63.

But an unqualified person going out with the qualified owner of greyhounds to course a hare, which was killed by the dogs, was not liable to the penalty of 5*l.* given by 5 Anne, c. 14, for using a greyhound to kill game; although he took an active part in the sport by beating the bushes in order to find a hare, and took it up after it was killed. *Lewis* v. *Taylor*, 16 East, 49.

A groom attending his qualified master while using dogs for killing the game, and pursuing it by his master's command, was not liable to a penalty under 5 Anne, c. 14. *Rex* v. *Taylor*, 15 East, 460.

Using a greyhound merely in the company of a qualified person, who kept it, was not an offence against the statute. *Rex* v. *Newman*, Lofft, 178 ; 5 Term Rep. 376.

A servant of a qualified person assisted his master in setting a trap on his land for taking rabbits and vermin, and was ordered, if a hare should be caught, to bring it to his master. A hare being afterwards caught in the trap, in the absence of the master, it was accordingly killed and carried to him by the servant :—Held, that he was not liable to the penalties for using snares for the destruction of game, or having it in his possession, so as to constitute an exposure to sale under 9 Anne, c. 25, s. 2. *Walker* v. *Mills*, 4 Moore, 343 ; 3 Br. & B. 1.

Keeping Sporting Dogs.]—The mere fact of keeping a sporting dog is no evidence of keeping it for the purpose of destroying game, without some evidence of its having been used for that purpose. *Read* v. *Phelps*, 15 East, 271.

To constitute the offence of keeping a setting-dog with 5 Anne, c. 14, s. 4, it must have been kept for the purpose of killing and destroying game ; therefore, where at the time the alleged offence was charged to have been committed, the dog was tied up, and never had been taken out into the field by his master, it was not an offence within the statute. *Hayward* v. *Horner*, 5 B. & Ald. 317.

So where a dog was kept as a house-dog. *Briarly* v. *Althorpe*, 5 B. & Ald. 320, n.

Not Producing.]—To bring a party within 52 Geo. 3, c. 93, for not producing his game certificate, it is not necessary that the demand should be made on the land on which he was sporting ; but the demand must be made so immediately after the party has left the land, as to form part of the same transaction. *Search* v. *Gardener*, 5 Car. & P. 38.

It is not necessary that the person making the demand should produce any certificate ; and if the other party refuses to produce his, he takes the risk of whether the person demanding is one having a right to make such demand. *Ib.*

If a person refuses to produce his game certificate, or to tell his name or residence, the person demanding need not go on to ask in what place, if any, he is assessed to the game duty. *Ib.*

The penalty for not producing a licence when lawfully required, is not complete by the refusal to produce it, unless the party refuses on request, to tell his christian and surname, and the place of his residence. *Molton* v. *Rogers*, 4 Esp. 215.

Right of Supervisor to conduct Prosecution.]—In prosecutions for taking game without a licence the inland revenue supervisor for the district has a right to conduct the case although the prosecution is not in his name, and a general authority given to him by the commissioners is sufficient compliance with 53 & 54 Vict. c. 21, s. 27. *Reg.* v. *Turner*, 58 J. P. 320.

Evidence of Authority to Prosecute—Re-opening Case.]—In a prosecution for pursuing game without a licence, the information alleged that it was by order of the commissioners of inland revenue. Objection was taken that no evidence thereof was given :—Held, that the justices were wrong in allowing such an objection, and in ignoring 7 & 8 Geo. 4, c. 53, s. 71. Held, further, that the justices were wrong in resolving not to re-open the case before they knew on what ground it would be asked for. *Hargreaves* v. *Hilliam*, 58 J. P. 655.

D. DEALERS IN.

Legality of Contracts.]—The 1 & 2 Will. 4, c. 32, s. 4, does not render illegal a contract made during the game season, whereby a party licensed to deal in game undertakes to deliver to another live game at a period out of the season. *Porritt* v. *Baker*, 10 Ex. 759 ; 3 C. L. R. 432 ; 1 Jur. (N.S.) 336.

The buying of game was formerly prohibited in all cases by 58 Geo. 3, c. 75 ; therefore, under that statute, a contract for the sale of live pheasants for the purpose of breeding, passed no property to the purchaser, and could not be enforced. *Helps* v. *Glenister*, 3 M. & Ry. 12; 8 B. & C. 533 ; 7 L. J. (O.S.) K. B. 117.

Disqualification—Sale of Beer by Retail.]—The holder of an additional licence to sell beer under 26 & 27 Vict. c. 33, s. 1, is a person "licensed to sell beer by retail" within the meaning of s. 18 of the Game Act, 1831 (1 & 2 Will. 4, c. 32), and is therefore disqualified from holding a licence to deal in game under that section. *Shoolbred* v. *St. Pancras JJ.*, 59 L. J., M. C. 63 ; 24 Q. B. D. 346 ; 62 L. T. 287 ; 38 W. R. 399 ; 54 J. P. 231.

Unlawful Possession.]—A person licensed under 1 & 2 Will. 4, c. 32, s. 4, who has in his possession live pheasants after the time mentioned in the act, is guilty of an offence under the act. *Loome* v. *Bailey*, 3 El. & El. 444; 30 L. J., M. C. 31; 6 Jur. (N.S.) 1299; 3 L. T. 406; 9 W. R. 119.

Breeding Pheasants.]—M., a pheasant-breeder for many years, set pheasants' eggs under barn-door hens in coops, cutting one wing of each bird to prevent escape and facilitate identification. He sold two cock pheasants on 5th February for 1*l.* to one of the public:—Held, that he was subject to the penalty under the 23 & 24 Vict. c. 90 and 24 & 25 Vict. c. 91, s. 17, for dealing in game without a licence. *Harnett* v. *Miles*, 48 J. P. 455.

Game killed Abroad.]—An excise licence under 23 & 24 Vict. c. 90, s. 14, is not required for the sale of game killed abroad. *Pudney* v. *Eccles*, 62 L. J., M. C. 27; [1893] 1 Q. B. 52; 5 R. 52; 67 L. T. 713; 41 W. R. 125; 17 Cox, C. C. 594; 57 J. P. 38.

A person licensed to deal in game by virtue of the Game Act, 1831 (1 & 2 Will. 4, c. 32), was convicted under s. 4 of knowingly having in his shop game during the close season, as defined in s. 3. It appeared that game was exposed for sale in his shop during the close season, but that it had been killed abroad:—Held, that the act did not apply to birds killed abroad, and that the conviction was wrong. *Guyer* v. *Reg.*, 58 L. J., M. C. 81; 23 Q. B. D. 100; 60 L. T. 824; 37 W. R. 586; 16 Cox, C. C. 657; 53 J. P. 436.

It is no defence to an information under the Wild Birds Protection Act, 1876, for exposing wild birds for sale during the prohibited season, that such birds have been bought or received of or from a person residing out of the United Kingdom. *Whitehead* v. *Smithers*, 46 L. J., M. C. 234; 2 C. P. D. 553; 37 L. T. 378.

E. UNLAWFUL POSSESSION OF.

Evidence of.]—In order to convict under the 25 & 26 Vict. c. 114, s. 2, it is not necessary that the person charged should have been seen on the land where he is said to have obtained unlawful possession of game found upon him; it is sufficient that circumstances are proved from which the magistrates may infer that the offence has been committed. *Brown* v. *Turner*, 32 L. J., M. C. 106; 13 C. B. (N.S.) 485; 9 Jur. (N.S.) 850; 7 L. T. 681; 11 W. R. 290.

Under 25 & 26 Vict. c. 114, s. 2, a person may be convicted of having obtained game by unlawfully going on land in search or pursuit of game without evidence of his having been on any particular land. *Evans* v. *Botterill*, 3 B. & S. 787; 33 L. J., M. C. 50; 10 Jur. (N.S.) 311; 8 L. T. 272; 11 W. R. 621.

A person may be convicted of that offence, or of having used any net, &c., for unlawfully killing or taking game, upon circumstantial evidence. *Ib.*

Upon an information against a person under 25 & 26 Vict. c. 114, s. 2, for having obtained game by unlawfully being on land in search or pursuit of game, it is not necessary to prove an actual search of the person by the constable if game was seen upon the person. *Hall* v. *Knox*, 4 B. & S. 515; 33 L. J., M. C. 1; 9 L. T. 380; 12 W. R. 103.

A policeman can only justify stopping and searching a cart upon a highway under 25 & 26 Vict. c. 114, where he has good cause to suspect that the cart is carrying game which has been unlawfully obtained. *Reg.* v. *Spencer*, 3 F. & F. 857.

In order to justify a conviction under 25 & 26 Vict. c. 114, s. 2, it is necessary that game or instruments for taking game should be found by the constable on the accused in a highway. *Clarke* v. *Crowder*, 38 L. J., M. C. 118; L. R. 4 C. P. 638; 17 W. R. 857.

It is not sufficient that the accused should be seen in a highway and followed, and game found on him elsewhere. *Ib.*

Semble, that it is also necessary that the game or instruments for killing or taking game should be detained and taken from the accused in the highway in order to give magistrates jurisdiction to convict for the offence. *Ib.*

A common carrier between B. and R. was met by a police constable coming along the turnpike road to R. with his horse and cart. The constable suspecting that he had been unlawfully on land in pursuit of game, asked him if he had any game in his cart, to which he replied that he had only a few rabbits. The constable then searched the cart, and found in a basket beneath the rabbits, a pheasant, nine partridges (three of which had been shot, and six netted), and two hares (one of which had been shot and the other trapped). The game was wet, and had been recently killed; and the boots of the carrier (who fainted when the game was discovered) were dirty, although the road was dry. The justices who convicted him found that "no evidence was given on the one hand to show that the game was unlawfully obtained, or on the other hand to show that it was lawfully obtained":—Held, that the foregoing circumstances did not constitute sufficient evidence on which he could be convicted of having obtained game by unlawfully going on land in search or pursuit of game within 25 & 26 Vict. c. 114, s. 2. *Jones* v. *Dicker*, 22 L. T. 95.

In order to give jurisdiction to magistrates to convict of an offence under 25 & 26 Vict. c. 114, s. 2, it is necessary that the game or instruments for killing or taking game should be seized and detained on the highway. *Turner* v. *Morgan*, 44 L. J., M. C. 161; L. R. 10 C. P. 587; 33 L. T. 172; 23 W. R. 659.

A man, whilst going in a cart along a highway, was required to stop by a constable. He drove off without obeying the order to stop, and shortly afterwards delivered to G. several rabbits, of which the constable subsequently took possession:—Held, that as the rabbits were not seized by the constable whilst they were in his possession upon the highway, he could not be convicted under 25 & 26 Vict. c. 114, s. 2. *Ib.*

A police constable saw the appellant in a highway with some rabbits slung over his back. The appellant left the highway and ran across a meadow followed by the police constable, and on being overtaken, at a distance from the highway, he threw the rabbits on the ground, and they were then and there taken possession of by the police constable. On appeal against a conviction under 25 & 26 Vict. c. 114, s. 2:—Held, that the conviction was right. *Turner* v. *Morgan* (L. R. 10 C. P. 587) commented on. *Lloyd* v. *Lloyd*, 14 Q. B. D. 725; 53 L. T. 536; 33 W. R. 457; 15 Cox, C. C. 767; 49 J. P. 630.

Proof of the possession of game being innocent lies on the person accused. A servant taking a hare out of a snare and carrying it to his master, never intending to make any use of it himself cannot be said ever to have had the possession of it. *Hemming* v. *Haley*, 1 L. J. (o.s.) K. B. 105.

—— **User of net Sufficient.**]—Two men were seen together by a policeman on the 16th of December on a highway, about half-past 9 p.m. One had a net under his arm for catching hares. Nothing else was found on either of them; but they had a lurcher with them. The policeman had heard a dog yelping as if in chase of a hare or rabbit a little time before these men came along the road. The night was damp and the net was wettish. They were both convicted under 25 & 26 Vict. c. 114, s. 2:—Held, that there was evidence to support the conviction; for that it was not necessary that they should have caught any game; it was sufficient if they had used the net for the purpose, though unsuccessfully, of which there was evidence. *Jenkin* v. *King*, or *Reg.* v. *Cornwall JJ.*, 41 L. J., M. C. 145; L. R. 7 Q. B. 478; 26 L. T. 428; 20 W. R. 669.

Abetting Poachers—Carrier buying Game from Poachers.]—M., a constable, at half-past seven in the morning in the month of October, stopped L. driving a carrier's cart on the highway, and after questioning L. searched it. M. found two pair of rabbits (of which L. gave no account), and seized them under 25 & 26 Vict. c. 114, s. 2. L., on being served with a summons, said "I bought them of a man I did not know. This was the first time I have been summoned. I won't have any more of them":—Held, that the evidence was not sufficient to justify the justices in convicting L. of aiding persons unknown, who unlawfully went on land in pursuit of game. *Lawley* v. *Merricks*, 51 J. P. 502.

Game, taking, during Fence Months.]—A pheasant was caught accidentally, between the 1st of February and the 1st of October, by a farmer on his own farm, in a wire set for rabbits and not for pheasants, but finding the pheasant in the wire still alive, he, after releasing it, and putting it on the ground, picked it up and carried it away with him. The 1 & 2 Will. 4, c. 32, s. 3, makes it unlawful "to kill or take any game between the 1st of February and the 1st of October":—Held, that the catching the pheasant in the wire, and the picking it up and carrying it away, was not one continuous act, but that the picking it up and carrying it away constituted a taking within the statute, but that it was material for the justices to consider whether the farmer took the bird away with a view only to restore it to liberty, or with a view to killing it or keeping it, in which latter case they ought to convict. *Watkins* v. *Price*, 47 L. J., M. C. 1; 37 L. T. 578; 27 W. R. 692.

The penalty for having possession of a partridge between the 1st February and 1st September does not attach if the bird was killed before or on the 1st February and kept afterwards. *Simpson* v. *Unwin*, 3 B. & Ad. 134; 1 L. J., M. C. 28.

By Dealer.]—See *Loome* v. *Bailey*, ante, col. 489.

F. GAMEKEEPERS.

Deputation of.]—The lord of a hundred or wapentake cannot grant a deputation to a gamekeeper. *Ailesbury (Earl)* v. *Pattison*, 1 Dougl. 28.

Bodies corporate, who were lords of manors, were not prevented by 3 Geo. 1, c. 11, from appointing unqualified persons their gamekeepers. *Spurrier* v. *Vale*, 1 Camp. 457; 10 East, 413.

A deputation to a gamekeeper, who is neither himself qualified to kill game, nor is a servant to the lord of a manor, need not state on the face of it that he is appointed to kill game for the use of the lord, and it will be presumed that whatever game he kills is for the lord's use till the contrary is proved. *Ib.*

A deputation is not admissible as evidence of the existence of a manor, without a foundation being first laid in fact. *Rushworth* v. *Craven*, M'Clel. & Y. 417.

The evidence of colourable title, necessary to make a deputation a defence to an action on the game laws, is such as primâ facie affords a fair presumption, 1st, of the existence of a manor; and, 2ndly, that there exists some serious claim to the manor on the part of the person under whom the defendant claims a right to act; and if the evidence actually given does not amount to that, it ought not to be left to the jury. *Ib.*

In an action for a penalty for using a gun to kill game without being qualified, evidence of the real title to a manor was admissible for the purpose of rebutting the presumption of the existence of a colourable title in the person under whom a gamekeeper deputed by the lord of the manor claimed to act. *Hunt* v. *Andrews*, 3 B. & Ald. 341.

Where a defendant pleaded that he had been deputed gamekeeper by the lord of a manor, and the jury negatived the existence of a manor:—Held, that this amounted to a negative of the existence of a reputed manor. *Bush* v. *Green*, 5 Scott, 289; 4 Bing. (N.C.) 41; 3 Hodges, 265; 7 L. J., C. P. 38; 1 Jur. 844.

Rights of—To carry Gun—Killing Dogs.]—A plea to an action for killing the plaintiff's dog cannot justify the act, by stating that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close, for the preservation of the hares, such plea not even stating that it was necessary to kill the dog for the preservation of the hares, nor stating that it was the dog of an unqualified person. *Vere* v. *Cawdor (Lord)*, 11 East, 568; 11 R. R. 268.

The gamekeeper to a lord of a manor has a right to carry a gun anywhere out of the manor. *Rogers* v. *Carter*, 2 Wils. 387.

—— **Other.**]—A gamekeeper was authorised by his deputation to seize greyhounds, setting-dogs, ferrets, and to do all things belonging to the office of gamekeeper, according to the directions of the acts of parliament:—Held, that he was not thereby authorised to seize hounds. *Grant* v. *Hulton*, 1 B. & Ald. 134.

The 1 & 2 Will. 4, c. 32, s. 13, does not authorise a gamekeeper, appointed by the lord of a manor, to seize a gun used within the limits of the manor by a person not authorised to kill game, for want of a game certificate. *Daddle* or *Duddle* v. *Hickton*, 17 L. T. 549; 16 W. R. 372.

A gamekeeper is not empowered to seize game in the possession of an unqualified person, under a general direction given him by the lord of a manor, although such seizure was made within the manor. *Bird* v. *Dale*, 1 Moore, 290 ; 7 Taunt. 560.

In an action for taking hares, where the defendant justified seizing them by command of the lord of the manor, and for his use within the manor, the hares being found in the possession of an unqualified person, and the plaintiff traversed the command :—Held, that the command to be proved to maintain the issue must be such a command as would legally authorise the seizure ; and that evidence of a wrongful command would not maintain the issue. *Ib.*

It was no defence to an action for penalties under the game laws that the defendant acted bonâ fide as gamekeeper of the manor in which the offence was committed, under a deputation from a person claiming a right to appoint the gamekeeper, there being no ground for the claim. *Calcraft* v. *Gibbs*, 5 Term Rep. 19.

The gamekeeper of a person who has merely the right of shooting over land is not justified in apprehending a person unlawfully being upon such land by night for the purpose of taking game. *Reg.* v. *Price*, 5 Cox, C. C. 277.

Liabilities of.]—A gamekeeper appointed by a person having only a permission to shoot, trying to take a gun from a poacher, and in the scuffle causing a loaded gun to go off, which killed the poacher, is guilty of manslaughter. *Reg.* v. *Wesley*, 1 F. & F. 528.

A person having only a right of shooting over land has no right to empower keepers to apprehend parties trespassing in search of game ; and on their resisting with no greater violence than is used by the keepers, they will not be liable for an assault ; but if the trespass is in the night they may be indicted for night poaching. *Reg.* v. *Wood*, 1 F. & F. 470.

GAMING AND WAGERING.

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F. BETTING ON LICENSED PREMISES. —*See* INTOXICATING LIQUORS.

A. LAWFUL AND UNLAWFUL GAMES.

Horse Races and Matches.]—A trotting match at 25*l.* a side along a turnpike road is not an illegal race within 18 Geo. 2, c. 34, s. 11. *Challand* v. *Bray*, 1 D. (N.S.) 783 ; 11 L. J., Q. B. 204 ; 6 Jur. 626.

A steeplechase for 50*l.*, or upwards, is a lawful race within 18 Geo. 2, c. 32, s. 11, notwithstanding the repeal by 3 & 4 Vict. c. 5, of the provisions as to horse racing in 13 Geo. 2, c. 19. *Evans* v. *Pratt*, 4 Scott (N.R.) 378 ; 1 D. (N.S.) 505 ; 3 Man. & G. 759 ; 11 L. J., C. P. 87 ; 6 Jur. 152.

A horse race for 50*l.* or upwards is a legal race by virtue of 18 Geo. 2, c. 34, s. 11. *Bentinck (Lord)* v. *Connop*, 5 Q. B. 693 ; D. & M. 538 ; 13 L. J., Q. B. 125 ; 8 Jur. 336.

Since the repeal of the 13 Geo. 2, c. 19, by 3 & 4 Vict. c. 5, a horse race for money given by third persons, by way of prize, is not illegal. *Applegarth* v. *Colley*, 10 M. & W. 723 ; 12 L. J., Ex. 34 ; 7 Jur. 18.

Game—Skill or Chance.]—All games, whether of skill or of chance, being within 9 Anne, c. 14, s. 5, a promissory note given to secure the payment of money won at either is invalid. *Sigel* v. *Jebb*, 3 Stark. 1.

Coursing.]—A coursing match was an illegal game within 9 Anne, c. 14, s. 5. *Daintree* v. *Hutchinson*, 10 M. & W. 85 ; 11 L. J., Ex. 397 ; 6 Jur. 736.

Foot Races.]—A foot race is a lawful game sport or pastime, within the proviso in 8 & 9 Vict. c. 109, s. 18. *Batty* v. *Marriott*, 5 C. B. 818 ; 17 L. J., C. P. 215 ; 12 Jur. 462. See *Johnson* v. *Lansley*, 12 C. B. 469 ; *Coombs* v. *Dibble*, 4 H. & C. 375 ; 35 L. J., Ex. 167 ; L. R. 1 Ex. 248 ; 12 Jur. (N.S.) 456 ; 14 L. T. 415 ; 14 W. R. 676.

Two persons agreed to run a foot race, and each of them deposited 10*l.* with a third person, the whole 20*l.* to be paid over to the winner :—Held, that the loser could not recover his deposit from the stockholder. *Ib.*

Where a number of persons assembled together in a public highway to enjoy a diversion called a stag hunt, which consisted in one of the number representing a stag, and the others chasing him, whereby an obstruction was caused :—Held,

that this was a game within 5 & 6 Will. 4, c. 50, s. 72. *Pappin* v. *Maynard*, 9 L. T. 327.

A foot race is within the statute 9 Anne, c. 14, entitled, "An Act for the Better Preventing of Excessive and Deceitful Gaming." *Parker* v. *Alcock*, 1 Younge, 361.

Cricket.]—A match at cricket for 20*l.* was within the 9 Anne, c. 14, s. 5, and 18 Geo. 2, c. 34, s. 8, and therefore illegal. *Hodson* v. *Terrill*, 1 C. & M. 797 ; 3 Tyr. 393; 1 D. P. C. 264; 2 L. J., Ex. 282.

A game at cricket for above 10*l.* was illegal, though the game was not finished in one day. *Ib.*

Hazard.]—The game of hazard is considered an unlawful game by 12 Geo. 2, c. 28, s. 3, and 18 Geo. 2, c. 34, s. 2, whether played in private or at a public gaming-table. *M'Kinnell* v. *Robinson*, 3 M. & W. 434; 1 H. & H. 146 ; 7 L. J., Ex. 149 ; 2 Jur. 595.

Rouge et Noir.]—The game of "rouge et noir" is illegal. *Rex* v. *Rogier*, 1 B. & C. 272 ; 2 D. & R. 431 ; 25 R. R. 393.

Baccarat.]—Baccarat is a game of chance and unlawful within s. 4 of 17 & 18 Vict. c. 38. *Jenks* v. *Turpin*, 53 L. J., M. C. 161 ; 13 Q. B. D. 505 ; 50 L. T. 808 ; 15 Cox, C. C. 486 ; 49 J. P. 20.

Chemin de fer.]—The game of "chemin de fer" is merely a form or variety of baccarat, a term which, as ordinarily understood in England, comprises both "baccarat banque" and "chemin de fer" ; it is, therefore, an unlawful game in the same sense and under the same circumstances as baccarat. *Jenks* v. *Turpin* (13 Q. B. D. 505) followed. *Fairtlough* v. *Whitmore*, 64 L. J., Ch. 386 ; 13 R. 402 ; 72 L. T. 354 ; 43 W. R. 421.

Cock Fights.]—A cock fight was a game within 9 Anne, c. 14, and no action could be maintained upon a wager on a cock fight. *Squires* v. *Whisken*, 3 Camp. 140.

Quære, whether cock fights are illegal. *Martin* v. *Hewson*, 10 Ex. 737 ; 24 L. J., Ex. 174 ; 1 Jur. (N.S.) 214.

Dominoes.]—A conviction which states that a keeper of a public-house, licensed under 9 Geo. 4, c. 61, has been "guilty of an offence against the tenor of his licence ; that is to say, that he knowingly suffered an unlawful game, to wit, the game of dominoes, to be played in his house," is bad, as the game of dominoes is not itself unlawful, and playing at dominoes does not necessarily amount to gaming within the meaning of the licence. *Reg.* v. *Ashton*, 1 El. & Bl. 286 ; 22 L. J., M. C. 1 ; 17 Jur. 50.

Billiards.]—The 8 & 9 Vict. c. 109, s. 18, applies to billiards, though a lawful game, and the proviso does not extend to money won by one of the players from the other. *Parsons* v. *Alexander*, 5 El. & Bl. 263; 24 L. J., Q. B. 277; 1 Jur. (N.S.) 660 ; 3 W. R. 510.

Sweepstakes.]—Before the running of a horse race, several persons subscribed into the hands of a secretary, and deposited with a treasurer 15*s.* each ; the names of the subscribers were written on cards, and the names of the horses intended to run were written in like manner on other cards ; each set of cards was placed in a box, and the cards drawn out alternately, as chance directed ; each subscriber was considered as holding that name of a horse which came out next before the drawing of his own name, and the holders became entitled to prizes varying from 2*l.* downwards, as the horses whose names they held came in first, second, &c., in the race :—Held, before 8 & 9 Vict. c. 109, an illegal game. *Gatty* v. *Field*, 9 Q. B. 431 ; 15 L. J., Q. B. 408 ; 10 Jur. 980.

A horse race being about to be run, 155 persons subscribed 1*l.* each, upon the terms that the names of the horses should be placed on separate cards in one box, and the names of the subscribers on separate cards in another box, and that two disinterested persons should draw these cards by chance, one from each box after the other, and that the person whose name was drawn next after the name of the winning horse should be entitled to 100*l.* out of the entire fund :—Held, that if this was not a lottery, but a bet, it was an illegal bet, and not recoverable. *Allport* v. *Nutt*, 1 C. B. 974 ; 3 D. & L. 233 ; 14 L. J., C. P. 272 ; 9 Jur. 900.

B. WAGERS.

1. Invalidity Generally.

Application of 8 & 9 Vict. c. 109.]—This statute does not extend to India. *Thackoorseydass* v. *Dhondmull*, 6 Moore, P. C. 300 ; 4 Moore, Ind. App. 339 ; 12 Jur. 315.

—— **Retrospective Operation.**]—Section 18 of 8 & 9 Vict. c. 109, has not a retrospective operation, so as to prevent a party from prosecuting an action on a wager which he had commenced before the statute passed. *Moore* v. *Durden*, 2 Ex. 22 ; 12 Jur. 138. S. P., *Pettumberdass* v. *Thackoorseydass*. 5 Moore, Ind. App. 109 ; 7 Moore, P. C. 289 ; 15 Jur. 257.

Common Law.]—According to the common law of England (altered by 8 & 9 Vict. c. 109), an action might be maintained on a wager, although the parties had no previous interest in the question on which it was laid, if it was not against the interests or feelings of third persons, and did not lead to indecent evidence, and was not contrary to public policy. *Thackoorseydass* v. *Dhondmull*, 4 Moore, Ind. App. 339 ; 6 Moore, P. C. 300 ; 12 Jur. 315.

Trial of Actions—Discretion of Judge.]—It was discretionary with a judge, whether he would or would not try an idle or frivolous cause respecting a wager ; but if he suffered it to be tried, and the plaintiff recovered a legal verdict, the court would not on that ground disturb it. *Robinson* v. *Mearns*, 6 D. & R. 26 ; 3 L. J. (O.S.) K. B. 124.

No action will lie on a wager respecting the mode of playing an illegal game ; and if such a cause is set down for trial, the judge will order it to be struck out of the paper. *Brown* v. *Leeson*, 2 H. Bl. 43 ; 3 R. R. 341.

If an action for money had and received is brought against the stakeholder on a dog-fight, to recover the stakes, on the ground that the plaintiff's dog won ; the judge will order it to be struck out of the cause paper, as he will not try which dog won the battle. *Egerton* v. *Furzeman*, 1 Car. & P. 613 ; R. & M. 213.

The lord chief justice refused to try an action to recover back a deposit paid to abide the

event of a wrestling match which did not take place. *Kennedy* v. *Gad*, 3 Car. & P. 376; M. & M. 225.

The stakeholder upon a cricket match between eleven players on each side, at 5*s.* a head, was liable to the winner, if the judge, in the exercise of his discretion, thought proper to try the cause. *Walpole* v. *Saunders*, 7 D. & R. 130; 4 L. J. (O.S.) K. B. 29.

Foot Race—Deposits with Stakeholder.]—A wager of less than 10*l.* on a foot race, to be run for a sum under 10*l.*, before 8 & 9 Vict. c. 108, s. 18, was legal and valid, and neither of the bettors could recover his stake from the stakeholder before the determination of the event. *Emery* v. *Richards*, 14 M. & W. 728; 15 L. J., Ex. 49.

An agreement to walk a match for 200*l.* a side, the money being deposited with a stakeholder, is a wager, and null and void, under 8 & 9 Vict. c. 109, s. 18. *Diggle* v. *Higgs*, 46 L. J., Ex. 721; 2 Ex. D. 422; 37 L. T. 27; 25 W. R. 777—C. A.

Subscription or Contribution to Lawful Game.]—The deposit of money to abide the event of a walking match is not a subscription or contribution for a sum of money to be awarded to the winner of a lawful game within the proviso of s. 18 of 8 & 9 Vict. c. 109; and although the winner of the match cannot sue the loser or the stakeholder to recover the stakes, yet a depositor may maintain an action to recover back the share deposited by him with the stakeholder. *Diggle* v. *Higgs*, supra.

D. and S. agreed to walk a match for 200*l.* a side, and each deposited 200*l.* with the defendant to be paid to the winner. S. won the match. D., after the determination of the match, but before the money was paid over to S., demanded the sum deposited by him from the defendant:—Held, that he was entitled to recover his share of the deposit from the defendant. *Ib.* S. P., *Batson* v. *Newman*, 1 C. P. D. 573; 25 W. R. 85—C. A.

The plaintiff deposited with the defendant 200*l.* to abide the event of a match between a horse of the plaintiff and another horse belonging to G.; but before the day fixed for the race, he gave notice to the defendant that he revoked the authority to pay over the money, and demanded the return of it:—Held, that the plaintiff was entitled to recover such deposit. The contract under which the money was deposited was one by way of wagering, and was not an agreement to contribute a sum of money within the meaning of the proviso contained in s. 18 of 8 & 9 Vict. c. 109, which proviso applies to contributions other than wagers. *Diggle* v. *Higgs* (2 Ex. D. 422) approved. *Trimble* v. *Hill*, 49 L. J., P. C. 49; 5 App. Cas. 342; 42 L. T. 103; 28 W. R. 479.

A person collected subscriptions from the members of a club to run greyhounds, on account of the treasurer, and became bankrupt:—Held, the treasurer might prove for the amount. *King, Ex parte, Watkins, In re*, 2 Mont. & Ayr. 676; 2 Deac. 23; 5 L. J., Bk. 45.

Horse Race already Run.]—A wager of more than 10*l.* on a horse race already run was not illegal, under 9 Anne, c. 14, s. 5. *Pugh* v. *Jenkins*, 1 Q. B. 631; 1 G. & D. 40; 10 L. J., Q. B. 201; 5 Jur. 1082.

Right of Action.]—No action can be maintained against the loser of a bet of 10*l.* for refusing to pay the same, though the bet is upon a legal horse race. *Thorpe* v. *Coleman*, 1 C. B. 990; 14 L. J., C. P. 260; 9 Jur. 903.

O. and T. made up a match for 100*l.*, to trot their respective horses a given distance. O. made up his stakes by getting his friends to take shares. The defendant took fifty shares, and disposed of twenty to plaintiff. O.'s horse won. The defendant promised the plaintiff to pay him as soon as he was paid by O. O. afterwards paid the defendant:—Held, that the plaintiff could not sue the defendant as for money had and received, the wager being illegal. *Martin* v. *Smith*, 4 Bing. (N.C.) 436; 6 Scott, 268; 6 D. P. C. 639; 1 Arn. 194; 7 L. J., C. P. 201; 2 Jur. 376.

No action will lie on a wager, though above 50*l.*, that a single horse shall run on the high road from A. to B., and arrive sooner than one of two horses placed at any distance the owner should please, such a race not being legalised by 13 Geo. 2, c. 19, or 18 Geo. 2, c. 34, s. 11. *Whaley* v. *Pajot*, 2 Bos. & P. 51.

Nor on a wager that the plaintiff could perform a certain journey in a postchaise and pair of horses in a given time. *Ximenes* v. *Jaques*, 6 Term Rep. 499: 1 Esp. 311.

C. was treasurer of a Derby lottery, and received the subscriptions. Tickets marked with the names of horses entered to run for the Derby stakes were issued to the subscribers; and it was understood that the holder of a ticket bearing the name of a winning horse would receive a prize in money. C. received 5*s.* for each, and was to pay the prizes. The holder of a ticket purchased of C. sold it to A. There was no written contract between any of the parties, and the party who bought of C. subscribed as for himself. The horse named on A.'s ticket won:—Held, that A. could not recover the amount of the prize from C., there being no privity between them. *Jones* v. *Carter*, 15 L. J., Q. B. 96; 8 Q. B. 134; 10 Jur. 33.

—— **Where one Party can determine Wager.**]—No action can be maintained by A. against B. on a wager, in which A. bets that B. will, and B. that he will not, pass his examination as an attorney; inasmuch as B. has the power of determining the wager in his own favour. *Fisher* v. *Waltham*, 4 Q. B. 889; D. & M. 142; 12 L. J., Q. B. 330; 7 Jur. 625.

Contracts in the Nature of Wagers.]—An action was brought for a breach of the following agreement:—The plaintiff agreed to buy, and the defendant agreed to sell, his horse Partington for 200*l.* provided he trotted eighteen miles within one hour within one month: and if the task was not performed, the horse was thereby sold to the plaintiff for 1*s.*, which the plaintiff that day paid to the defendant. At the trial, it appeared that the task was not performed, and that the defendant had refused to deliver the horse to the plaintiff. A verdict was found for the plaintiff:—Held, upon a motion to arrest the judgment, that this agreement was illegal, and within 9 Anne, c. 14. *Brogden* v. *Marriott*, 3 Bing. (N.C.) 88; 2 Scott, 712; 2 Hodges, 136; 5 L. J., C. P. 302.

An agreement between two persons, each of whom is possessed of a horse, to ride a race, the winner to have both horses, is null and void, being an agreement by way of wagering, within 8 & 9

Vict. c. 109, s. 18, and not an agreement to contribute towards a prize to be awarded to the winner of a lawful game, within the meaning of the proviso in that section. *Coombs* v. *Dibble*, 4 H. & C. 375; 35 L. J., Ex. 167; L. R. 1 Ex. 248; 12 Jur. (N.S.) 456; 14 L. T. 415; 14 W. R. 676.

In the course of a bargain between the plaintiff and the defendant for the sale of goods, a dispute arose as to the price of similar goods on a former sale; and the following memorandum was signed:—"The plaintiff states that the goods sold by him to the defendant, and afterwards burnt, were invoiced at 5*s*. 9*d*. per cwt. of 112 lbs. The defendant says the price was 6*s*. per cwt. The losing man is to pay for the winner one gallon of best brandy. The five tons of rags now lying at the Salford station are to be regulated, as to price, according to the above, viz. the plaintiff says they are invoiced at 5*s*. 9*d*.; the defendant says 6*s*. It is also agreed by both parties that if the plaintiff is wrong, they are to be charged at 3*s*. only; if the defendant is wrong he is to pay for the same 6*s*.":—Held, that, independently of the clause about the brandy, this was a contract by way of wagering within 8 & 9 Vict. c. 109, s. 18, and therefore could not be enforced by the plaintiff in an action for goods bargained and sold. *Rourke* v. *Short*, 5 El. & Bl. 904; 25 L. J., Q. B. 196; 2 Jur. (N.S.) 352; 4 W. R. 247.

The plaintiff was a "tipster," i.e. gave information as to the probable winners of horse races. Upon his giving the name of a horse to the defendant as the probable winner of a certain race, it was agreed between them that the plaintiff should have 2*l*. on the horse at 25 to 1; that is to say, that if the defendant backed the horse and won, the plaintiff should have 50*l*. out of his winnings, but if the horse lost the plaintiff should pay the defendant 2*l*. The defendant did back the horse and it won, and the plaintiff thereupon claimed 50*l*. out of the defendant's winnings:—Held, that the agreement was void within 8 & 9 Vict. c. 109, s. 18, and that the 50*l*. could not be recovered. *Higginson* v. *Simpson*, 46 L. J., C. P. 192; 2 C. P. D. 76; 36 L. T. 17; 25 W. R. 303.

A wager, under the disguise of a contract to pay a reward for information, is illegal. *Ib*.

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," published the following advertisement:—"100*l*. reward will be paid to any person who contracts the increasing epidemic, influenza, after having used the ball three times daily for two weeks" in a certain specified manner; "1,000*l*. is deposited with the A. bank, showing our' (the defendants') sincerity in the matter." The plaintiff, on the faith of this advertisement, purchased from a chemist one of the defendants' smoke balls, and used it in the manner required, and then contracted influenza:—Held, that such a contract is not a contract by way of wagering within 8 & 9 Vict. c. 109. *Gerhard* v. *Bates* (2 El. & Bl. 476), discussed. *Carlill* v. *Carbolic Smoke Ball Co.*, 62 L. J., Q. B. 257; [1893] 1 Q. B. 256; 4 R. 176; 67 L. T. 837; 41 W. R. 210; 57 J. P. 325—C. A.

H. and W. each deposited 500*l*. in the hands of a stakeholder, upon an agreement that if W., before a certain date, proved the convexity or curvature to and fro of any canal, river, or lake, by actual measurement and demonstration to the satisfaction of certain referees he should receive both sums, but that if he failed, then H. should receive both. The experiment was made, and the referees decided in favour of W.:—Held, that the agreement was a wager, and consequently null and void, within 8 & 9 Vict. c. 109, s. 18. *Hampden* v. *Walsh*, 45 L. J., Q. B. 238; 1 Q. B. D. 189; 33 L. T. 852; 24 W. R. 607.

—— **Sale of Stocks and Shares.**]—*See* infra, col. 507.

Wagering Policies—Want of Insurable Interest.]—J. H. effected with the defendant company two policies of insurance on the life of his father, J. H., in which he had no insurable interest. According to the policies, the premiums were to be paid weekly. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurances effected on his life; but when he became aware of them he objected to their being continued, and gave notice to that effect to the company. J. H., the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the county court judge gave judgment for the plaintiff:—Held, that under the circumstances of the case the policies were wagering policies, and consequently the premiums paid in respect of them could not be recovered. *Howard* v. *Refuge Friendly Society*, 54 L. T. 644.

See further, INSURANCE (LIFE).

Rescission of Contract by Tossing.]—The plaintiff and the defendant had agreed in writing that the plaintiff should take a lease of the defendant and buy a goodwill and fixtures for 800*l*., of which 25*l*. was to be paid, and was paid, by the plaintiff as a deposit. Afterwards the defendant offered the plaintiff 50*l*. to be off the bargain. The plaintiff refused this, but the parties agreed that it should be settled by a toss whether the defendant should give the plaintiff 50*l*. or 75*l*. to be off the bargain. The defendant won the toss, and when the plaintiff sued him for the 50*l*., and for the 25*l*. deposit, set up that the contract of rescission was a wagering one and void, under 8 & 9 Vict. c. 109, s. 18. The jury found that the deposit was not in contemplation of the parties, but that a rescission of the contract was in fact made:—Held, that the plaintiff was entitled to recover both the 50*l*., as consideration for the rescission, and also the 25*l*. deposit. *Wilson* v. *Cole*, 36 L. T. 702.

2. INVALIDITY FOR IMMORALITY AND IMPOLICY.

An action will not lie upon a voluntary wager between two indifferent persons, upon the sex of a third person, apparently a man, having acted and continuing to act as such in various public characters. First, because such inquiry tends to indecent evidence; and secondly, because it tends to disturb the peace of the individual and of society. *De Costa* v. *Jones*, Cowp. 729.

A policy upon the sex of a person is a wagering policy within 14 Geo. 3, c. 48. *Roebuck* v. *Hammerton*, Cowp. 737.

And an action cannot be maintained upon a wager whether an unmarried woman has had a child. *Ditchburn* v. *Goldsmith*, 4 Camp. 152.

A wager by which the defendant received from the plaintiff 100 guineas on the 31st May, 1802, in consideration of paying the plaintiff a guinea a day as long as Napoleon Buonaparte (then first consul of the French Republic) should live, which bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise, is void on the grounds of immorality and impolicy. *Gilbert* v. *Sykes*, 16 East, 150; 14 R. R. 327.

A wager between two voters, with respect to the event of an election of a member to serve in parliament laid before the poll began, is illegal. *Allen* v. *Hearn*, 1 Term Rep. 56; 1 R. R. 149.

A wager respecting the amount of any branch of the public revenues is illegal, because it leads to an improper discussion, and is contrary to sound policy. *Atherfold* v. *Beard*, 2 Term Rep. 610; 1 R. R. 556.

But the mere circumstance that a wager refers to the public revenue does not establish its illegality. *Thackoorseydass* v. *Dhondmull*, 6 Moore, P. C. 300; 4 Moore Ind. App. 339; 12 Jur. 315.

The mere circumstance that a wager has a tendency to make a party to it do what is wrong, not being a matter of duty, will not, according to the common law of England, vitiate the wager. So, where a wager in India related to the price of opium at a future day, the proceeds of which formed part of the government revenue, and it was the interest of one party to the wager to raise, and of the other to depress the price of opium:—Held, that the wager was legal. *Ib.*

So a wager as to the conviction or the acquittal of a prisoner on trial on a criminal charge is illegal, as being against public policy. *Evans* v. *Jones*, 5 M. & W. 77; 2 H. & H. 67; 8 L. J., Ex. 173; 3 Jur. 318.

An engagement, in consideration of 40 guineas, to pay 100*l.*, in case Brazilian stock should be done at a certain sum on a certain day, subscribed by several persons, each for himself, is a policy of insurance, and void, under 14 Geo. 3, c. 48. *Paterson* v. *Powell*, 9 Bing. 320, 620; 2 M. & Scott, 399, 773; 2 L. J., C. P. 13.

A wager that A. had purchased of B. is not void at common law, or prohibited by 14 Geo. 3, c. 48. *Good* v. *Elliott*, 3 Term Rep. 693; 1 R. R. 803.

3. Money Paid by Third Person.

Request to Bet—Implied Authority to Pay.]—A testator had requested a friend to bet for him on certain horses, and the friend paid the amount lost by the bets:—Held, that the request to bet implied an authority to pay the bets if lost, and that the friend was entitled to prove against the estate for the amount paid by him in respect of the bets. *Bubb* v. *Yelverton, Ker, In re*, 24 L. T. 822; 19 W. R. 739.

The plaintiff, a turf commission agent, was employed by the defendant to make bets for him in the plaintiff's own name. After the plaintiff had so made some bets, but before he had paid those which were lost, the defendant repudiated the bets. On the settling day the plaintiff, who was a member of Tattersall's, paid the bets, as, if he had been a defaulter, he would have been subject to certain disqualifications in connection with racing matters, and he then sued the defendant for the amount so paid:—Held, that he was entitled to recover the amount so paid. *Read* v. *Anderson*, 53 L. J., Q. B. 532; 13 Q. B. D. 779; 51 L. T. 55; 32 W. R. 950; 49 J. P. 4—C. A.

A plaintiff who, by the defendant's authority, lays illegal bets in the defendant's name, and losing, pays them without a subsequent express direction so to do, cannot recover from the defendant the amount of the money so paid. *Clayton* v. *Dilly*, 4 Taunt. 165.

Where a dinner is ordered at a tavern by the authority of two persons who have laid a wager of a rump and a dozen, if the winner pays the bill he may maintain an action against the loser for money paid, to recover the amount. *Hussey* v. *Crickett*, 3 Camp. 168.

Money paid in discharge of a lost bet made for another person is recoverable from such other person. *Oldham* v. *Ramsden*, 44 L. J., C. P. 309; 32 L. T. 825.

In an action for money paid by the plaintiff for the defendant's use at his request, it is no answer that the money was paid in discharge of claims against the defendant under wagering contracts, void by the statute 8 & 9 Vict. c. 109, s. 18. *Knight* v. *Cambers*, 15 C. B. 562; 3 C. L. R. 565; 24 L. J., C. P. 121; 1 Jur. (N.S.) 525.

It is no defence to an action against the acceptor of a bill of exchange that the bill was given for bets on horse-races, made by the drawer as the acceptor's agent, but paid by him without the acceptor's request. *Oulds* v. *Harrison*, 10 Ex. 572; 3 C. L. R. 353; 24 L. J., Ex. 66; 3 W. R. 160.

Effect of Gaming Act, 1892.]—The Gaming Act, 1892, is not retrospective, and therefore a betting agent can recover moneys due to him before the act came into operation, though the action was commenced after that date. *Knight* v. *Lee*, 62 L. J., Q. B. 28; [1893] 1 Q. B. 41; 5 R. 54; 67 L. T. 688; 41 W. R. 125; 57 J. P. 117.

Section 1 of the Gaming Act, 1892, prevents a plaintiff who has, at the defendant's request, paid money in settlement of lost bets, from recovering the money from the defendant, even though the plaintiff was no party to the betting. *Tatam* v. *Reeve*, 62 L. J., Q. B. 30; [1893] 1 Q. B. 44; 5 R. 83; 67 L. T. 683; 41 W. R. 174; 57 J. P. 118.

—— **In respect of Wagering Contract.**]—The defendant, who had agreed to fight a boxing match with another person for stakes to be deposited with a stakeholder by himself and the other combatant, requested the plaintiff to lend him the money for his stake. The plaintiff advanced the money, which was deposited with the stakeholder. The defendant won the match and received the stakes. In an action by the plaintiff to recover from the defendant the money advanced as money lent:—Held, that the money was paid by the plaintiff in respect of a contract rendered null and void by the Gaming Act, 1845, within the meaning of s. 1 of the Gaming Act, 1892, and the action could not be maintained. *Carney* v. *Plimmer*, 66 L. J., Q. B. 415; [1897] 1 Q. B. 634; 76 L. T. 374; 45 W. R. 385; 61 J. P. 324—C. A.

4. Money Lent by Third Person.

For Payment of Bets.]—Money lent to enable the borrower to pay a bet which he has already lost does not constitute a debt for an illegal

consideration within 5 & 6 Will. 4, c. 41, s. 1, and is consequently recoverable by the lender. *Pyke, Ex parte, Lister, In re*, 47 L. J., Bk. 100; 8 Ch. D. 754; 38 L. T. 923; 26 W. R. 806.

For Illegal Game.]—Money lent for the purpose of playing an illegal game cannot be recovered back. *M'Kinnell* v. *Robinson*, 3 M. & W. 434; 1 H. & H. 146; 7 L. J., Ex. 149; 2 Jur. 595.

—— **By Licensed Victualler.**]—Money lent by a licensed publican for the purpose of enabling a guest to play at skittles cannot be recovered, the "knowingly suffering any unlawful games, or any gaming whatsoever," upon the premises, being an offence against the tenor of the publican's licence which subjects him to penalties under 9 Geo. 4, c. 61, s. 21. *Foot* v. *Baker*, 6 Scott (N.R.) 301; 5 Man. & G. 335; 7 Jur. 131.

5. Relation of Principal and Agent.

Employment of Principal's Money by Agent.]—An agreement between a principal and his agent that the agent shall employ moneys of the principal in betting on horse-races, and pay over the winnings therefrom to his principal, is not a contract by way of gaming or wagering rendered void by 8 & 9 Vict. c. 109, s. 18, nor is it illegal. *Beeston* v. *Beeston*, 45 L. J., Ex. 230; 1 Ex. D. 13; 33 L. T. 700; 24 W. R. 96.

Agent employed to make Bets—Action for Winnings.]—The Gaming Act, 1892, does not deprive a principal, employing an agent to make bets for him, of his right to recover from such agent any sums received by the agent on account of such bets. *De Mattos* v. *Benjamin*, 63 L. J., Q. B. 248; 10 R. 103; 70 L. T. 560; 42 W. R. 284.

The plaintiff employed the defendant to make bets for him upon commission. The defendant having done so received from the losers money in respect of bets so made which were won by him. The plaintiff claimed this money from the defendant, but the defendant refused to pay it on the ground that it was money won upon a wager, and therefore that the plaintiff could not recover, in consequence of the provisions of 8 & 9 Vict. c. 109, s. 18:—Held, that the plaintiff was entitled to recover; that the defendant had received the money for the use of the plaintiff; that the provisions of 8 & 9 Vict. c. 109, s. 18, only apply to the original contract between the two persons who make a bet, and that they do not make void a contract such as that which the plaintiff had made with the defendant. *Bridger* v. *Savage*, 54 L. J., Q. B. 464; 15 Q. B. D. 363; 53 L. T. 129; 33 W. R. 891; 49 J. P. 725—C. A.

—— **Breach of Instructions.**]—The plaintiff having employed the defendant to bet on commission, and the defendant having failed to make certain bets pursuant to the plaintiff's instructions, the plaintiff sued the defendant for breach of contract as his agent, claiming as damages the excess of gains over losses which should have been received by the defendant, had the bets in question been made, after deducting the amount of his commission:—Held, that as by statute 8 & 9 Vict. c. 109, s. 18, the bets would not have been recoverable at law, the plaintiff could not maintain the action. *Cohen* v. *Kittell*, 58 L. J., Q. B. 241; 22 Q. B. D. 680; 60 L. T. 932; 37 W. R. 400; 53 J. P. 469.

6. In Other Countries.

Money won at play or lent for the purpose of gambling in a country where the games are not illegal, may be recovered in the courts of this country. *Quarrier* v. *Colston*, 1 Ph. 147; 12 L. J., Ch. 57; 6 Jur. 959.

It is no defence to an action for money lost in France that it was lent for the purpose of gaming there. *King* v. *Kemp*, 8 L. T. 255.

Bills made in France and on French stamps cannot be enforced in England if they are given for a gambling debt. *Winne* v. *Callender*, 1 Russ. 293.

7. Recovery of Deposits.

Repudiation of Wager before Determination of Event.]—The 8 & 9 Vict. c. 109, s. 18, which avoids contracts by way of gaming or wagering, and prohibits the maintenance of actions for the recovery of money won upon any wager, or deposited in the hands of a stakeholder to abide the event of any wager, does not preclude the party who repudiates the wager, before the event is ascertained, from recovering from the stakeholder the amount of his deposit. *Varney* v. *Hickman*, 5 C. B. 271; 5 D. & L. 364; 17 L. J., C. P. 102.

The 8 & 9 Vict. c. 109, s. 18, does not preclude a party who repudiates a wager before the event is ascertained from recovering from the stakeholder the amount of his deposit. *Martin* v. *Hewson*, 10 Ex. 737; 24 L. J., Ex. 174; 1 Jur. (N.S.) 214.

Where money is deposited with a stakeholder to abide the result of a wager, the depositor may revoke his authority before the money is paid over by the stakeholder and recover from the stakeholder the money deposited by him. The words "any sum of money paid" in s. 1 of the Gaming Act, 1892, mean "paid out and out," and do not apply to money "deposited" to be handed over to a third person. *O'Sullivan* v. *Thomas*, 64 L. J., Q. B. 398; [1895] 1 Q. B. 698; 15 R. 253; 72 L. T. 285; 43 W. R. 269; 59 J. P. 134.

It is a good answer to an action for money had and received that the money was deposited in the hands of the defendant to abide the event on which a wager was made, and was claimed by the plaintiff as the winner of the wager, and that he did not repudiate the wager, nor demand back his money before the event thereof, and had never repudiated the wager, nor claimed the money on any ground than as the winner of the wager, and that no part of the money was a subscription or a contribution, or due on any agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise. *Savage* v. *Madder*, 36 L. J., Ex. 178; 16 L. T. 600; 15 W. R. 910.

When Stakes not paid over.]—When the loser of an illegal wager repudiates the wager at any time before the stakes have been paid over by the stakeholder, and before action, he can recover his own stake. *Graham* v. *Thompson*, Ir. R. 2 C. L. 64; 16 W. R. 206.

Liability of a Stakeholder.]—A stakeholder

receiving country bank notes as money, and paying them over wrongfully to the original staker after he has lost the wager, is answerable to the winner for money had and received to his use. *Pickard* v. *Bankes*, 13 East, 20.

But not after the wager has been determined against the plaintiff. *Brandon* v. *Hibbert*, 4 Camp. 37.

In order to maintain an action against a stakeholder to recover the amount of stakes deposited with him to abide the determination of certain persons on a legal event, the plaintiff must either have the decision in his favour, or show that it was no longer practicable to obtain it. *Brown* v. *Overbury*, 11 Ex. 715; 25 L. J., Ex. 169; 4 W. R. 252.

Notice to Stakeholder.]—Where A. and B. deposited money in the hands of a stakeholder to abide the event of a boxing match, and after the battle A. claimed the whole sum from the stakeholder, and threatened him with an action if he paid it over to B., which he nevertheless did, by the direction of the umpire:—Held, that A. was entitled to recover from him his own stakes, as money had and received to his use, on the ground of its being an illegal wager. It would be otherwise if no notice was given. *Hastelow* v. *Jackson*, 8 B. & C. 221; 2 M. & Ry. 209; 6 L. J. (O.S.) K. B. 318.

The plaintiff deposited with the defendant 200*l.* to abide the event of a match between a horse of the plaintiff and another horse belonging to G.; but before the day fixed for the race, he gave notice to the defendant that he revoked the authority to pay over the money, and demanded the return of it:—Held, that the plaintiff was entitled to recover such deposit. The contract under which the money was deposited was one by way of wagering, and therefore null and void under 8 & 9 Vict. c. 109, s. 18. *Diggle* v. *Higgs* (2 Ex. D. 422) approved. *Trimble* v. *Hill*, 49 L. J., P. C. 49; 5 App. Cas. 342; 42 L. T. 103; 28 W. R. 479.

D. and S. agreed to walk a match for 200*l.* a side, and each deposited 200*l.* with the defendant to be paid to the winner. S. won the match. D. after the determination of the match, but before the money was paid over to S., demanded the sum deposited by him from the defendant:—Held, that he was entitled to recover his share of the deposit from the defendant. *Diggle* v. *Higgs*, 46 L. J., Ex. 721; 2 Ex. D. 422; 37 L. T. 27; 25 W. R. 777—C. A.

When the loser of an illegal wager repudiates it and demands his deposit back at any time before the stakes have been paid over by the stakeholder, the authority of the latter is determined; and the loser may recover his own stake as money had and received by the stakeholder to his use. *Hampden* v. *Walsh*, 45 L. J., Q. B. 238; 1 Q. B. D. 189; 33 L. T. 852; 24 W. R. 607.

H. and B. deposited 50*l.* each with N., and entered into a written agreement that the 100*l.* should be paid to H. if his horse trotted eighteen miles in an hour, and if not, then to B. The referee decided that the horse did trot the distance within the hour. B. demanded his 50*l.* back from N. before the money had been paid over to H.:—Held, that B. was entitled to recover his stake back from N., for that the transaction was simply a wager, and did not come within the proviso in 8 & 9 Vict. c. 109, s. 18, as to contributions to a prize or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise. *Batson* v. *Newman*, 1 C. P. D. 573; 25 W. R. 85—C. A.

Death of Stakeholder—Liability of Estate.]—The amount of a bet lost at a horse-race was paid by the loser into the hands of a third party, upon the faith of the promise of the latter to pay it to the winner. The person who received the money died before he had paid it to the winner. A claim filed in equity by the winner to be paid the amount out of the assets of the deceased was disallowed. *Beyer* v. *Adams*, 26 L. J., Ch. 841; 3 Jur. (N.S.) 709; 5 W. R. 795.

—— **Payment by Administratrix.**]—Moneys which had been deposited with a testator to abide the result of bets between himself and the depositors, were, after his death, returned to the depositors by his administratrix, who, at the same time, paid the amount of such of the bets as were not pending at his death, but had been decided against him in his lifetime:—Held, that in respect of the deposits so returned upon bets not decided in his lifetime, the administratrix was entitled to credit in her accounts against the general estate; but not so in respect of the sums paid for bets decided before his death, and for the deposits upon such bets. *Manning* v. *Purcell*, 7 De G. M. & G. 55; 3 Eq. R. 387; 24 L. J., Ch. 522; 3 W. R. 273.

Before 8 & 9 Vict. c. 109, s. 18.]—Money deposited upon an illegal wager, laid on a future event, might be recovered before the event happened. *Aubert* v. *Walsh*, 3 Taunt. 277; 12 R. R. 651.

So money deposited on an illegal wager might be recovered back from the winner after the wager had been lost. *Lacaussade* v. *White*, 7 Term Rep. 535; 2 Esp. 629.

—— **Payment made with Loser's Consent.**]—But where the money deposited on an illegal wager had been paid over to the winner by the consent of the loser, the latter could not afterwards maintain an action against the former to recover back his deposit. *Howson* v. *Hancock*, 8 Term Rep. 575.

—— **Before Payment over.**]—If a wager was deposited with a stakeholder on the event of a battle to be fought by the parties laying the wager, and it was not paid over, though the battle was fought, either party might recover from the stakeholder the sum deposited by him. *Cotton* v. *Thurland*, 5 Term Rep. 405.

A person who deposited in the hands of a stakeholder a sum as a wager, on the event of a boxing-match between himself and another, might, after committing a breach of the peace by fighting, recover back his deposit from the stakeholder, having demanded it before it was paid over. *Smith* v. *Bickmore*, 4 Taunt. 474.

8. Avoidance of Securities.

a. Generally.

Effect of 5 & 6 Will. 4, c. 41, s. 1.]—The statute has a prospective operation. *Hitchcock* v. *Way*, 6 A. & E. 943; 2 N. & P. 72; W. W. & D. 491; 6 L. J., K. B. 215.

Semble, that the construction put by some of the old authorities on 9 Anne, c. 14, s. 1—namely, that it only avoided the security given for a

gaming debt, and not the contract to pay the debt itself—was erroneous; but, at all events, such construction cannot be held good since 5 & 6 Will. 4, c. 41. *Applegarth* v. *Colley*, 10 M. & W. 723; 12 L. J., Ex. 34; 7 Jur. 18.

Judgment obtained Adversely.]—In an action against the marshal, for an escape of a prisoner in custody under an execution on a judgment obtained adversely against him, it was no defence that the judgment was to recover the amount of a bill of exchange given for money lost at play, the 16 Car. 2, c. 7, and 9 Anne, c. 14, not including judgments obtained adversely, but those only given to secure money lost at play. *Chapman* v. *Lane*, 1 G. & D. 523; 11 A. & E. 980; 10 L. J., Ex. 543—Ex. Ch.

Recovery of Deposit—Deposit with Party to Wager—Decision of Wager and Appropriation of Deposit before Repudiation.]—Section 18 of the Gaming Act, 1845, which provides that "no suit shall be brought or maintained for recovering any sum of money or valuable thing which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," applies to deposits in the hands of one of the parties to the wager as well as deposits in the hands of third persons. The plaintiff, having entered into gambling transactions with the defendants in respect of differences upon pretended purchases and sales of stocks and shares, deposited with the defendants 3,000*l.* in cash as security for any losses which should appear on the accounts between them to have been sustained by him. The 3,000*l.* were from time to time appropriated by the defendants in payment of the plaintiff's losses. The deposit having been exhausted, the plaintiff closed his account with the defendants and commenced an action to recover the 3,000*l.*:—Held, that the events having happened, to abide which the 3,000*l.* had been deposited, and the money having been appropriated by the defendants before there was any repudiation of the transactions by the plaintiff, he was precluded by s. 18 of the Gaming Act, 1845, from maintaining the action. *Manning* v. *Purcell* (7 De G. M. & G. 55; 24 L. J., Ch. 522) followed. *Strachan* v. *Universal Stock Exchange* (64 L. J., Q. B. 723, affirmed next case) distinguished. *Strachan* v. *Universal Stock Exchange* (No. 2), 65 L. J., Q. B. 178; [1895] 2 Q. B. 697; 73 L. T. 492; 44 W. R. 90; 59 J. P. 789—C. A.

—— **Securities deposited as "Cover" for Transactions in Stocks and Shares.**]—Transactions between stockjobbers and their customers entered into under written terms that none but real purchases of stocks and shares were intended, but in which in fact there was no intention to purchase, but only to speculate in differences, are gaming transactions, and therefore void under the Gaming Act, 1845, s. 18. But securities deposited by the customer as "cover" for any balance which might be found to be due from him to the stockjobbers are not "deposited to abide the event on which any wager should have been made" within the meaning of that section, and the customer is not precluded from maintaining an action for their recovery. *Universal Stock Exchange* v. *Strachan* (No. 1), 65 L. J., Q. B. 428; [1896] A. C. 166; 74 L. T. 468; 44 W. R. 497; 60 J. P. 468—H. L. (E.)

Penalty — Discovery.] — The forfeiture of securities under the stat. 9 Anne, c. 14, s. 1, for moneys lent at play is not a penalty of such a nature as to protect a party from discovering whether the consideration of the security on which he brings his action was not moneys lent at play. *Sloman* v. *Kelly*, 4 Y. & Coll. 169.

I O U.]—Quære, whether an I O U is security within the stat. 9 Anne, c. 14. *Wilkinson* v. *L'Eangier*, 2 Y. & Coll. 363.

Relief when granted by Court.]—The court will grant an injunction to prevent the negotiating a note obtained at play, upon affidavit, before service of subpœna. —— v. *Blackwood*, 3 Anstr. 351.

Bills of exchange made in France on French stamps, and substituted in France for English bills of exchange which were originally given for a gambling debt, ordered to be delivered up. *Wynne* v. *Callander*, 1 Russ. 293.

Injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt, under the circumstances, continued. Jurisdiction of the Court of Chancery to stay the proceedings in foreign courts. *Portarlington* (*Lord*) v. *Soulby*, 3 Myl. & K. 104.

A bond executed for a sum of money lost at billiards is void. *Kenny* v. *Browne*, 3 Ridgw. P. C. 514.

Bond for money won at play, and a part of it paid. The court ordered the money to be repaid, and relieved against the bond for the remainder. *Rawden* v. *Shadwell*, Ambl. 269.

One apprentice gives a bond to another apprentice for 50*l.* won at play. Bond decreed to be delivered up, gaming among apprentices being of the worst consequence. *Woodroffe* v. *Farnham*, 2 Vern. 291.

The court ordered securities given by the plaintiff to prevent a prosecution for cheating at cards to be delivered up. *Osbaldiston* v. *Simpson*, 13 Sim. 513; 7 Jur. 734.

A., having engaged to run a foot race for 1,000*l.*, prevails on B. and C. to advance the money required for making good the stakes; and it is agreed by the three that bets shall be made by B. and C. on A., and that the winnings and losses shall be borne by all three. A. loses the race, and B. and C. pay on account of themselves and A. the bets lost. A. executes to B. and C. a mortgage for the amount of his share of the money so paid by them, and subsequently sells the estate to them, for a consideration of which the money so due to them forms part. Bill by the son of A., praying a declaration that he was entitled under the stat. 9 Anne, c. 14, to the estate, or at least to the mortgage, and relief founded on that declaration. A demurrer for want of equity was overruled. *Parker* v. *Alcock*, Younge, 361.

The court will not assist a plaintiff seeking to have a contract set aside on the ground of fraud, if the contract be in its nature one of gambling or wagering. Where a person having only thirty shares in a company, in the course of a fortnight entered into contracts for the sale of between seven hundred and eight hundred shares, to be delivered on a future day, and was unable to deliver them in consequence of the shares of the company being under the control of the persons to whom he had agreed to sell, the court refused to assist him on an interlocutory application,

though the fraud was not denied by the defendants. *Rees* v. *Fernie*, 4 N. R. 539.

In the year 1827 a bond to secure the payment of a sum of money was given to S. by L.; M. joined in the bond as surety. In 1829 L. died. In 1832 S. brought an action in Ireland against M. upon the bond, and M. then filed a bill in Ireland for an injunction to restrain the action, on the ground that the bond was granted on a gambling transaction. An injunction was granted; and subsequently a decree nisi for taking the bill pro confesso was made against S., and the order was served upon him two days before his death, which happened in 1833. In 1837 S.'s personal representatives brought an action upon the bond against M., in England. M. then filed a bill for an injunction. S.'s representatives, in their answer, stated that they were entirely ignorant as to the nature of the consideration for the bond, and that they had found among S.'s papers certain memorandum books relating to bets upon horse-races, which books they had destroyed as useless, but they denied that the books showed the consideration for the bond. Upon this answer the vice-chancellor granted an injunction, which was continued, upon appeal, without obliging the plaintiff to bring the money into court. *Milltown (Earl)* v. *Stewart*, 8 Sim. 371; 3 Myl. & C. 18; 6 L. J., Ch. 298.

b. Bills of Exchange.

Renewals.]—To a declaration by drawer against acceptor of two bills of exchange for 50*l.* each, he pleaded that he accepted the bills at the request of a third person, to whom he had lost 100*l.* by gaming, and in consideration of the sum so lost; that there was no other consideration, and that the plaintiff, when the bills were drawn and accepted, had notice of the gaming consideration. It appeared on the trial that the defendant at first accepted, in consideration of the gaming transaction, a bill drawn by the plaintiff for 100*l.*, which was dishonoured, and the plaintiff then gave him time, and took the acceptances declared upon by way of renewal; and that the plaintiff at that time knew of the gaming transaction:—Held, first, no material variance, the evidence showing sufficiently that the acceptances declared upon were given for the original gaming transaction. *Hay* v. *Ayling*, 20 L. J., Q. B. 171; 16 Q. B. 423; 15 Jur. 605.

Held, secondly, not material that the latter acceptances were given partly on a new consideration, namely, the extension of time for payment. *Ib.*

The validity of the plea was not affected by 8 & 9 Vict. c. 109, s. 18, which makes the contract, but not a security, void; for under 5 & 6 Will. 4, c. 41, s. 1, the consideration for the security is illegal, and the plaintiff was not a bonâ fide holder. *Ib.*

Special Plea—Evidence.]—To an action by indorsee against acceptor of a bill, he pleaded, that, before the accepting of the bill, he, at one sitting and meeting, and on credit, lost to C., who won of the defendant, a sum exceeding 100*l.* by gaming and playing at vingt-un; that afterwards, and before the accepting, the defendant, at one sitting and meeting, and on credit, lost to C., who won of the defendant, a sum exceeding 100*l.*, by gaming and playing at the game of hazard; and the sums, making together 2,654*l.*, having been won and lost, and remaining unpaid, it was agreed between C. and the defendant, that 500*l.*, parcel thereof, should be secured to C. by his acceptance. At the trial it was proved that there were five bills for 500*l.* each, that C. and the defendant had played together at vingt-un and hazard, and that C. had won of the defendant more than the amount of the five bills; but there was no evidence of any loss at vingt-un. It did not appear that there had been more than two meetings at which the defendant lost:—Held, first, that there was evidence to warrant the finding of the jury that more than 100*l.* had been lost at one sitting. *Cooke* v. *Stratford* or *Stafford*, 13 M. & W. 379; 2 D. & L. 399; 14 L. J., Ex. 66.

Held, secondly, that, as there was no evidence of any loss at vingt-un, the plea was not proved as framed. *Ib.*

Accepted by Third Party.]—A. and B. jointly made bets with third persons on a horse-race, B. received the money, and gave A. a bill accepted by C. (who was no party to the betting) for his share:—Held, that A. was not precluded by 8 & 9 Vict. c. 109, s. 18, from suing C. upon the bill. *Johnson* v. *Lansley*, 12 C. B. 469.

Payment by Agent.]—It is no defence to an action against the acceptor of a bill of exchange, that the bill was given for bets on horse-races, made by the drawer as the acceptor's agent, but paid by him without the acceptor's request. *Oulds* v. *Harrison*, 10 Ex. 572; 3 C. L. R. 353; 24 L. J., Ex. 66; 3 W. R. 160.

See also BILLS OF EXCHANGE.

c. Cheques.

Illegality of Consideration.]—To a declaration upon a cheque, a plea that the plaintiff and the defendant gamed together, by playing at billiards, and that the cheque was made to secure a sum of money won by the plaintiff from the defendant by such gaming is a good defence under 5 & 6 Will. 4, c. 41, s. 1. *Parsons* v. *Alexander*, 5 El. & Bl. 263; 24 L. J., Q. B. 277; 1 Jur. (N.S.) 660; 3 W. R. 510.

A cheque given in payment for counters obtained from the secretary of a club to enable the purchaser to gamble at cards cannot be sued upon by the secretary. *St. Croix* v. *Morris*, 1 Cab. & E. 485.

Payment by Bankers.]—The plaintiff, in payment of bets on horse-races, gave the defendant three cheques on the plaintiff's bankers payable to bearer on demand, which were indorsed by the defendant to third persons, to whom they were paid by the plaintiff's bankers; in an action to recover back the sums so paid, the defendant sought to set off the amount of a cheque drawn by M., payable to bearer on demand, which was given by the defendant to the plaintiff in payment of a bet and was cashed by him:—Held, first, that the word "bill" in 5 & 6 Will. 4, c. 41, ss. 1, 2, includes a cheque; that the payment of the cheques by the plaintiff's bankers, being a payment by his direction, on his account, and in discharge of his liability, was a payment by the drawer of the cheque to the indorsee thereof within s. 2, and that, therefore, the plaintiff was

entitled to recover. *Lynn* v. *Bell*, Ir. R. 10 C. L. 487.

Held, secondly, that the plea of set-off could not be sustained, inasmuch as M., and not the defendant himself, paid the amount. *Ib.*

d. Promissory Notes.

Not within the Statute.]—A promissory note, given to secure money advanced for payment of racing bets, is not to be deemed to have been given for an illegal consideration within 5 & 6 Will. 4, c. 41, s. 1. *Pyke, Ex parte, Lister, In re*, 47 L. J., Bk. 100 ; 8 Ch. D. 754 ; 38 L. T. 923 ; 26 W. R. 806—C. A.

In the Hands of Third Persons.]—Action on a promissory note, by indorsee against maker. Plea, that he made the note, and delivered it to the indorser in payment of a bet on the amount of hop duty ; and that the plaintiff took it when overdue, and without value. On the trial, it was proved that the note was made and given for the bet to the indorser, but that it was not overdue when indorsed to the plaintiff. The judge reserved leave to enter a verdict for the plaintiff, if, on the evidence, the note was overdue. He left it to the jury to say whether there was value for the indorsement, telling them that the burden lay on the defendant to prove that there was none :—Held, that there was no misdirection ; for that, though proof that a negotiable instrument was affected with fraud or illegality in the hands of a previous holder raises a presumption that he would indorse it away to an agent without value, and consequently calls on the plaintiff for proof that he gave value, the presumption does not arise when the previous holder merely held without consideration ; and that a bet, though void, and therefore no consideration, was not illegal so as to raise a presumption that the indorsement was without value. *Fitch* v. *Jones*, 5 El. & Bl. 238 ; 24 L. J., Q. B. 293 ; 1 Jur. (N.S.) 854 ; 3 W. R. 507.

The plaintiff brought an action to recover the amount due on two promissory notes given by the defendant to B. in respect of gambling transactions, on the Stock Exchange, and indorsed over by B. to the plaintiff for valuable consideration :—Held, that the plaintiff's right to recover was not affected by the fact that he had notice of the notes having been given by the defendant to B. in respect of gambling transactions, the consideration for the notes not being illegal, but falling only within the category of void contracts under 8 & 9 Vict. c. 109. *Lilley* v. *Rankin*, 56 L. J., Q. B. 248 ; 55 L. T. 814.

When Substituted for a Bill.]—To an action on a note for 100*l.* made by the defendant on the 12th September, 1833, payable six months after date to the order of K., and by K. indorsed to the plaintiff, the defendant pleaded that on the 23rd July 1833, he lost money at play to A., and that the note was given to secure the money so lost. The evidence was that in July, 1833, the defendant gave A. a bill of exchange for 87*l.* payable six months after date, for money won by him from the latter at hazard, which bill the defendant indorsed to K., and that in December, 1833, the note declared upon was substituted for the bill :—Held, that the evidence did not support the plea. *Boulton* v. *Coghlan*, 1 Scott, 588 ; 1 Bing. (N.C.) 640; 1 Hodges, 145; 4 L. J., C. P. 172.

e. Bonds.

Payment of Betting Debts.]—A person owed considerable sums lost in betting on horse-races. In order that he might be allowed to fulfil racing engagements, a sum of money was paid, and a bond given to trustees to distribute among his creditors on such debts. The amount of the cash and bond together was less than half the amount of the debts :—Held, that the bond was valid. *Bubb* v. *Yelverton*, 39 L. J., Ch. 428 ; L. R. 9 Eq. 471 ; 22 L. T. 258 ; 18 W. R. 512.

After Assignment.]—A bond was assigned for valuable consideration without notice of objection to its validity, and the obligor having applied to the assignee for a further advance, offering to give a mortgage for the whole, but stating no objection to the validity of the bond, was not allowed to endeavour to avoid the bond, by evidence that it was given to secure money lost by a bet on a horse-race. *Hawker* v. *Hallewell*, 3 Sm. & G. 194 ; 2 Jur. (N.S.) 537 ; 4 W. R. 584. Affirmed, 25 L. J., Ch. 558 ; 2 Jur. (N.S.) 794 ; 4 W. R. 631—L.JJ.

Bonds are within the equity of 5 & 6 Will. 4, c. 41, which makes securities valid in the hands of bonâ fide holders, without notice that the consideration was a gaming debt. *Ib.*

A bond executed for a sum of money lost at billiards is void ; but where such bond was assigned with the privity of the obligor, and upon his assurance that it was valid, and where he paid part of the money, and prevailed on the assignee to enter satisfaction upon the judgment obtained on the bond, and accept a new security for the remainder of the debt, equity will not relieve him. *Kenney* v. *Browne*, 3 Ridgw. P. C. 514.

Bonâ fide Loan—Intention to Pay Bets.]—Where a deed, containing covenants for the payment of 2,000*l.*, with interest, purporting to be a security for the repayment of a loan to that amount, is declared on, and the plea is that the deed is a mortgage deed within 9 Anne, c. 14, and 5 & 6 Will. 4, c. 41, as part of the consideration for it was money won in betting ; on that issue there is nothing objectionable in the judge directing the jury, that if they believed that there was no agreement between the parties that a betting debt due from the defendant to the plaintiff should be repaid out of the loan, but that the plaintiff advanced the 2,000*l.* absolutely as a loan to the defendant, as the lawful owner, to dispose of it as he pleased, and the defendant gave the deed to secure that loan, then the deed was valid, though the plaintiff expected to be paid out of the loan. *Fox* v. *Hill*, 4 H. & N. 359 ; 5 Jur. (N.S.) 964 ; 7 W. R. 263—Ex. Ch. *S. C.*, at Nisi Prius, 1 F. & F. 136.

C. RACES.

1. Rights and Liabilities on Contracts.

Waiver of Conditions.]—If a race is advertised to take place under certain conditions, the stakeholder cannot waive any of the conditions without the consent of the whole of the subscribers. *Weller* v. *Deakins*, 2 Car. & P. 618.

Entrance Money.]—Where, by the terms of a horse-race, the entrance money is to be given to the second best horse, and it is doubtful, on the

construction of those terms, whether all the money paid at the entering each horse is to be considered as entrance money, the court will put such a construction on the words as will include the whole in the description of entrance money to be given to the second best horse, being most agreeable to 13 Geo. 2, c. 19, ss. 2 and 7. *Dowson* v. *Scriven*, 1 H. Bl. 218.

Keeping of Appointment.]—The plaintiff and defendant made an agreement in writing to run a match with greyhounds "on the Wednesday during the Newmarket February meeting, 1841." The Newmarket meetings were meetings of a coursing club; the power of appointing and adjourning meetings was vested in the stewards, who were governed by printed rules; and the practice of the club was to hold the February meeting on the first Tuesday in that month, weather permitting, but if the weather prevented its being then held, to adjourn it to a future day, weather permitting. At the time when the contract was made, the day appointed for the February meeting was Tuesday, the 2nd February, 1841. On Wednesday, the 3rd, the plaintiff and the defendant were there, but frost prevented the meeting from being then held, and it was adjourned to Tuesday, the 9th, and again, from the same cause, to Tuesday, the 16th when it was held. On Wednesday, the 17th, the plaintiff was ready with his dog to run the match, but the defendant made default:—Held, that, the true construction of the contract was, that the match should be run on the Wednesday during the February meeting, whenever it should be actually held, and therefore that the plaintiff performed his part of the contract by being ready to run on Wednesday, the 17th. *Daintree* v. *Hutchinson*, 10 M. & W. 85; 11 L. J., Ex. 397; 6 Jur. 39.

"Regularly Hunted."]—If, to qualify a horse to start for a certain stake, it should have been regularly hunted with the hounds of A., it is not necessary that the horse should have been hunted every day the hounds went out, but once hunting with those hounds is not sufficient. *Weller* v. *Deakins*, 2 Car. & P. 618.

"Across a Country"—Written Contract—Parol Evidence.]—In an action on the following memorandum, signed by the parties: "Evans and Pratt: T. H., umpire. F. Pratt bets T. Evans, 100*l.* to 25*l.* p. p. Mr. Riley's brown mare (late his property) beats T. Evans' mare, Matilda, four miles across a country, 13*s.* each. To come off the 1st March, 1841. The umpire's decision to be final":—Held, that evidence was admissible to show that, in sporting phraseology, across a country meant over all obstructions, and prohibited the rider from availing himself of an open gate. *Evans* v. *Pratt*, 4 Scott (N.R.) 378; 1 D. (N.S.) 505; 3 Man. & G. 759; 11 L. J., C. P. 87; 6 Jur. 152. See also *Daintree* v. *Hutchinson*, 10 M. & W. 85; 11 L. J., Ex. 397; 6 Jur. 39.

—— **Decision of Umpire.**]—Held, that it was not competent to either party to dispute the decision of the umpire whom they had constituted judge of the law and fact. *Ib.*

"Unprofessional Riders."]—A race was run, subject to conditions, one of which was, that the riders should be gentlemen, farmers, or tradesmen, being persons never having ridden as regular jockeys or paid riders; another, that the decision of the committee on any dispute that might arise should be final. At the trial, it appeared that the rider of the plaintiff's horse, which first came to the winning post, had been in the habit of riding at the races, sometimes receiving his expenses, but never having been paid for his services; and that the plaintiff's right to the stakes was disputed on the ground of an alleged cross, on the subject of which the committee had heard evidence, and intimated an opinion adverse to the plaintiff, but had come to no final decision:—Held, that the rider of the plaintiff's horse was not disqualified, nor the plaintiff, under the circumstances, disentitled to maintain the action. *Walmsley* v. *Matthews*, 3 Scott (N.R.) 584; 3 Man. & G. 133; 5 Jur. 508.

—— **Decision of Steward.**]—The plaintiff entered his horse for a steeplechase, one of the conditions being, that no groom or professional jockey would be allowed to ride; and another, that all disputes should be decided by the steward, whose decision should be final. The plaintiff intended his horse to be ridden by W., but, before the day of the race, was informed by the steward that he considered W. a professional jockey, and that the horse, if ridden by him, would be no horse in the race. The plaintiff insisted that W. was qualified, and on the race-day, notwithstanding a similar intimation from the steward to the plaintiff, W. rode the horse, which came in first. On the following day, the steward pronounced the second horse to be the winner, and by his directions the stakes were paid to the owner of that horse:—Held, that the steward had decided the question within the meaning of the condition; that his decision was final, although it was not made after hearing both parties; and that the plaintiff could not recover the stakes from the stakeholder. *Benbow* v. *Jones*, 14 M. & W. 193; 14 L. J., Ex. 257.

Stewards Unable to Decide.]—The defendant was stakeholder of a race, which was to be decided by the award of four stewards. After the race was over, the stewards met, but were unable to agree, two being in favour of the plaintiff's horse, and two in favour of another horse. In an action by the plaintiff to recover the stakes:—Held, that it was a condition precedent that there should be a decision of the stewards, if practicable, and that the plaintiff could not submit the question to the jury, or recover back his amount of contribution. *Brown* v. *Overbury*, 11 Ex. 715; 25 L. J., Ex. 169; 4 W. R. 252.

Race not Run according to Conditions.]—The plaintiff and H. agreed, in writing, to run a match between two horses on a specified day, with a specified person as judge, and a specified person as starter. They had each deposited a stake in the defendant's hands, the whole to be paid to the winner, and the agreement made "the money to be given up by the decision of the judge." On the day fixed the plaintiff and H. were present, but the starter failed to appear. H. refused, on that ground, to run the race. The judge held that the objection was not material. The plaintiff's horse was trotted over the course, and the judge declared the plaintiff the winner. He, after the day fixed for the race, demanded the stakes from the defendant, who refused to hand them over. In an action by the plaintiff to recover from the defendant the stakes:—Held, that, as the race was never run according to the conditions agreed upon, it must be taken not to

have been run at all; that therefore the judge's jurisdiction never arose, and his decision was invalid; and that the plaintiff was not entitled to recover the whole of the stakes, but that, as the race had not and could not be run upon the specified terms, the plaintiff and H. were each entitled to recover back his own stake from the defendant as money had and received. *Carr* v. *Martinson*, 1 El. & El. 456; 28 L. J., Q. B. 126; 5 Jur. (N.S.) 788; 7 W. R. 293.

Held, also, that even if demand of that amount was necessary before action (per Lord Campbell, C.J., and Crompton, J., it was not), the demand of the larger sum was a demand of the less. *Ib.*

Effect of Club Rules.]—In an action for the recovery of the amount of the stake deposited by one of the parties to a horse-race, to abide the event of the race, the jury found for the plaintiff on the ground that the race, though run under the auspices of the Australian Jockey Club, was not run under the Jockey Club rules as provided by the agreement; the court below granted a new trial on the ground that the race was properly run under the agreement:—Held, on the construction of the agreement and the rules of the Jockey Club which it referred to, that the finding of the jury was wrong, and that a new trial was properly granted. *Dines* v. *Wolfe*, 5 Moore, P. C. (N.S.) 382; L. R. 2 P. C. 280; 20 L. T. 251.

Trotting Match—Mode of Trotting.]—On a wager that A. will trot two horses sixteen miles in two successive hours, he may trot them in any manner he thinks proper. *Robson* v. *Hall*, Peake, 127.

Boat Race—Referee's Decision—Fair Start.]—K. and S., two watermen, agreed to row a right-away sculler's race upon the Thames; the start to take place at 2.30 p.m.; the rowing to be according to the recognised rules of boat-racing, and a referee to be chosen, whose decision should be final. In watermen's races it is the practice for the men to start themselves. A referee was appointed, and the race commenced, but a foul having taken place, the men were ordered by the referee to row over again. On the following day they came to the starting-place. After several fruitless attempts to start, K. rowed up to the referee's steamboat, which had drifted out of sight of the men, and complained that S. would not start. The referee looked for S., but not seeing him, told K. to inform S. that he must start, and that if he would not to row over without him. K. then rowed off, and the referee afterwards saw him row over the course, but did not hear him speak to S. The referee thereupon decided that K. was entitled to the stakes; and it was found by the jury in an action against the stakeholder, that the referee's order was not communicated to S. and that a fair opportunity of starting was not given to him:—Held, that, under the agreement, it was necessary to empower the referee to award the stakes, that there should be a race or a start, and that it was essential to a start that the referee's directions should be conveyed to S. That, in the absence of any such communication, there could have been no fair start, so that the referee's decision was without jurisdiction and void. *Sadler* v. *Smith*, 10 B. & S. 17; 39 L. J., Q. B. 17; L. R. 5 Q. B. 40; 21 L. T. 502; 18 W. R. 148—Ex. Ch.

If the referee had decided, though upon insufficient evidence, that the communication was duly made to S., his decision as to the person entitled to the stakes would have been final, but he appeared to have neglected to decide, whether what he had imposed as a condition of the start had been fulfilled. *Ib.*

Recovery of Subscription.]—A. entered his horse for a race, and paid the subscription money. The horse won; but it turned out that, by the rules of the race, he was not entitled to run. Notice of the objection had been given to A. before the race:—Held, that he was not entitled to recover his subscription money. *Goldsmith* v. *Martin*, 4 Man. & G. 5; 4 Scott (N.R.) 620; 11 L. J., C. P. 201.

Action for Unpaid Stakes.]—The clerk of the course at a race cannot bring actions for unpaid stakes. *Charlton* v. *Hill*, 5 Car. & P. 147.

2. Jurisdiction and Liability of Stewards.

Validity of Decision.]—Stewards of horse-races are not in the strict legal position of judges or arbitrators, and where there are more than one, it is not necessary to make their decision valid that it should have been arrived at jointly. It need only be fair and final. *Parr* v. *Winteringham*, 1 El. & El. 394; 28 L. J., Q. B. 123; 5 Jur. (N.S.) 787; 7 W. R. 288.

—— Made by a Majority.]—Three stewards of a horse-race, as to which their decision was to be final, met and discussed an objection raised to the winner by a competitor. No actual decision was then arrived at, and no other meeting of the three was held. Afterwards, two of the three stewards made known their decision, and the third, upon hearing it, made known his dissent from it:—Held, that the decision of the two was valid. *Ib.*

Right to Reopen Question.]—The plaintiff's horse ran in a race, subject to the following conditions: that he had been fairly hunted with certain hounds during the season; that he had been a certain time in possession of his owner; and the stewards were to disqualify any horse that they did not consider to have been hunted in a genuine and bonâ fide manner, and their decision in all cases of dispute was to be final. The horse came in first, and his owner claimed the stakes. On an objection that the horse had not been fairly hunted, the stewards at once went into the question, and held that he had, leaving the question whether the plaintiff was the owner within the conditions, for future decision. They subsequently decided that he was such owner, but at the same time disqualified the horse as not having been fairly hunted, because he had not been ridden by his owner. In an action for the stakes:—Held, that the first decision was inchoate only, and that the stewards could reopen the question, and that the ultimate decision, disqualifying the horse, was by the conditions final. *Smith* v. *Littledale*, 15 W. R. 69.

Finality of Decision.]—At a steeplechase, weight for age—run under certain rules, one of which made the decision of the stewards final, and another required that upon entering a horse his age should be stated—the defendant's horse

was entered as "aged;" he came in first, but was objected to as being a "six-year-old" and not an "aged" horse; the stewards decided that, though, as a matter of fact, the horse was a "six-year-old," and not "aged," the misstatement in the entry was immaterial, inasmuch as the weight imposed on a "six-year-old" and on an "aged" horse was the same:—Held, that the stewards had not exceeded their jurisdiction; that, there being no question as to the bona fides of their judgment, their decision on the construction of the rules, as well as on the matters of fact, was final and conclusive between the parties; and, accordingly, that the defendant's horse was entitled to the stakes. *Newcomen* v. *Lynch*, Ir. R. 10 C. L. 248—Ex. Ch. S. P., *Benbow* v. *Jones*, 14 M. & W. 193; 14 L. J., Ex. 257.

When Jurisdiction Arises.]—Although the judge of a horse-race has power to decide finally who is entitled to the stakes as winner, such power does not accrue to him until the race has been run. *Carr* v. *Martinson*, 1 El. & El. 456; 28 L. J., Q. B. 126; 5 Jur. (N.S.) 788; 7 W. R. 293.

One Steward interested in Result.]—One of the conditions of a race was, that all disputes should be settled by the stewards, whose decisions should be final. There were four stewards, and a dispute having arisen as to whether the plaintiff's horse or the defendant's mare was the winner, three of the stewards voted in favour of the plaintiff's horse. One of the three had betted against the defendant's mare:—Held, that the steward was not disqualified from acting by reason of his pecuniary interest in the event of the race; and even assuming that he was, that did not annul the decision of the other stewards. *Ellis* v. *Hopper*, 3 H. & N. 766; 28 L. J., Ex. 1; 4 Jur. (N.S.) 1025; 7 W. R. 15.

Liability — Negligence.]—A person gratuitously undertaking the duties of steward of a horse-race is not liable for negligent nonfeasance in not appointing a judge, unless it appears that he commenced to perform the duties of the office. *Balfe* v. *West*, 13 C. B. 466; 22 L. J., C. P. 175; 1 W. R. 335.

—— Turning Ticket-holder out of Inclosure.]—In 1843, Lord Eglinton being steward of the Doncaster races, tickets were sold in Doncaster at a guinea each, which were understood to entitle the holders to admission into the Grand Stand and its inclosure, and to remain there during the races. They were issued with Lord Eglinton's privity, but they were not sealed or signed by him:—Held, that it was lawful for Lord Eglinton, without returning the guinea, or assigning any reason for what he did, to order any holder of a ticket to quit the stand and inclosure, and, after reasonable time, to force him to leave, though such holder had not misconducted himself, and, but for the order to quit, would have been justified, by the purchase of the ticket, in remaining there. *Wood* v. *Ledbitter*, 13 M. & W. 838; 14 L. J., Ex. 161; 9 Jur. 187.

3. Use of Land for.

Custom.]—A custom for the freemen or citizens of Carlisle to enter on Ascension-day upon certain land in an extra-parochial hamlet, near to the city of Carlisle, for the purpose of horse racing, is a good custom. *Mounsey* v. *Ismay*, 1 H. & C. 729; 32 L. J., Ex. 94; 9 Jur. (N.S.) 306; 7 L. T. 717: 11 W. R. 270.

But such a claim is not a claim to an easement within 2 & 3 Will. 4, c. 71, s. 2. *Mounsey* v. *Ismay*, 3 H. & C. 486; 34 L. J., Ex. 52; 11 Jur. (N.S.) 141; 12 L. T. 27; 13 W. R. 521.

Rights of Way.]—To a declaration for breaking and entering into land of the plaintiff, the defendant pleaded that there was a public highway over and along the land for all persons to go and return at such times of the year as horse-races were holden on the land at their free will and pleasure for the purpose of witnessing the races, and that the trespasses were a use by the defendant of the highway for these purposes. Other pleas alleged a common right for all persons to go and remain for a reasonable time for the purpose of witnessing the horse-races:—Held, that the pleas were bad. *Coventry (Earl)* v. *Willes*, 9 L. T. 384; 12 W. R. 127.

4. Racecourse.

Ratability.] — In ascertaining the ratable value of land used as a racecourse, the assessment committee may call for the books of the racecourse proprietors, or give affirmative evidence of the amounts of the profits made, the profits being a material element, though not a test, in determining the ratable value. *Reg.* v. *Verrall*, 45 L. J., M. C. 29; 1 Q. B. D. 9; 33 L. T. 379; 24 W. R. 139.

D. Gambling in Funds, Stocks, or Shares.

Intention to Purchase and Deliver.]—The question of time bargains is, whether at the time of making the contract there was a bonâ fide intention to purchase or deliver shares. If there was such an intention the contract is good; if there was not such an intention, the contract is an agreement by way of gaming or wagering within 8 & 9 Vict. c. 109, s. 18, and by that section is null and void. *Barry* v. *Croskey*, 2 Johns. & H. 1.

The plaintiff, a stockbroker at B., was employed by the defendant to purchase on his behalf shares in railway companies, with a view to sell them before the settling day on the Stock Exchange. The plaintiff employed K., a stockbroker in London, to buy the shares, and he having purchased them by the orders of the defendant through the plaintiff, sold them before the settling day. By the custom of the Stock Exchange, K. was responsible as the purchaser; he did not, however, pay money on the purchase and transfer of the shares, but was debited by the selling brokers with the amount, he having opened accounts with them, and on the settling day the accounts were closed, and the balance ascertained:—Held, that as shares were really bought and sold, the transaction was not by way of gaming and wagering, and that the plaintiff was entitled to recover his commission, and the amount of losses on the sale of the shares. *Ashton* v. *Dakin*, 7 W. R. 384.

Time bargains in stock, though they may be gaming or wagering within the 8 & 9 Vict. c. 109, relating to games and wagers, were not so within the 12 & 13 Vict. c. 106, s. 201 (Bankrupt Act of 1845). *Ryder*, *Ex parte*, 1 De G. & J. 317; 26 L. J., Bk. 69; 3 Jur. (N.S.) 1159.

Speculation in Differences.]—Transactions between stockjobbers and their customer entered into under written terms that none but real purchases of stocks and shares were intended, but in which in fact there was no intention to purchase, but only to speculate in differences, are gaming transactions, and therefore void under the Gaming Act, 1845, s. 18. *Universal Stock Exchange* v. *Strachan* (No. 1), 65 L. J., Q. B. 428; [1896] A. C. 166; 74 L. T. 468; 44 W. R. 497; 60 J. P. 468—H. L. (E.)

A contract between stockbrokers and their customer that the broker shall, at the customer's direction, buy shares and sell them, and that the profits shall belong to the customer—the brokers being personally liable to him for those profits—and that the losses shall be borne by the customer—the stockbrokers personally (and not by way of indemnity) receiving those losses—is a wagering contract within 8 & 9 Vict. c. 109, s. 18, and void as such. *Byers* v. *Beattie*, Ir. R. 2 C. L. 220; 16 W. R. 279.

The fact that the brokers are in either case to receive their commission and charges makes no difference. *Ib.*

A colourable contract for the sale and purchase of railway shares, where neither party intends to deliver nor to accept the shares, but merely to pay differences according to the rise or fall of the market, is gaming within 8 & 9 Vict. c. 109, s. 18. *Grizewood* v. *Blane*, 11 C. B. 538.

A., B. and C. were members of the Stock Exchange, according to the rules and customs of which there are two days appointed in a month for settling transactions relating to foreign securities, and, in case of a loan upon or a sale of such securities, the lender or seller has the right, in case of non-payment of the loan or non-completion of the purchase, either to sell or take them at their market value, the deficiency, if any, in the price being paid to the borrower or purchaser, and the surplus, if any, beyond the loan or purchase money, being paid by him to the lender or seller, who, if the borrower or purchaser is declared a defaulter, is bound to take the securities at a price fixed by the official assignees of the association. According to these rules and customs A. lent to C. money on the security of foreign railway shares, which were of the full value of the loan, and on each succeeding settling day the amount of depreciation or increase in the value of the shares was paid by C. or A. respectively to the other, till C. was declared a defaulter, when A. took the shares at the price fixed by the official assignees. C. was afterwards adjudged a bankrupt, and A. tendered a proof for the balance due to him in respect of the transaction, after deducting the price at which he had taken the shares. According to the same rules and customs B. agreed with C. to sell him 100 foreign railway shares for a certain sum. The transaction was not completed, but on each succeeding settling day the differences were paid by B. or C., as in A.'s case; and on C. being declared a defaulter, B. likewise took the shares at their market value, and on C.'s bankruptcy tendered a proof for the balance due to him in respect of the said shares:—Held, that these were not gambling transactions, or illegal within 8 & 9 Vict. c. 109, s. 18, and that the proofs must be admitted. *Phillips, Ex parte, Morgan, In re, Marnham, Ex parte*, 2 De G. F. & J. 634; 30 L. J., Bk. 1; 6 Jur. (N.S.) 1273; 3 L. T. 516; 9 W. R. 131.

Indemnity of Broker.]—The defendant employed the plaintiff, a stockbroker, to speculate for him on the Stock Exchange, knowing that for the purpose of carrying out his transactions the plaintiff would have to enter into contracts to buy or sell stocks and shares, and, in order to protect himself and the defendant, would have to enter into other contracts to sell or buy respectively. The plaintiff knew that the defendant never expected or intended to accept actual delivery of the stocks and shares which the plaintiff might buy for him, nor actually to deliver the stocks and shares that the plaintiff might sell for him. The defendant, nevertheless, knew that he incurred the risk of having to accept or deliver; but was content to run that risk in the expectation and hope that the plaintiff would arrange so as to make nothing but differences payable to or by him; and unless that arrangement was made the defendant was, to the knowledge of the plaintiff, wholly unable to pay for or deliver the stocks and shares bought or sold. In an action by the plaintiff against the defendant for commission and indemnity against the liabilities incurred by the plaintiff on the Stock Exchange, with the authority and for the benefit of the defendant, the defendant pleaded that the claim was founded on gaming and wagering transactions, illegal at common law and under 8 & 9 Vict. c. 109, s. 18:—Held, that the plaintiff was entitled to recover both the commission and indemnity claimed. *Thacker* v. *Hardy*, 48 L. J., Q. B. 289; 4 Q. B. D. 685; 39 L. T. 595; 27 W. R. 158—C. A.

A principal instructed his broker to buy for him shares on the Montreal Stock Exchange. The principal, who was a bank clerk, at the time he gave the instructions, had no intention of taking delivery of the shares, but intended to sell them again as soon as a profit should be obtainable owing to a rise in the price. The broker, however, took delivery, paid the full price by means of loans raised on the security of the shares, and resold when instructed. He received a commission of ¼ per cent. on each transaction, but any profit or loss accruing was credited or debited to the principal's account:—Held, that delivery to the broker was delivery to the principal; that the transactions were not gambling transactions as between the broker and his principal, and therefore, were not void by reason of article 1927 of the civil code of Lower Canada. *Thacker* v. *Hardy* (4 Q. B. D. 685) approved. *Forget* v. *Ostigny*, 64 L. J., P. C. 62; [1895] A. C. 318; 11 R. 474; 72 L. T. 399; 43 W. R. 590—P. C.

A written contract was entered into by an "outside" stockjobber with his customer, that bonâ fide purchases and sale of stocks and shares should be made between them. No subsequent bargain was in fact come to between the parties that the purchases and sales should not be carried out, and merely the differences paid, but it was contemplated that this might be so, and in the actual dealings no delivery of stocks took place The stockjobber did, however, offer to deliver certain shares and stock:—Held, that, although the parties may have contemplated that, as a whole, there would be a mere payment of differences between them, yet, inasmuch as the actual contracts entered into involved the liability for the actual delivery of the stock dealt with, they were not gaming or wagering transactions within 8 & 9 Vict. c. 109, s. 18. *Universal Stock Exchange* v. *Stevens*, 66 L. T. 612; 40 W. R. 494.

If a broker is employed to make wagering contracts such as are illegal under 8 & 9 Vict. c. 109, s. 18, and at the request of his principal pays the amount due under such contract, he can recover the amount so paid from his principal; and the illegal nature of the contract with reference to which the money is paid, is no defence to an action founded on such a claim. *Rosewarne* v. *Billing*, 15 C. B. (N.S.) 316; 33 L. J., C. P. 55; 10 Jur. (N.S.) 496; 9 L. T. 441; 12 W. R. 104.

Declaration for money paid by the plaintiff for the use of the defendant, at his request. Plea, that the money was paid, in respect of differences on the price of shares in a public company, to be paid by the defendant under wagering contracts, contrary to 8 & 9 Vict. c. 109, which the plaintiff had made for the defendant with third persons:—Held, that as the plea did not negative the plaintiff's request, and the statute made such contracts only void, and not illegal, the plea disclosed no defence. *Knight* v. *Cambers*, 15 C. B. 562; 3 C. L. R. 565; 24 L. J., C. P. 121; 1 Jur. (N.S.) 525.

To a declaration for money paid, and on accounts stated, the defendant pleaded, first, that the causes of action accrued after the passing of the 8 & 9 Vict. c. 109, under and by virtue of certain contracts made between the plaintiff and the defendant by way of gaming upon the market price of shares; and, secondly, that the causes of action accrued to the plaintiff as a broker in the city of London, about the purchasing and selling for the defendant, in the city of London, of shares, and that the plaintiff was not duly licensed in pursuance of the statute:—Held, that the pleas were bad. *Jessopp* v. *Lutwyche*, 10 Ex. 614; 3 C. L. R. 359; 24 L. J., Ex. 65.

Where a person desiring to speculate on the Stock Exchange had instructed a broker to buy and sell stocks for him, with the intention that he should only receive or pay "differences," and has authorised the broker to pay any losses for him, the broker is entitled to recover any sums which he has so paid for the principal even though he has not entered into separate contracts on his behalf, but has appropriated to him parts of larger amounts of stock which he (the broker) has bought as a principal with the view of dividing them among different clients for whom he has been instructed to buy. *Rogers, Ex parte, Rogers, In re*, 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29—C. A.

Sale of Undeclared Dividends.]—A bonâ fide sale of an undeclared dividend is not a wager within 8 & 9 Vict. c. 109, s. 18. *Martin* v. *Gibbon*, 33 L. T. 561; 24 W. R. 87—C. A.

The printed rule of the Stock Exchange that the committee will not recognise bargains in prospective dividends being in practice treated by the committee not as forbidding such transactions, but only as declaring that the committee will not adjudicate on disputes arising out of them, the unwritten usage of the Stock Exchange that members deal with each other as principals, will be cognisable in courts of law in respect to contracts between members of the Stock Exchange for the sale and purchase of such dividends. *Ib.*

Therefore, if a broker, employed to sell prospective dividends on shares by a person holding or whom he has no reason to believe does not hold such shares, sell to a jobber, he will be personally liable to the jobber, and may pay the amount for which he is liable, although forbidden to do so by his principal, and may recover from his principal the amount so paid. *Ib.*

Work Done and Money Paid.]—To a declaration for work done, commission and money paid, a plea, that the plaintiff was a stock and share broker, and as such made contracts with persons for the defendant by way of wagering, contrary to 8 & 9 Vict. c. 109, under the semblance of pretended sales, respecting the future market price of public and other stock, shares, scrip, and goods and chattels, whereby the defendant was to receive or pay the difference between the price of the public stock on the days on which the contracts were made and the price on certain future days, according as the price had become lower or higher; and that the work was done, and the commission claimed in respect of the making such contracts, and the money paid in discharging the differences which had become payable, is no defence under 8 & 9 Vict. c. 109. *Knight* v. *Fitch*, 15 C. B. 566; 3 C. L. R. 567; 24 L. J., C. P. 122; 1 Jur. (N.S.) 526.

To an action for work done and money paid, at the request of the defendant, a plea that by agreement between the plaintiff and defendant, the plaintiff, as agent to the defendant, contracted with third parties for the pretended purchases and sales of shares in a railway company, under which contracts no shares were actually transferred; and that the contracts of pretended purchase and sale between the parties were by way of wagering only on the market prices of the shares, contrary to 8 & 9 Vict. c. 109, s. 18; and that the work was done and the money paid in pursuance of that agreement, and in making and performing those contracts of pretended purchase and sale, and in and about the paying by the plaintiff of those differences; which payment was made without any request by the defendant to the plaintiff, is a bad plea, as disclosing no answer to the count for work done. *Inchbald* v. *Cockerill*, 4 Jur. (N.S.) 693.

Payments partly for bonâ fide Sales.]—In an action for money paid the defendant pleaded that the money was paid for and in respect of differences which the plaintiffs, as the defendant's brokers, contracted to pay for him on account of certain unlawful contracts, by way of gaming and wagering, relating to the public funds, and to railways and shares in railways, and to the then present and future prices thereof respectively, in lieu of and instead of making, accepting, and paying for transfer thereof, partly contrary to 7 Geo. 2, c. 8, and partly contrary to 8 & 9 Vict. c. 109:—Held, that the plea being no answer as to the money paid in respect of losses on the sale of shares, was bad altogether, and was not made good as to the money paid in respect of losses on sales of consols by the 75th section of the Common Law Procedure Act of 1852. *Lyne* v. *Siesfeld*, 1 H. & N. 278.

E. STATUTORY OFFENCES.

1. LOTTERY.

a. What is.

Horse-Race—Names on Cards.]—A horse-race being about to be run, the plaintiff and one hundred and fifty-four other persons subscribed

1*l.* apiece, which was deposited with the defendant on the terms that the name of each subscriber should be written on a card, and the name of each of the horses written on another, and then the two sets of cards placed in a box, and the cards should be drawn by chance from each of the boxes, and the person whose name should be drawn next after the name of the winning horse, should be entitled to receive 100*l.* from the entire fund :—Held, an illegal lottery within 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119. *Allport* v. *Nutt*, 3 D. & L. 233 ; 1 C. B. 974 ; 14 L. J., C. P. 272 ; 9 Jur. 909. S. P., *Gatty* v. *Field*, 9 Q. B. 431 ; 15 L. J., Q. B. 408 ; 10 Jur. 980.

—— **Prize for "placing" Horses—Coupons.**]—A prize of 100*l.* was offered by a sporting newspaper to purchasers who correctly "placed" the first, second, third, and fourth horses in a race. The price of the newspaper was one penny, and a column of twenty-five coupons was attached. Purchasers were invited to fill four blank spaces with the names of horses and send the coupons so filled to the office of the newspaper. No. 1 coupon was free of charge, but if all or any of the remaining twenty-four coupons were used, a penny stamp was to be sent with each. A summons under the Lottery Acts was issued against the newspaper proprietors. The magistrate found as a fact that the winning of the prize in the competition would be by chance, and not by skill :—Held, that this coupon competition was not a lottery. Neither the selection of the winner, nor the "placing" of the first four horses, were matters of pure chance. *Stoddart* v. *Sagar*, 64 L. J., M. C. 234 ; [1895] 2 Q. B. 474 ; 15 R. 579 ; 73 L. T. 215 ; 44 W. R. 287 ; 18 Cox, C. C. 165 ; 59 J. P. 598.

The proprietor of a sporting newspaper issued weekly at the price of one penny, in connection with the newspaper and from the same office, a handicap-book or racing record containing general information as to horse-races past and to come. The last page of this book was a coupon, in which six races to come were selected, and pecuniary prizes were offered to any purchaser of the book who filled up one coupon with the names of six, five, or four winning horses, and returned the coupon to the newspaper office within a limited time and under certain specified conditions :—Held, that this was not a proposal and scheme for the sale of chances in a lottery within s. 41 of the Lottery Act, 1823. *Caminada* v. *Hulton*, or *Reg.* v. *Hulton*, 60 L. J., M. C. 116 ; 64 L. T. 572 ; 39 W. R. 540 ; 17 Cox, C. C. 307 ; 55 J. P. 727.

"Missing Word Competition"—Right of Competitors to return of their Contributions.]—The proprietor of a paper conducted competitions in the following manner : A sentence was inserted in the paper with one word missing ; intending competitors were required to cut out a coupon attached to the paper, to write the missing word on the coupon and send it, together with a fee of 1*s.* for each coupon, to the proprietor. The missing word was decided upon before the commencement of the competition. The entrance fees were divided amongst the successful competitors :—Held, (1) that the competition constituted a lottery within the meaning of 42 Geo. 3, c. 119 ; (2) the moneys, which had been brought into court, were not impressed with any trust which the court could administer : so far as they were impressed with any trust, it was one which had arisen out of an illegal transaction, and that the assistance of the court would not be invoked in administering it. *Barclay* v. *Pearson*, 62 L. J., Ch. 636 ; [1893] 2 Ch. 154 ; 3 R. 388 ; 68 L. T. 709 ; 42 W. R. 74.

Sale of Land for Purpose of.]—An agreement to sell and convey land for the purpose of being resold by lottery in contravention of the 12 Geo. 2, c. 28, and a deed afterwards executed to secure the payment of the price of the land so conveyed, is void. *Fisher* v. *Bridges*, 3 El. & Bl. 642 ; 2 C. L. R. 928 ; 24 L. J., Q. B. 165 ; 1 Jur. (N.S.) 157 ; 2 W. R. 706—Ex. Ch.

Allotment of Land by Ballot.]—A company consisting of a number of persons subscribing small sums was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot. Quære, whether it was illegal as being contrary to the Lottery Acts, or whether it fell within 12 Geo. 2, c. 28, s. 11. *O'Connor* v. *Bradshaw*, 5 Ex. 882 ; 20 L. J., Ex. 26.

Tickets for Prizes.]—C. kept an eating-house, and sold tickets for what was called the Great Eastern Money Club, in respect of which prizes were drawn ; and the holders of the tickets, whose numbers were drawn for prizes, received the same, and C. delivered out the prizes to such ticket-holders :—Held, that this evidence was sufficient to support a conviction against him for keeping a lottery, but was not sufficient to support a conviction for keeping a room for betting upon horse-racing under 16 & 17 Vict. c. 119. *Reg.* v. *Crawshaw*, Bell, C. C. 303 ; 30 L. J., M. C. 58 ; 3 L. T. 51 ; 9 W. R. 68 ; 8 Cox, C. C. 375.

The appellant erected a tent, in which he sold packets, each containing a pound of tea, at 2*s.* 6*d.* a packet. In each packet was a coupon entitling the purchaser to a prize ; this was publicly stated by the appellant before the sale, but the purchasers did not know until after the sale what prizes they were entitled to ; the prizes varied in character and value, and the tea was worth the money paid for it :—Held, that this constituted a lottery within 42 Geo. 3, c. 119, s. 2. *Taylor* v. *Smetten*, 52 L. J., M. C. 101 ; 11 Q. B. D. 207 ; 48 J. P. 36.

A lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what was professed to be a shilling's worth of goods, and also to the chance of certain bonuses of goods of greater value than the shilling, is an illegal lottery. *Reg.* v. *Harris*, 10 Cox, C. C. 352.

Enclosing Money in Packets.]—H. kept a shop for the sale of sweets and sold penny packets of caramel, several of which contained a halfpenny in addition to a fair pennyworth of sweets. There had been no advertisement as to these enclosures :—Held, that H. was rightly convicted under 42 Geo. 3, c. 119, s. 2, of keeping a lottery. *Hunt* v. *Williams*, 52 J. P. 821.

Presents according to Seats.]—The programme of an entertainment stated that at its conclusion the proprietor "would distribute amongst his audience a shower of gold and silver treasures on a scale utterly without parallel, besides a shower of smaller presents, all of which would

be impartially divided amongst the audience and given away." The public was admitted on purchasing tickets, which were not numbered. The seats of the audience were numbered. At the conclusion of the entertainment the proprietor called out a number on a seat, and delivered one of the articles to the person occupying that seat, and in that way distributed all the articles amongst the audience:—Held, a lottery within 42 Geo. 3, c. 119, s. 2. *Morris* v. *Blackman*, 2 H. & C. 912; 10 Jur. (N.S.) 520.

Concession to Company—Prospectus advertising Foreign Lottery—English Company setting up Lottery Abroad.]—A company, formed to acquire and work a concession conferring the exclusive privilege of conducting all operations in connection with lottery loans in Persia, issued a prospectus which referred to the profits made on the continent by lotteries, and stated that the operations of the company would be conducted upon the lines adopted by European states where government lotteries were in vogue, and that "at least five issues have to be made annually in Persia with minimum drawings of 10,000*l*., and it is estimated that these operations should return continuously increasing dividends." The company had agreed to purchase this concession. A shareholder commenced an action to restrain the company from acquiring, and from publishing any prospectus or scheme relating to the acquisition of, this concession, and from publishing any advertisement or notice in any manner relating to such lottery loans, and from applying the funds of the company in the purchase of the said concession, contending that the enterprise of the company was illegal and in contravention of the Lottery Acts:—Held, that the proposed purchase of the concession was lawful; that the company were not attempting to erect or set up any lottery in this country within the meaning of 9 Geo. 1, c. 19, s. 4; that the general statements in the prospectus did not amount to a publication, advertisement, or notice of a foreign lottery within the meaning of 6 & 7 Will. 4, c. 66; and that the action must therefore be dismissed. *Macnee* v. *Persian Investment Corporation*, 59 L. J., Ch. 695; 44 Ch. D. 306; 62 L. T. 894; 38 W. R. 596.

Society—Periodical Drawings amongst Members.]—A society constituted avowedly for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Act. *Wallingford* v. *Mutual Society*, 50 L. J., Q. B. 49; 5 App. Cas. 685; 43 L. T. 258; 29 W. R. 81—H. L. (E.) And see *Smith* v. *Anderson*, 50 L. J., Ch. 39; 15 Ch. D. 269; 43 L. T. 336; 29 W. R. 22—Argument in C. A.

An association was formed in 1872 with the object of buying foreign bonds and other securities below par value, and, after payment of expenses and a fixed rate of interest to all the members, dividing the profits which should be made by the sale of the bonds or their payment off at par, amongst some of the members, who were to be chosen by lot at annual drawings for that purpose. There was a trust deed which set out in detail the working of the scheme. In an action against a former trustee for alleged breaches of trust: Semble, that it was illegal under the Lotteries Acts. *Sykes* v. *Beadon*, 48 L. J., Ch. 522; 11 Ch. D. 170; 40 L. T. 243; 27 W. R. 464.

b. Persons Liable.

Printers.]—The printer of a newspaper, publishing an illegal proposal for gambling in the lottery, incurred a penalty under 22 Geo. 3, c. 47, s. 13. *King* v. *Smith*, 4 Term Rep. 414.

c. Proceedings.

Proceedings for Penalty.]—Proceedings for the recovery of penalties, relating to lotteries, contrary to 42 Geo. 3, c. 119, must, since the 46 Geo. 3, c. 48, s. 59, be sued for in the name of the attorney-general, and not before magistrates, whether the lotteries are private or state lotteries. *Reg.* v. *Tuddenham*, 9 D. P. C. 937; 5 Jur. 871.

Indictment.]—By 10 & 11 Will. 3, c. 17, s. 1, lotteries are declared to be common and public nuisances; s. 2, which came into operation on a subsequent day, rendered persons keeping lotteries liable to a penalty, to be sued for by information or action. The 42 Geo. 3, c. 119, contains similar enactments with regard to lotteries called "Little Goes":—Held, on an indictment, containing counts for keeping a lottery, framed upon these statutes, that the counts were good and the offence indictable. *Reg.* v. *Crawshaw*, Bell, C. C. 303; 30 L. J., M. C. 58; 3 L. T. 510; 9 W. R. 68; 8 Cox, C. C. 375.

Defence to Action to Recover.]—In an action for money had and received, a plea that the money was the amount of a prize in an illegal lottery held by defendant, and that he paid over the amount to one whom he conceived to be the winner, and who was entitled to receive and retain the money, was bad for duplicity. *Holmes* v. *Lock*, 1 C. B. 524.

"Aiding, abetting, counselling and procuring" to keep.]—A wholesale confectioner who sells sweetmeats, some of which contain coin, to a shopkeeper with a view to his selling them and the chance of obtaining money in them to the public, is rightly convicted of "aiding, abetting, counselling, and procuring the commission of an offence" within the meaning of s. 5 of the Summary Jurisdiction Act, 1848. *Barratt* v. *Burden*, 63 L. J., M. C. 33; 10 R. 602.

2. Keeping a Place for Betting and Gaming.

a. Liability for.

Common Gaming House.]—Keeping and maintaining a common gaming-house for lucre and gain, and causing and procuring idle and evil-disposed persons to come there to play together at rouge-et-noir, and permitting such persons to play at such game for large sums of money, is indictable at common law. *Rex* v. *Rogier*, 2 D. & R. 431; 1 B. & C. 272; 25 R. R. 393. S. P., *Rex* v. *Taylor*, 3 B. & C. 502.

Unlawful Gaming.]—A. was the proprietor of the Park Club and was also occupier of the premises used by the club, and received the profits. B., C., D. and E. were members of the committee of management, whose duty it was to regulate the internal management of the club, and (amongst other things) to make by-laws and regulations for the carrying it on and for

the government of its members, who were elected by them. F., G. and H. were members of the club. By the rules and regulations of the club, hazard was not to be played, dice were excluded, and the points at whist were limited to 1*l.*; all games were to be played for ready money; and under no pretence were strangers to be admitted to the card-room. An entrance fee of 10 guineas and an annual subscription of six guineas was paid by each member of the club. The kitchen was conducted at a loss, and wines and cigars supplied at a slight excess over cost price. The profits accruing to the proprietor arose from the entrance fees and subscriptions, and what was called "card money." Members' cheques were cashed by the proprietor to the amount of 200*l.*, for which he charged 1 per cent. The game of baccarat was played nightly. Upon an information charging the eight persons abovenamed with having committed offences against s. 4 of 17 & 18 Vict. c. 38, A., the proprietor, was adjudged to have been guilty of "keeping and using the Park Club for the purpose of unlawful gaming," and fined 500*l.* The four committeemen were adjudged to have been guilty, as persons "having the care or management of and assisting in conducting the business" of the house so kept and used for the purpose of unlawful gaming, and were each fined 500*l.* The three players were also adjudged to have been guilty of the offence, as persons who "assisted by playing in conducting the business of the house so kept and used for the purpose of unlawful gaming," and were each fined 100*l.*:—Held, that the proprietor of the club and the four members of the committee were properly convicted; but that the players,—though possibly liable to be indicted for unlawful gaming in a common gaming-house,—were not liable to be summarily convicted under this statute. *Jenks* v. *Turpin*, 53 L. J., M. C. 161; 13 Q. B. D. 505; 50 L. T. 808; 15 Cox, C. C. 486; 49 J. P. 20.

Per Hawkins, J.:—If the house in question had been opened and used for a double purpose, viz. as an honest sociable club for those who did not desire to play, as well as for the purposes of gaming for those who did, it would not the less be a house opened and kept "for the purpose of gaming." To constitute "unlawful gaming," it is not necessary that the games played shall be unlawful games: it is enough that the play is carried on in a "common gaming-house." The expression "unlawful games" was intended by the legislature to cover and include some games which, being lawful in themselves, were only made unlawful when played in particular places or by particular persons. It makes no difference that the use of the house and the gaming therein is limited to the subscribers or members of the club, and that it is not open to all persons who might be desirous of using it. It is not a public but a common gaming-house that is prohibited. "Baccarat" is a game of chance, and unlawful within 17 & 18 Vict. c. 38, s. 4. Excessive gaming per se is not any longer a legal offence; it was not an offence at common law; and there now exists no statute against it. But the fact that it is habitually carried on in a house kept for the purpose of gaming is cogent evidence for a jury or other tribunal called upon to determine whether the house in which it is carried on is a common gaming-house, so as to make the keeper of it liable to be indicted for a nuisance at common law. *Ib.*

Per A. L. Smith, J.:—A "common gaming-house" is a house kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which (1) a bank is kept by one or more of the players exclusively of the others, or (2) in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet. It is immaterial whether the bank is kept by the owner or occupier or keeper of the house or by one of the players. *Ib.*

Betting House—Club.]—A club whose members habitually bet is not within the meaning of the Betting Houses Act (16 & 17 Vict. c. 119, s. 1). *Oldham* v. *Ramsden*, 44 L. J., C. P. 309; 32 L. T. 825.

"Place"—What is.]—The term "place" in s. 3 of 16 & 17 Vict. c. 119, does not necessarily mean one particular spot, but may include a place extending over a considerable area of ground; such place need not be bounded by a definite line, but it cannot be of unlimited extent, and is to be confined to the area occupied by persons congregating together and resorting to it. It is not necessary that the delinquent should remain stationary in the place so used, he may use the place by moving about within its area. *Reg.* v. *Preedy*, 17 Cox, C. C. 433.

—— **Movable Box within Ring at Races.**]—By 16 & 17 Vict. c. 119, s. 3, "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes" of betting with persons resorting thereto is liable to a penalty. The respondent and a companion, having paid for admission, were in a railed inclosure of the grand stand at a race meeting. The companion stood on a small wooden box not attached to the ground, and he and the respondent called out offering to make and making bets with other persons. The companion received the money for bets made, and the respondent booked the same. They stood together in one place within the inclosure during the races:—Held, that the fixed and ascertained spot defined in the inclosure by the box at which the respondent orally advertised his willingness to bet was a "place" used by him for the purpose of betting with persons resorting thereto, and he was liable to a penalty under 16 & 17 Vict. c. 119, s. 3. *Gallaway* v. *Maries*, 51 L. J., M. C. 53; 8 Q. B. D. 275; 45 L. T. 763; 30 W. R. 151; 46 J. P. 326.

—— **Temporary Structure adjoining Racecourse.**]—Upon a slip of land adjoining a racecourse, during the races, there was erected a temporary wooden structure, four feet high, without a roof. Over it was a board exhibited upon which was the name of the proprietor, and there were betting lists containing the odds upon and against each horse which he was willing to bet. The structure had two frontages, and boards used as desks fronting each way. At each desk a man sat with a book for the purpose of recording the bets made with persons outside. Persons betting deposited money and received a card containing the terms of the bet:—Held, that this was an office or a place within the meaning of the 16 & 17 Vict. c. 119, s. 1. *Shaw*

v. *Morley*, 37 L. J., M. C. 105; L. R. 3 Ex. 137; 19 L. T. 15; 16 W. R. 763; 11 Cox, C. C. 128.

—— **Stool covered by Umbrella.**]—B. was on a racecourse, standing on a stool, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when opened was seven or eight feet high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." B. was calling out, offering to make bets; and he was seen to make bets, the money being deposited with him, and for which he gave a ticket:—Held, that B. was using a fixed and ascertained "place" for the purpose of betting with persons resorting thereto, and was properly convicted under 16 & 17 Vict. c. 119, s. 3. *Bows* v. *Fenwick*, 43 L. J., M. C. 107; L. R. 9 C. P. 339; 30 L. T. 524; 22 W. R. 804.

—— **Cricket Ground.**]—By the Betting Houses Act (16 & 17 Vict. c. 119), s. 1, no house, office, room, or other place shall be opened, kept or used for the purpose. A ground used for cricket, footracing, &c., is a place within the meaning of the enactment, and the owner, occupier, or keeper may be convicted under the act for knowingly permitting any other person to use any such house, office, or place for the purpose of betting with persons resorting to it, though the person so using it is in no sense the occupier or keeper of the premises. *Haigh* v. *Sheffield Corporation*, 44 L. J., M. C. 17; L. R. 10 Q. B. 102; 31 L. T. 536; 23 W. R. 547.

—— **Ground for Pigeon Shooting.**]—E. was the occupier of inclosed grounds, in which a pigeon-shooting match between two persons for 10*l.* a-side, and afterwards a foot-race, took place, and into which the public were admitted on payment of money. The persons who were admitted into the grounds made bets with each other, both on the pigeon-shooting match and on the foot-race:—Held, that the grounds were a "place," and that they were kept and used by E. for the purpose of betting within the meaning of 16 & 17 Vict. c. 119, s. 3. *Eastwood* v. *Millar*, 43 L. J., M. C. 139; L. R. 9 Q. B. 440; 30 L. T. 716; 22 W. R. 799.

—— **Particular Spot in Open Space.**]—The habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, is not the using of a place for such purpose within the 16 & 17 Vict. c. 119, s. 1. *Doggett* v. *Catterns*, 19 C. B. (N.S.) 765; 34 L. J., C. P. 159; 11 Jur. (N.S.) 243; 12 L. T. 355; 13 W. R. 390—Ex. Ch.

For three consecutive days a bookmaker took up his position at one end of an advertisement hoarding erected on an open space of ground on a river bank, and betted on horse races with passers-by. The ground was of considerable extent, uninclosed, and free to the public frequenting it:—Held, that the spot where he stood was a sufficiently defined "place" to be within the mischief aimed at by s. 3 of the Betting House Act, 1853, and that he had used a place for the purpose of betting with persons resorting thereto contrary to the statute. *Liddell* v. *Lofthouse*, 65 L. J., M. C. 64; [1896] 1 Q. B. 295; 74 L. T. 139; 44 W. R. 349; 18 Cox, C. C. 249; 60 J. P. 264.

The business of a bookmaker on the turf not being illegal if carried on in a way which does not infringe the provisions of the Betting Act, 1853, a partner in such a business who intended that the business should be thus carried on, and was unaware that it was being carried on otherwise, is entitled to an account and to payment of his share of the profits. *Thwaites* v. *Coulthwaite*, 65 L. J., Ch. 238; [1896] 1 Ch. 496; 74 L. T. 164; 44 W. R. 295; 60 J. P. 218.

Dog-races were held in an inclosed field hired for the purpose by a committee, the public being admitted to a reserved portion of the field on payment of a small sum. The appellant attended the races, and moved about the reserved portion, making bets with various persons there:—Held, that the appellant did not use a place for the purpose of betting with persons resorting thereto, within the meaning of ss. 1 and 3 of 16 & 17 Vict. c. 119, and therefore was not liable to be convicted for an offence under those sections. *Snow* v. *Hill*, 54 L. J., M. C. 95; 14 Q. B. D. 588; 52 L. T. 859; 33 W. R. 475; 15 Cox, C. C. 737; 49 J. P. 440.

The fact that any one who carries on the business of a professional betting man goes to a particular spot to bet, and remains there for some hours betting, with persons who have been brought together to that spot in the expectation of finding him there to bet with, is sufficient to constitute that spot a "place" within the meaning of s. 3 of the Betting Act, 1853. *McInany* v. *Hildreth*, 66 L. J., Q. B. 376; [1897] 1 Q. B. 600; 76 L. T. 463; 61 J. P. 325.

On the morning of the day upon which a horse-race called the Lincolnshire Handicap was run a crowd of persons assembled upon a piece of vacant ground in the borough of Jarrow, known as the Pit Heap, to which the public had free access at all times upon the day in question. The appellant, a professional bookmaker, went to the Pit Heap in the course of the morning, and took up his stand at a particular spot upon the Pit Heap with his back against a wall. He remained for the space of several hours upon that one spot making bets with, and receiving money in respect of such bets from, a number of persons in the crowd, and entering particulars of these transactions in a betting book. There was no evidence that he had ever used the Pit Heap or any spot upon it for a like purpose before the day in question:—Held, the appellant was rightly convicted of using a place for the purpose of betting with persons resorting thereto, contrary to the provisions of the Betting Act, 1853. *Ib.*

—— **Enclosure on Racecourse — Bookmaker Betting without Confining Himself to any Fixed Spot.**]—The owners and occupiers of a racecourse fenced off with iron rails an enclosure of about a quarter of an acre in extent, adjoining the course. The enclosure is uncovered except that on the side further from the course there are raised tiers of seats covered with a roof. The general public are admitted to the enclosure on race days upon payment, and vary in number from 500 to 2,000. Amongst them are always from 100 to 200 bookmakers, who are admitted as members of the general public, and on the

same terms. The bookmakers have no rights, privileges, interest, or control in or over the enclosure. Each bookmaker is accompanied by a clerk. The bookmakers do not confine themselves to any fixed spot in the enclosure, nor do they use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same spot. The bookmakers carry on their business in the enclosure in competition with each other, betting with those of the public within the enclosure desirous of betting with them, whether upon credit or by way of ready-money betting:—Held, that in these circumstances the bookmakers were not persons using a house, office, room, or other place for the purpose of betting with persons resorting thereto within the meaning of s. 3 of the Betting Act, 1853 (Rigby, L.J., dissentiente). *Hawke* v. *Dunn* (66 L. J., Q. B. 364; [1897] 1 Q. B. 579), not followed. *Powell* v. *Kempton Park Racecourse Co.*, 66 L. J., Q. B. 601; [1897] 2 Q. B. 242; 77 L. T. 2; 46 W. R. 8; 61 J. P. 548.

Any area of enclosed ground, covered or uncovered, which is known by a name or capable of reasonably accurate description, to which persons from time to time or upon any particular occasions or occasion resort, or who may properly be described as resorting thereto, used by a professional betting man for the purpose of exercising his calling and betting with such persons, or for the purpose of carrying on a ready-money betting business, may be a "place" within the meaning of s. 3 of the Betting Act, 1853. Metes and bounds are not essential, and it is immaterial whether the bookmaker remains upon one particular spot within the area or moves about within that area from one spot to another. Each case must depend and be decided upon its own particular circumstances. *Hawke* v. *Dunn*, 66 L. J., Q. B. 364; [1897] 1 Q. B. 579; 76 L. T. 355; 45 W. R. 359; 18 Cox, C. C. 543; 61 J. P. 292.

The law does not forbid betting itself, nor is the business or avocation of a bookmaker necessarily illegal. That which the legislature has forbidden, and which it has pronounced to be illegal, is the use, by those who make a trade and business in betting, of any place for the purpose of betting with persons resorting thereto or for the purpose of receiving, either themselves or by any other person, any money or valuable thing as the consideration for a bet or bets on the event of any horse-race, &c. *Ib.*

Upon the occasion of a race meeting about one thousand persons, including the respondent, a bookmaker and professional betting man, were admitted to a *l.* stand known as Tattersall's ring. Tattersall's ring was enclosed by an iron fence breast high, and about forty yards long by thirty yards broad, and was owned by a limited company. The respondent invited all persons about him to bet with him, and certain persons did so, each being required to pay in advance to the respondent a deposit of the money for which they had respectively backed the horse. The respondent did not confine himself to any one fixed spot or locality—he had no stool, box, umbrella, nor anything of a similar character to denote the precise spots at which from time to time he was carrying on his betting operations—but moved about the ring at his will, shouting out the odds and making his bets in various parts of it. After each race the respondent paid to each backer the bets they had respectively won:—Held, that the ring was a "place" within the meaning of s. 3 of the Betting Act, 1853. *Ib.*

—— **Bar-room in Public-house.**]—The bar-room of a public-house is a "place" within the meaning of s. 3 of 16 & 17 Vict. c. 119. *Reg.* v. *Preedy*, 17 Cox, C. C. 433.

A bookmaker went nine days within a fortnight into the bar of a public-house, but had no interest in or exclusive occupation of the bar. Whilst there he betted with all comers, received bets on horse-races, being seated at a table with sporting papers and slips and cards before him for two hours at a time:—Held, that he was liable to conviction under 16 & 17 Vict. c. 119, s. 3, for using the place for the purpose of betting. *Mc William* v. *Dawson*, 56 J. P. 182.

User of House for Betting.]—In order to support a conviction under s. 3 of 16 & 17 Vict. c. 119, it is unnecessary that there should be evidence that the house, room, or place has been opened and kept or used previously to the occasion in question for the purpose of such illegal betting as is forbidden by s. 1; it is also immaterial that the principal user of the house, room, or place is for a legitimate object, if it is also used for the prohibited purpose. *Reg.* v. *Preedy*, 17 Cox, C. C. 433.

The payment of bets which have been previously made does not of itself constitute "betting" within the Betting Act, 1853. Therefore a person who uses a house for paying bets which he has previously made elsewhere does not by the mere payment of such bets in that house commit an offence under s. 3 of the act. *Bradford* v. *Dawson*, 66 L. J., Q. B. 191; [1897] 1 Q. B. 307; 76 L. T. 54; 45 W. R. 347; 18 Cox, C. C. 473; 61 J. P. 134.

A person on three successive days went to the bar-room of a public-house for the purpose of betting, and did there bet upon certain horse-races with persons resorting thereto, but he had no interest in the keeping, management, or tenancy of the room, or of any part of the public-house:—Held, that as the room had not been opened, kept, or used for the purpose of betting, he had not committed an offence under s. 3 of the Betting Houses Act, 1853, which imposes a penalty upon any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purpose of betting with persons resorting thereto. *Whitehurst* v. *Fincher*, 62 L. T. 433; 17 Cox, C. C. 70; 54 J. P. 565.

Keeping Place for Purpose of Betting.]—To open or keep a house or other place for the purpose of betting with persons resorting thereto is made an offence by the first part of s. 1 of the Suppression of Betting Houses Act, 1853, and it is not necessary to prove that money has been received as a deposit on bets. *Bond* v. *Plumb*, [1894] 1 Q. B. 169; 10 R. 44; 70 L. T. 405; 42 W. R. 222; 17 Cox, C. C. 749; 58 J. P. 168.

A newspaper called "Turf Life" published what was termed a coupon competition, inviting persons, for a prize of 100*l.*, to name the horses which should be first, second, third, and fourth in a certain race. The coupons, which formed part of each copy of the paper, were numbered from 1 to 25. No. 1, called the "Free Coupon," could be used without any money being remitted

to make the competitor eligible, but additional coupons could be filled up, and for each of these one penny had to be remitted; so that if all the coupons were used the remittance must be two shillings. Money was received at the newspaper office from intending competitors:—Held, that the magistrate having found the above facts insufficient to support charges of keeping an office or place, receiving moneys and deposits on bets, and publishing advertisements inviting persons to make bets, contrary to the Betting Acts, 1853, and 1874, the court would not interfere with his finding. *Stoddart* v. *Sagar*, 64 L. J., M. C. 234; [1895] 2 Q. B. 474; 15 R. 579; 73 L. T. 215; 44 W. R. 287; 18 Cox, C. C. 165; 59 J. P. 598.

—— **Person having Care of Place—Liability of Manager.**]—The appellant was manager of bicycle grounds. Bicycle races, at which 20,000 spectators were present, took place there. Placards, with the words "No betting allowed," were posted in the grounds, and twelve police constables were employed there by the manager, but some betting took place about twenty yards from the winning-post where he stood, acting as judge of the races. He was aware that betting would and did take place, but could not have wholly prevented it under the circumstances, although he might have repressed it to certain extent with the aid of the constables:—Held, that as the business of the grounds was not that of illegal betting within 16 & 17 Vict. c. 119, s. 1, he was not liable to conviction under s. 3, as a "person having the care or management of or in any manner assisting in conducting the business of any . . . . place opened, kept, or used for the purposes aforesaid." *Reg.* v. *Cook*, 13 Q. B. D. 377; 51 L. T. 21; 32 W. R. 796; 48 J. P. 694.

Suffering House to be Used in Contravention of Betting Houses Act.]—By s. 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), any licensed person who suffers his house to be used in contravention of the Betting Houses Act (16 & 17 Vict. c. 119) is liable to a penalty. By ss. 1 and 3 of the Betting Houses Act (16 & 17 Vict. c. 119), any occupier of a house who permits it to be used by another for the purpose of any money being received by or on behalf of such person by way of betting is guilty of an offence.—The defendant, the keeper of a licensed house, allowed a person who made bets near it to deposit in the house the stakes received by him. Such stakes had been received by him outside the house:—Held, that, as the money was proved to have been received by the depositor outside and not inside the house, the defendant was not liable to be convicted for suffering the house to be used by the depositor for the purpose of money being received by him by way of betting contrary to ss. 1 and 3 of the Betting Houses Act (16 & 17 Vict. c. 119). *Davis* v. *Stephenson*, 59 L. J., M. C. 73; 24 Q. B. D. 529; 62 L. T. 436; 38 W. R. 492; 17 Cox, C. C. 73; 54 J. P. 565.

The respondent, a keeper of a beerhouse, was charged under s. 3 of the Betting Houses Act, with permitting his premises to be used for the purpose of betting. It appeared that a bookmaker and his clerk were, with the respondent's permission, in the bar of the beerhouse on five consecutive days for the purpose of betting, and did bet, with persons resorting there. Neither the bookmaker nor his clerk had any interest in the beerhouse, nor did either of them occupy any particular place in the bar:—Held, that the respondent ought to have been convicted. *Hornsby* v. *Raggett*, 61 L. J., M. C. 24; [1892] 1 Q. B. 20; 66 L. T. 21; 40 W. R. 111; 17 Cox, C. C. 428; 56 J. P. 135.

A person was charged on a summons under the Betting Houses Act (16 & 17 Vict. c. 119), ss. 1 and 3, with knowingly and wilfully permitting a place of which he was the occupier to be used by certain persons for the purpose of betting with persons resorting thereto. On the hearing it was proved that he occupied as tenant a house, with a piece of inclosed ground adjoining, used for cricket, foot-racing, and other games and sports. On the day named in the summons foot-racing took place in the grounds, to which persons were admitted on payment of 6*d*. Within the grounds, but outside the space reserved for the runners, and amongst the spectators, some fifteen or twenty professional bettors stood on chairs and stools in different spots, with books in their hands, calling out the odds on the various runners, and betting with different persons, a man behind each of the professional bettors recording the bets in a book, the persons betting paying 1*s*. each, and receiving a ticket. The evidence satisfied the magistrate that the party knew of what was going on and took no steps to prevent it, and that he might have prevented it if he had been so minded; and he accordingly convicted him of the offence charged:—Held, that the conviction was right. *Haigh* v. *Sheffield Corporation*, 44 L. J., M. C. 17; L. R. 10 Q. B. 102; 31 L. T. 536; 23 W. R. 547.

Using a Place for the purpose of "betting with persons resorting thereto."]—There is evidence to go to the jury in support of an indictment, under s. 1 of the Betting Houses Act, 1853, charging the defendant with using a place for the purpose of "betting with persons resorting thereto," when it is shown that the defendant has, on various occasions, gone to a public-house bar, and there, or just outside the door, has received bets from persons who had met him there. Semble, if a person habitually resorts to the bar of a public-house, or similar place, with a view to meeting others to bet with him, that is a user of that place for the purpose of "betting with persons resorting thereto," even if all the bets are handed over outside the house. *Reg.* v. *Worton*, 64 L. J., M. C. 74; [1895] 1 Q. B. 227; 15 R. 102; 72 L. T. 29; 18 Cox, C. C. 70—C. C. R.

Where a club is a bonâ fide association, a member betting with other members on the premises cannot be convicted under s. 3 of the Betting Act, 1853, of unlawfully using the premises for the purpose of "betting with persons resorting thereto." *Downes* v. *Johnson*, 64 L. J., M. C. 238; [1895] 2 Q. B. 203; 15 R. 466; 72 L. T. 728; 43 W. R. 556; 59 J. P. 487.

To satisfy the meaning of the word "resort" within s. 1 of the Betting Houses Act, 1853, persons must "resort physically," and the mere sending of letters and telegrams does not constitute "resorting" within the meaning of the act. *Reg.* v. *Brown*, 64 L. J., M. C. 1; [1895] 1 Q. B. 119; 15 R. 59; 72 L. T. 22; 43 W. R. 222; 18 Cox, C. C. 81; 59 J. P. 485—C. C. R.

"House used for unlawful gaming"—Isolated Occasion.]—An isolated instance of an unlawful game of cards being played among friends at the house of one of them does not render the

owner of the house liable to the penalties imposed by s. 4 of the Gaming House Act, 1854. The question whether a particular game at cards falls within the category of unlawful games is one for the court and not for the jury. *Reg.* v. *Davies*, 66 L. J., Q. B. 513; [1897] 2 Q. B. 199; 76 L. T. 786—C. C. R.

Advertisement—Betting Houses—Advice with respect to Wagers.]—The Betting Act, 1874, is confined to such bets as are mentioned in the Betting Act, 1853, that is, to bets made in any house, office, or place kept for betting, and the act does not apply to advertisements offering information for the purpose of bets not made in any house, office, or place kept for that purpose. *Cox* v. *Andrews*, or *Andrews* v. *Cox*, 53 L. J., M. C. 34; 12 Q. B. D. 126; 32 W. R. 289; 48 J. P. 247.

—— **Advertising as to Betting—Prizes for Selecting Winning Horses.**]—The respondent, a newspaper proprietor, published weekly a "Racing Record," which contained information as to races which had been recently run and as to those which were about to take place; at the end of the book was a coupon, which the purchaser of the book might cut off, and, after writing upon it the names of the horses which he thought would win the six races mentioned on it might send it to the respondent's office; the respondent offered prizes to the persons who selected six, five, or four winners, the prizes varying in amount according to the number of winners selected. The "Racing Records" were sold principally through newsvendors or stationers, and a few copies only were sold by the respondent over the counter at his office:—Held, that the respondent had not committed any offence under the Betting Act. *Caminada* v. *Hulton* or *Reg.* v. *Hulton*, 60 L. J., M. C. 116; 64 L. T. 572; 39 W. R. 540; 17 Cox, C. C. 307; 55 J. P. 727.

On Licensed Premises.]—*See* INTOXICATING LIQUORS.

b. Proceedings.

One Justice.]—An information for using a place for betting contrary to 16 & 17 Vict. c. 119, s. 3, need not be laid before two justices; one is sufficient. *Lee* v. *Gold*, 44 J. P. 395.

Proper Information or Summons.]—Upon a warrant issued by a justice under 16 & 17 Vict. c. 119, s. 11, an act for the suppression of betting-houses, founded upon an information that a house was used as a common gaming-house within the meaning of the 8 & 9 Vict. c. 109, an act to amend the law concerning gaming and wagers, the house was searched, and B. and others apprehended and brought before the petty sessions, when B. was charged with having the management of a room in the house for the purpose of betting with persons resorting thereto, upon horse-races, contrary to the statute. No information charging such offence on summons embodying such information had been issued or served:—Held, that the want of such information or summons rendered the proceedings on the hearing invalid, and that the conviction thereon must be quashed. *Blake* v. *Beech*, 45 L. J., M. C. 111; 1 Ex. D. 320; 34 L. T. 764.

Held, also, that a month's notice of the taking of such proceedings was not necessary before laying an information under 16 & 17 Vict. c. 119, s. 17. *Ib.*

An information under 16 & 17 Vict. c. 119, charged A. with having on the 5th October, and on divers other days and times between the 5th October and laying the information (the 16th November), being then and there the occupier of a house, knowingly and wilfully opened, kept, and used the same for the purpose of betting with persons resorting thereto. The justices stated that it was established to their satisfaction that he did so keep and use the house on the 8th November, but not on the 5th October, or any other day; and they convicted him of the offence committed on the 8th November:—Held, that the information was good, as not alleging more than one offence, and that the conviction thereon might, therefore, be upheld. *Onley* v. *Gee*, 30 L. J., M. C. 222; 7 Jur. (N.S.) 570; 4 L. T. 338; 9 W. R. 662.

Arrest of Persons en masse—Jurisdiction of Magistrate to bind by Recognisances.]—The power of binding by recognisances persons "haunting, resorting, and playing" in gaming-houses given by s. 14 of the Unlawful Games Act, 1541, is exercisable by a magistrate where, in the case of a suspected betting-house, he has issued his warrant to the police under s. 11 of the Betting Act, 1853, and persons found on the premises have been arrested and brought before him. *Murphy* v. *Arrow*, 66 L. J., Q. B. 865; [1897] 2 Q. B. 527; 77 L. T. 435; 46 W. R. 94.

Penalty—Betting Houses Act—Licensing Act.]—The provisions of s. 17 of the Licensing Act, 1872, whereby a licensed person is liable to a penalty of 10*l.* for using his premises for the purpose of betting, do not repeal the provisions of s. 3 of the Betting Houses Act, 1853, whereby such person is liable to a penalty of 100*l.* for the same offence. *Sims* v. *Pay*, 58 L. J., M. C. 39; 60 L. T. 602; 16 Cox, C. C. 609; 53 J. P. 420.

—— **Right to.**]—On a summary conviction under 17 & 18 Vict. c. 38, for permitting gaming to be carried on in a house, before a metropolitan police magistrate, half the penalty, which is not payable to the informer, is payable to the receiver of the metropolitan police, and not to the overseer of the parish. *Wray* v. *Ellis*, 1 El. & El. 276; 28 L. J., M. C. 45; 5 Jur. (N.S.) 624; 7 W. R. 91.

No Appeal from Conviction.]—A conviction before justices, under 16 & 17 Vict. c. 119, s. 3, for keeping a gaming-house is a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, and the court of appeal has, therefore, no jurisdiction to hear an appeal from a judgment of the high court quashing the conviction on a case stated by justices. *Blake* v. *Beech*, 2 Ex. D. 335; 36 L. T. 723—C. A.

3. BETTING IN PUBLIC PLACE.

a. Instruments of Gaming.

Money.]—Betting odds on one of several dogs about to be run in a race and paying half a sovereign, is not playing or betting with a coin as an instrument of gaming. *Hirst* v. *Molesbury*, 40 L. J., M. C. 76; L. R. 6 Q. B. 130; 23 L. T. 55; 19 W. R. 246.

Halfpence used for pitch-and-toss are not in-

struments of gaming within 5 Geo. 4, c. 83, s. 4, *Watson* v. *Martin*, 34 L. J., M. C. 50 ; 11 Jur. (N.S.) 321 ; 11 L. T. 372 ; 13 W. R. 144 ; 10 Cox, C. C. 56. But see now 31 & 32 Vict. c. 52.

Machine.]—T. and L. were charged with an offence under 31 & 32 Vict. c. 52, s. 3, in being on a racecourse with a machine so constructed as to register the odds laid upon the horses then about to run in a race there. They were taking deposits on the bets made and amounts staked on the several horses, and soliciting bystanders to make bets, charging ten per cent. upon the amounts won, for the use of the instrument which displayed the state of the odds, and by a mechanical arrangement varied the announcement from time to time according to the bets made, and they having been convicted :—Held, that such a machine was an instrument or means of wagering within the meaning of the section, and that the conviction was therefore right. *Tollett* v. *Thomas*, 40 L. J., M. C. 209 ; L. R. 6 Q. B. 514 ; 24 L. T. 508 ; 19 W. R. 890.

Game of Chance.]—In order to convict under 36 & 37 Vict. c. 38, s. 3, of the offence of playing or betting by way of wagering or gaming, in a public place, with a coin, card, token, or other article used as an instrument or means of wagering or gaming, it is necessary to allege and prove that the defendant was guilty of wagering or gaming at some game or pretended game of chance. *Ridgeway* v. *Farndale*, 61 L. J., M. C. 199 ; [1892] 2 Q. B. 309 ; 67 L. T. 318 ; 41 W. R. 128 ; 17 Cox, C. C. 561 ; 56 J. P. 697.

A conviction under 5 Geo. 4, c. 83, s. 4, which stated that the defendant "did play in a certain highway (to wit) the River Thames, with certain instruments of gaming (to wit) cards, at a certain game of chance" is sufficient, as it describes the offence in the words of the statute creating it. *Grant, Ex parte*, 5 W. R. 289.

b. Public Place.

Place where Public have Access.]—A colliery company had a large field of thirty acres which they allowed the workmen and their families to use for recreation and bowling matches. Strangers were also allowed to come and play there, and were not turned away. One day T. and others played at pitch-and-toss in the field :—Held, that they were liable to be convicted under 36 & 37 Vict. c. 38, s. 3, for playing in a place to which the public are permitted to have access. *Turnbull* v. *Appleton*, 45 J. P. 469.

Railway Carriage.]—A party was convicted under 5 Geo. 4, c. 83, s. 4 (Vagrant Act), of playing in a certain open and public place (to wit, a carriage used on a railway) with an instrument of gaming :—Held, that the conviction was bad, it not showing that the carriage was being used for the conveyance of passengers on the line. *Freestone, In re*, 1 H. & N. 93 ; 25 L. J., M. C. 121 ; 2 Jur. (N.S.) 525 ; 4 W. R. 567.

The Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3, imposes a penalty upon "every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at, or with any coin, card, &c., used as an instrument or means of such wagering or gaming, at any game or pretended game of chance" :—Held, that a railway carriage while travelling on its journey is within the definition of an open and public place to which the public have or are permitted to have access in the section. *Langrish* v. *Archer*, 52 L. J., M. C. 47 ; 10 Q. B. D. 44 ; 47 L. T. 548 ; 31 W. R. 183 ; 15 Cox, C. C. 194 ; 47 J. P. 295.

4. Cheating at Play.

What is.]—The three prisoners being at a public-house with the prosecutor, one of the three placed a pen-case on the table and left the room. One of the two remaining then took out of the case a pen, and putting it under the prosecutor's glass, proposed to him, that he, the prosecutor, upon the return of the man who had left, should bet the man that there was no pen in the case. Being thus induced, the prosecutor made the bet and staked the money ; but the case having been turned into his hand, another pen tumbled out, and the prisoner took his money. Semble, that these facts did not amount to the offence of cheating at play within 8 & 9 Vict. c. 109, s. 17. *Reg.* v. *Hudson*, Bell, C. C. 263 ; 29 L. J., M. C. 145 ; 6 Jur. (N.S.) 566 ; 2 L. T. 263 ; 8 W. R. 421 ; 8 Cox, C. C. 305.

The prisoners were indicted and convicted under the 8 & 9 Vict. c. 109, s. 17, of obtaining by fraud and unlawful device and ill-practice in playing at a certain game or sport, to wit, in and by wagering on the event of a certain game or sport, a watch and other things from the prosecutor. The evidence was, that the prosecutor was induced to go to a public-house and drink and toss for wagers with one of the prisoners, and the event was that the prosecutor lost, and the prisoners took away the property stated :—Held, that this was a sport, pastime, or exercise, if not a game, within the meaning of s. 17 of 8 & 9 Vict. c. 109. *Reg.* v. *O'Connor*, 45 L. T. 512 ; 15 Cox, C. C. 3 ; 46 J. P. 214.

Sufficiency of Indictment.]—An indictment, framed under 8 & 9 Vict. c. 109, s. 17, alleged that the defendant, "by fraud, unlawful device, and ill-practice in playing at and with cards, unlawfully did win from, &c., a certain sum of money, with intent," &c. ; but it was not averred to whom the money belonged :—Held, that such an averment was not necessary, and the indictment was sufficient. *Reg.* v. *Moss*, 1 Dears. & B. 104 ; 26 L. J., M. C. 9 ; 2 Jur. (N.S.) 1196 ; 7 Cox, C. C. 200 ; 5 W. R. 49.

J. M.

GARNISHEE.

In Attachment of Debts.]—*See* ATTACHMENT OF DEBTS.

In Interpleader.]—*See* INTERPLEADER.

Foreign Attachment.]—*See* MAYOR'S COURT.

GAS AND GASWORKS.

1. *Supply.*
   - *a.* Duties as to, 539.
   - *b.* Payment for, 542.
   - *c.* Interference with, 545.

2. *Rights and Liabilities of Gas Companies.*
   a. In Breaking up Roads and Laying down Pipes, 545.
   b. Creating Nuisance, 549.
   c. For Explosions. *See* infra.
3. *Ratability of Works.* See RATES.
4. *Other Matters*, 551.
5. *Injury by Explosions*, 553.

1. SUPPLY.

a. Duties as to.

Generally.]—The effect of the Metropolitan Gas Act of 1860 is not to prevent companies who were not enumerated in it, and who were supplying gas to others than the public at the time of the passing of the act, from continuing to do so. *Imperial Gas Light and Coke Co.* v. *West London Junction Gas Co.*, 15 L. T. 66; 14 W. R. 1019.

Semble, that railway companies, and hotels in connection with them, are not "the public" within s. 54. *Ib.*

Notice to Supply—Length of Notice required.]—The Metropolis Gas Act, 1860, by s. 2 incorporates the Gasworks Clauses Act, 1847, except so far as the provisions thereof are inconsistent, and by s. 77 imposes a penalty upon a gas company if they wilfully fail for seven days after notice in writing by the consumer to furnish a supply of gas. The Gasworks Clauses Act, 1871, provides by s. 1 that the Gasworks Clauses Act, 1847, and this act shall be construed together as one act, and the provisions of this act shall be held to repeal such of the provisions of the former act as are inconsistent with it, and by s. 11 it is provided that every owner or occupier of a house requiring a supply of gas shall serve a notice upon the undertakers specifying the premises, and the day (not being an earlier day than a reasonable time after such notice) upon which such supply is to commence:—Held, that s. 11 of the later act repealed s. 17 of the former act, so that a metropolitan gas company to which these acts apply is bound to give a supply of gas within a reasonable time after notice by the consumer, and is not entitled to a seven days' notice. *South Metropolitan Gas Co.* v. *Noakes*, 61 L. T. 556.

Refusal—Penalty.]—By the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 2, the Gasworks Clauses Act, 1847 (10 Vict. c. 15), is incorporated with this act, and made to apply to the several metropolitan gas companies enumerated; by the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 1, the Gasworks Clauses Act, 1847, and this act shall be construed together as one act:—Held, that the Gasworks Clauses Act, 1871, applied to all the enumerated companies. *Commercial Gas Co.* v. *Scott*, 44 L. J., M. C. 171; L. R. 10 Q. B. 400; 32 L. T. 765; 23 W. R. 874.

The Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 36, imposes a penalty whenever the undertakers neglect or refuse to supply gas to any occupier within the limits of the special act under such pressure as is prescribed:—Held, that the section applied to a case where the gas company had improperly cut off the supply of gas. *Ib.*

Obligation—For what Period.]—There is no obligation upon a gas company to continue to supply a customer with gas for any particular period, nor does the circumstance of quarterly payments, or the hiring of a meter by the year, or of the company being the only one in the neighbourhood, afford any ground for implying a contract to that effect. *Hoddesdon Gas and Coke Co.* v. *Haselwood*, 6 C. B. (N.S.) 239; 28 L. J., C. P. 268; 5 Jur. (N.S.) 1013; 7 W. R. 415.

—— "Owner or Occupier" of Premises—Bankruptcy of Owner of Premises—Payment of Arrears.]—At the date of the receiving order the debtor was in arrear in respect of gas supplied to his premises during the previous quarter, and the company in consequence cut off the supply, and declined to reconnect at the request of the official receiver until the arrears were paid. The official receiver paid the amount claimed under protest. On application by the trustee in the bankruptcy for repayment:—Held, that the official receiver could not be said to be "owner or occupier" of the premises within s. 11 of the Gasworks Clauses Act, 1871, and was, therefore, not entitled to call on the company to supply him with gas, and that the application of the trustee must fail. *Mason, Ex parte, Smith, In re*, [1893] 1 Q. B. 323; 5 R. 47; 67 L. T. 596; 41 W. R. 159; 57 J. P. 72; 9 Morrell, 304.

A gas company had, under s. 16 of the Gasworks Clauses Act, 1847, power to stop the gas from entering the premises of a person who had been supplied with gas and had neglected to pay the rent due for it. Under s. 18 of its private act of 1872, in case any consumer should leave the premises where gas had been supplied to him without paying the rent due to the company, the company could not require from the next tenant payment of the arrears unless (inter alia) the incoming tenant should continue the trade or business of the outgoing tenant, and should have paid a consideration for so doing. A mill company had been supplied with gas on their premises, and owed to the gas company arrears of rent. Plaintiffs were appointed by the court receivers and managers of the business of the mill company on behalf of debenture-holders, and they entered into possession of the premises and carried on the business there:—Held, that whether or not the plaintiffs were "occupiers" of the premises so as to have the right themselves, apart from the mill company, to require a supply of gas, the gas company had a right to refuse to give it until the arrears of rent were paid. *Paterson* v. *Gas Light and Coke Co.*, 65 L. J., Ch. 709; [1896] 2 Ch. 476; 74 L. T. 640; 45 W. R. 39; 60 J. P. 532—C. A.

Per Lindley, L.J., and Lopes, L.J.: Receivers and managers on behalf of debenture-holders, whether appointed under a deed or by the court, are in the position of caretakers as regards the mortgagor company, and their entering on the premises makes no change of possession. The plaintiffs, therefore, were not "incoming tenants" within the meaning of s. 18 of the act of 1872, and that section was not applicable to the case. The principle of *Smith, In re, Mason, Ex parte* ([1893] 1 Q. B. 323), applied. *Ib.*

Per Rigby, L.J.: Sect. 18 of the act of 1872 enabled the gas company to require payment of arrears from incoming tenants except in certain cases, but did not deprive the company of its remedy by way of stopping the supply of gas.

Assuming that the plaintiffs in other respects came within the section, they were not persons who had paid any consideration to anybody for carrying on the business. *Ib.*

Failure of Supply—Unavoidable Occurrence—Abatement of Price.]—A gas company who are under a statutory obligation to supply a fixed quantity of gas to the public lamps in a district at a fixed price during a certain period are not liable to a reduction in that price if, by reason of an occurrence over which they had no control (such as a frost of exceptional severity), the fixed amount of gas has not been supplied during a part of that period. *Richmond Gas Co. and Richmond Corporation, In re*, 62 L. J., Q. B. 172; [1893] 1 Q. B. 56; 5 R. 29; 67 L. T. 554; 41 W. R. 41; 56 J. P. 776.

Supply beyond Assigned District.] — Upon the true construction of s. 6 of the Metropolis Gas Act, 1860, a gas company is prohibited from furnishing to a customer a supply of gas for the purpose of consumption by him within a district assigned to another company, notwithstanding that the meter through which the supply passes is on a part of the customer's property which is within the district. *Imperial Gas Light Co.* v. *West London Junction Gas Co.* (56 L. J., Ch. 862, n.) distinguished. *Gas Light and Coke Co.* v. *South Metropolitan Gas Co.*, 62 L. J., Ch. 123; 62 L. T. 126; 54 J. P. 373—H. L. (E.)

—— **Interference with Private Rights.**]—A corporation having, under the provisions of an act of parliament, bought up a gas company which previously supplied gas to the borough, and which had compulsory powers for the purpose within the borough, commenced supplying gas to an adjoining township, in which another gas company already existed, having similar powers within the township. The gas company of the township having filed a bill against the corporation to restrain them from supplying gas within the township, and alleging, as a personal injury which entitled them to maintain their suit, that the corporation had contracted to supply gas to a particular manufactory within the township which otherwise they must have supplied, and that they had thereby been deprived of the profits arising from the supply of gas to the manufactory, and that great loss would be sustained by them:—Held, that the injury alleged was not such as entitled the plaintiffs to maintain the suit. *Pudsey Coal Gas Co.* v. *Bradford Corporation*, 42 L. J., Ch. 293; L. R. 15 Eq. 167; 28 L. T. 11; 21 W. R. 286.

Purity and Illuminating Power.]—The Gas Light and Coke Company's Act, 1868, and the City of London Gas Act, 1868, do not repeal the provisions of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), as to the purity and illuminating power of the gas without as well as within the city of London. *Gas Light and Coke Co.* v. *St. George, Hanover Square, Vestry*, 42 L. J., Q. B. 50; 28 L. T. 281—Ex. Ch. S. P., *Great Central Gas Consumers' Co.* v. *Clarke*, infra.

—— **Gas Examiner—Hearing Counsel.**]—The chief gas examiner of the metropolitan district has a discretion as to whether he will or will not hear counsel upon an appeal to him under s. 12 of the Gas Companies Acts Amendment Acts, 1880. *Reg.* v. *Williamson*, 59 L. J., Q. B. 493; 63 L. T. 276; 38 W. R. 769; 55 J. P. 101.

—— **Supply of Impure Gas—Remedy.**]—The obligation to supply pure gas imposed upon those who deal with the public under the Gas Works Clauses Act, 1871, is statutory and not contractual; and the means of enforcing that obligation is either by indictment or by the remedy provided by that act. *Clegg, Parkinson & Co.* v. *Early Gas Co.*, 65 L. J., Q. B. 339; [1896] 1 Q. B. 592; 44 W. R. 606.

b. Payment for.

Price, how Regulated.]—The price to be charged for gas supplied to the metropolis (as well as the quality) is regulated by the Metropolis Gas Act, 1860, and not by a prior private act. *Great Central Gas Consumers' Co.* v. *Clarke*, 13 C. B. (N.S.) 838; 32 L. J., C. P. 41; 11 W. R. 123—Ex. Ch.

Arrears—From whom Recoverable.]—By the Gas Light and Coke Company's Act, 1872, in case a consumer of gas leaves the premises without paying the rates due for gas supplied to him, the company shall not require payment of the arrears from the incoming tenant unless he shall have agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade of the outgoing one and pay him or the owner a consideration for so doing. B. having taken over a public-house from M., who was in debt to the gas company for gas supplied, was summoned by the company for non-payment of the arrears:—Held, that the act of 1872 gave no positive power to require payment of the arrears from B. and that the gas company could not recover them from him. *Gas Light and Coke Co.* v. *Mead*, 45 L. J., M. C. 71; 33 L. T. 729. And see *Mason, Ex parte, Smith, In re*, and *Paterson* v. *Gas Light and Coke Co.*, supra.

Distress for Money Due.]—A gas company, having under its private act of parliament a power to levy by distress all sums of money due for the supply of gas, is not a landlord or other person to whom rent is due withing the meaning of s. 34 of the Bankruptcy Act, 1869, and such a company having distrained upon the goods of a liquidating debtor will be restrained from dealing with the distress. *Roberts, In re, Hill, Ex parte*, 46 L. J., Bk. 116; 6 Ch. D. 63; 37 L. T. 46; 25 W. R. 784—C. A.

A landlord's distress for rent is not liable to be restrained as "an execution or other legal process" within the Bankruptcy Act, 1869, s. 13. *Birmingham and Staffordshire Gas Light Co., Ex parte, Fanshaw, In re*, 40 L. J., Bk. 52; L. R. 11 Eq. 615; 24 L. T. 639; 19 W. R. 603.

Under a local statute a gas company had the same rights with respect to recovering the rent or charge due for the supply of gas, as landlords have with respect to recovering rent. The company, after notice that a firm indebted to them for a supply of gas had filed a petition under the Bankruptcy Act, 1869, s. 125, distrained in pursuance of its statutory rights upon their goods. The creditors of the firm afterwards resolved on liquidation, and a trustee was appointed:—Held, that the distress was not liable to be restrained as "an execution or other legal process" within s. 13; and that, assuming the filing of the peti-

tion to be equivalent to the commencement of a bankruptcy, the company was entitled to distrain, after the filing, for one year's supply of gas. *Ib.*

By their special act (39 & 40 Vict. c. 119, s. 44) the corporation of Walsall were empowered to "recover from any person any rent or charge due to them by him for gas supplied by the like means as landlords are for the time being by law allowed to recover rent in arrear":—Held, that, after the filing of a liquidation petition by a customer, the corporation were entitled as against the trustee in the liquidation to levy a distress in respect of a sum due by the debtor for gas supplied to him before the filing of the petition. *Harrison, Ex parte, Peake, In re*, 53 L. J., Ch. 977; 13 Q. B. D. 753; 51 L. T. 878.

Held, also, that the corporation were not, within the meaning of s. 34 of the Bankruptcy Act, 1869, "other persons" to whom any rent was due by the debtor, but that, by virtue of s. 44 of the special act, they were entitled to the rights given to landlords by s. 34. The payment to a gas company for gas supplied, though it is called "rent" in some acts of parliament, is not really of the nature of rent, and consequently a gas company does not come within the words "other person to whom any rent is due" in s. 34 of the Bankruptcy Act, 1869. Those words apply only to a person who, though he is not the landlord of the bankrupt, fills a position analogous to that of a landlord, because he is entitled to receive that which is rent strictly so called. *Birmingham Gas Light Co., Ex parte*, (L. R. 11 Eq. 615), and *Hill, Ex parte* (6 Ch. D. 63), commented on. *Ib.*

When Gratuitous.]—The Oldham Corporation Gas and Water Act (16 & 17 Vict. c. xlii.) provides by s. 58 that "the corporation shall at all times afford an ample supply of gas and water without charge to all hospitals and infirmaries within the limits of the act, and all baths and washhouses and all buildings within those limits respectively maintained at the expense of the borough rates or the rates for the relief of the poor or other rates raised within those limits." The Oldham Poor Law Union, in addition to four townships within the limits of the act, contains four townships not included within those limits, and the workhouse, which is situate within the limits, is maintained by rates raised for the relief of the poor within all the townships of the union:—Held, that the corporation are not bound to supply gas and water gratuitously to the workhouse, as the benefit can only be demanded by institutions which are supported by rates wholly raised within the limits. *Oldham Union* v. *Oldham Corporation*, 2 W. R. 590.

Reduction of Price—Jurisdiction of Quarter Sessions.]—By s. 35 of the Gasworks Clauses Act, 1847, a court of quarter sessions may, on the petition of two gas-ratepayers, appoint some accountant, or other competent person, to examine and ascertain at the expense of the gas company (the amount of the expense to be determined by the court) the actual state and condition of the concerns of the company, and to make a report thereof to the court, and power is given to the court to examine witnesses on oath touching the truth of the said accounts and the matters therein referred to; and if it appear to the court that the profits of the company during the preceding year have exceeded the prescribed rate, the court has power, in case the whole of the reserve fund has been and remains invested, and in case dividends to the amount hereinbefore limited have been paid, to make an order reducing the price of the gas supplied by the company. A petition was under this section presented to the recorder of Hanley praying him to appoint a person to inquire into the actual condition of the undertaking of the prosecutors, and an accountant was appointed. During the inquiry he examined not only the accounts of the then previous year, but re-opened all the accounts of previous years to 1871, and a report based upon this inquiry was sent in by him to the recorder. It was admitted that the whole of the reserve fund was not then and never had been invested, and that the prescribed maximum dividend had not been paid. The recorder, being of opinion that the accounts when amended showed that the company had in point of fact earned enough to pay the prescribed maximum dividend, and to have invested and kept invested the whole of the reserve fund, made an order reducing the price of gas 6*d.* per 1,000 cubic feet. He further ordered the prosecutor to pay 650*l.*, the expense of the proceedings before the accountant, and to pay to the petitioners 2,433*l.* 6*s.* 6*d.*, "their costs of and incident to the petition." Upon an application for a writ of certiorari to quash the order as being made without jurisdiction:—Held, that the order to reduce the price of gas was bad, the power of the recorder being absolutely restricted by s. 35 to cases where the whole of the reserved fund has been invested and the prescribed dividend paid; and that the recorder acted without jurisdiction in ordering the costs of the petitioners to be paid to the prosecutors. *Reg.* v. *Hanley (Recorder)*, 56 L. J., M. C. 125; 19 Q. B. D. 481; 57 L. T. 444; 36 W. R. 222; 52 J. P. 100.

The accountant and the recorder had jurisdiction to inquire into the accounts of past years for the purpose of ascertaining the actual condition of the concern; but, semble, that they had no power to disallow and re-cast them, and by so doing vary the accounts of the year into which they were inquiring. *Ib.*

—— **Appointment of Engineer to assist Accountant.**]—The court of quarter sessions has no jurisdiction, under s. 35 of the Gasworks Clauses Act, 1847, to appoint a gas engineer to assist an accountant appointed thereunder to examine and ascertain the actual state and condition of the concerns of the gas company, and where such order is made a writ of certiorari will lie to bring the order up to be quashed. *Reg.* v. *Brindley*, 54 L. T. 435; 50 J. P. 534.

—— **Application by Consumers.**] — Certain consumers of gas brought an action against the gas company which supplied them, on the ground that the company had created a reserve fund greatly in excess of that authorised by its special acts, and had carried over from year to year large undivided profits, thereby avoiding the obligation upon it to reduce the price of the gas which it so supplied:—Held, that no such duty as alleged was imposed by the acts on the company; that the consumers had no control over the affairs of the company, and were not, therefore, entitled to raise the question, the shareholders alone being interested; and that the court could not order the reserve fund and

undivided profits to be applied in reduction of the price of the gas in the manner suggested. *Mason* v. *Ashton Gas Co.*, 54 L. T. 708; 50 J. P. 628—C. A.

c. Interference with.

Fraudulently Cutting Pipes—Concealment.]—A count stated that the defendants bored into the gas-pipes of the plaintiffs, and affixed gas-pipes of the defendants thereto, and kept them so affixed for a long time, without the knowledge of the plaintiffs, by means whereof quantities of the plaintiffs' gas flowed out of their pipes; that the defendants, maliciously contriving to prevent the plaintiffs from discovering the trespasses so committed till six years should have elapsed, fraudulently and without the plaintiffs' knowledge cut off from the plaintiffs' gas-pipes the gas-pipes of the defendants so affixed thereto, and fraudulently and without the plaintiffs' knowledge stopped and plugged up the gas-pipes of the plaintiffs, where the gas-pipes of the defendants had been so affixed, by means whereof the plaintiffs were prevented from discovering the trespasses until six years from their commission had elapsed, and thereby the remedy of the plaintiffs by action became barred:—Held, that the count disclosed a good cause of action. *Imperial Gas Light and Coke Co.* v. *London Gas Light Co.*, 10 Ex. 39; 2 C. L. R. 1230; 23 L. J., Ex. 303; 18 Jur. 497; 2 W. R. 527.

Laying Pipe to communicate with Pipe of Company without Consent.]—The appellants, on their own premises, substituted for part of a gas pipe belonging to the respondents a larger pipe for the purpose of increasing their supply. This was done without any fraud, waste, or misuse of the gas, but without the respondent's consent, although notice of intention to disconnect the pipe from the meter was duly given under s. 15 of the Gasworks Clauses Act, 1871. Upon summons a stipendiary magistrate convicted the appellants under s. 18 of the Gasworks Clauses Act, 1847:—Held, upon a case stated, that the appellants had within the meaning of that section caused to be laid a pipe to communicate with a pipe belonging to the undertakers without their consent; and that the magistrate rightly convicted them. *Wood* v. *West Ham Gas Co.*, 52 L. T. 817; 33 W. R. 799; 49 J. P. 662.

Larceny of Gas.]—A person was indicted for stealing a quantity of gas from a gas company. He only paid the company for the amount that was indicated by a meter placed on the premises; but by means of stop-cocks and pipes he intercepted large quantities of gas which did not pass through the meter. He was convicted of larceny:—Held, that the conviction was good, and that there is nothing in the nature of gas to prevent it being the subject of larceny. *Reg.* v. *White*, Dears. C. C. 203; 1 C. L. R. 489; 3 Car. & K. 363; 22 L. J., M. C. 123; 17 Jur. 536; 1 W. R. 418; 6 Cox, C. C. 213.

2. Rights and Liabilities of Gas Companies.

a. In Breaking up Roads and Laying down Pipes.

When Indictable.]—In a town there was a gas company, established by a local act, which incorporated the Gasworks Act, 1847. There were also commissioners under a local act, with powers to lay down mains and pipes for the public lighting of the town, but with no powers to supply or lay down pipes for the supply of private houses. The commissioners, who had formerly been supplied with gas by the old company, duly transferred their powers to the Longton Gas Company, which was a company, but without any parliamentary powers as a gas company. Upon an indictment against them for obstructing the public highway, by opening trenches and laying down pipes, and conveying gas to the public lamps and to private houses:—Held that they were not indictable for the acts done for the public lighting of the town, those acts being authorised by the powers transferred to them by the commissioners; but that the taking up the pavement, and digging trenches, in one instance across the street, and in other instances across the footway of the street, in order to lay down service-pipes to private houses from the mains, could not be justified as acts done in the exercise of the right of each householder to make such a slight temporary obstruction on the highway as may be necessarily incidental to the enjoyment of his property; and that therefore the company, having no parliamentary powers for the purpose, and a householder who authorised the acts, were indictable. *Reg.* v. *Longton Gas Co.*, 2 El. & El. 651; 29 L. J., M. C. 118; 6 Jur. (N.S.) 601; 2 L. T. 14; 8 W. R. 293; 8 Cox, C. C. 317.

Restraining by Injunction.]—A gas company was incorporated by statute, for the purpose of supplying a town with gas. Some years afterwards another company was formed, and registered under the 7 & 8 Vict. c. 110, for a like purpose, and commenced opening up the streets and highways to lay down their pipes, some of the inhabitants approving and some disapproving of the works. A court of equity refused an injunction to restrain the new company from continuing their works, the nuisance or damage being trivial. *Att.-Gen.* v. *Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 304; 22 L. J., Ch. 811; 17 Jur. 677; 1 W. R. 185.

The disturbance of the pavement of a town by an unincorporated gas company, without lawful authority, for the purpose of laying down gas-pipes, is not a nuisance so serious and important that a court of equity will interfere by injunction to prevent it. The views of the governing body of a town, and the motives of the persons instituting a suit, are not immaterial where the complaint is of a public injury. *Att.-Gen.* v. *Cambridge Consumers' Gas Co.*, 38 L. J., Ch. 94; L. R. 4 Ch. 71; 19 L. T. 508; 17 W. R. 145.

Dover Gas Company—Powers of.]—The Dover Gas Light Company has power under its act of incorporation, without the consent of the commissioners for executing the paving acts for Dover, but under the conditions prescribed by its act, to lay down in the streets of Dover in which gas-pipes had been already laid down by them, and were still in use, additional gas-pipes parallel to and to be used with such others, for the same purpose of supplying gas to the town. *Dover Gas Light Co.* v. *Dover Corporation*, 7 De G. M. & G. 545; 1 Jur. (N.S.) 812.

Private Roads—Occupiers.]—An estate was

purchased for the purpose of building houses; a part was laid out as private roads, and upon a partition, the owners taking the roads covenanted that the other freeholders and the occupiers of the houses should have the full use and enjoyment of the roads in as absolute a manner as if they were public roads :—Held, that a request to be supplied with gas by a minority of the occupiers of houses was sufficient, without the consent of the freeholders, to justify the breaking up the roads by the gas company to lay down their pipes to comply with such request; and every occupier had the same right, for the purpose of his use and enjoyment, to call in all such aid as he might have done if the roads had been public roads. *Selby* v. *Crystal Palace District Gas Co.*, 4 De G. F. & J. 246; 31 L. J., Ch. 595; 8 Jur. (N.S.) 830; 6 L. T. 790; 10 W. R. 636.

Injuring Property when laying Pipes.]—By 10 & 11 Vict. c. 15 (The Gasworks Clauses Act, 1847), s. 6, the undertakers are authorised to open and break up the soil and pavement of the several streets, within the limits of their special act, and to lay down pipes for supplying gas. By s. 7, it is provided that nothing herein shall authorise the undertakers to lay down or place any pipe or other works into, through or against, any building, or in any land not dedicated to the public use, without the consent of the owners and occupiers. A road passed alongside the plaintiff's premises, and over certain arches occupied by him as cellars. A company, constituted under a local act incorporating the Gasworks Clauses Act, 1847, in opening and breaking up the soil of the road for the purpose of laying down gas-pipes, damaged the arches :—Held, that the arches were buildings within s. 7, and that the company could not justify breaking through them. *Thompson* v. *Sunderland Gas Co.* 46 L. J., Ex. 710; 2 Ex. D. 429; 37 L. T. 30; 25 W. R. 809—C. A.

A gas company, for the purposes of their undertaking, broke up the concrete pavement of a street within the limits of their special act. In the course of such work a servant of the company in striking the concrete with a pick, caused a piece of the concrete to fly up some distance and break a plate-glass window upon adjoining premises. In an action by the owner of the premises to recover damages :—Held, that the company were liable under s. 6 of the Gasworks Clauses Act of 1847, which was incorporated in their special act. *Hornby* v. *Liverpool United Gas Light Co.*, 47 J. P. 231.

Agreements to Repair and Obstruct Highway.]—A gas company agreed with a highway board that, in consideration of the board allowing them to open a highway under the control of the board for the purpose of laying down their pipes, they would pay to the board a certain sum per yard of road so opened, and would make good the surface of the road. On demurrer to a declaration for a breach of this agreement :—Held, that as the highway board could have prevented the laying down of the pipes, and was liable to keep the road in repair after the gas company had left it, there was a good consideration moving from the highway board to support the agreement, and that the agreement did not necessarily contemplate the indictable offence of blocking up the highway, and was therefore not illegal. *Edgware Highway Board* v. *Harrow District Gas Co.*, 44 L. J., Q. B. 1; L. R. 10 Q. B. 92; 31 L. T. 402; 23 W. R. 90.

"Street, Highway, or Public Place"—Laying Mains on Seashore.]—A gas company laid down main pipes between two villages on the seashore in an open tract of land above mean high-water mark, which belonged to the owner of the enclosed land fronting the shore. The inhabitants of the villages had always gone to and fro between them along the shore, and at high water passed over this piece of land as they chose and in accordance with the tide, but by no defined track. The owners brought an action for a mandatory injunction to compel the company to remove the pipes :—Held, that the tract of land in question was not a "street, highway, or public place" within the meaning of the Gasworks Clauses Act, 1847. *Maddock* v. *Wallasey Local Board*, 55 L. J., Q. B. 267; 50 J. P. 404.

Support of Mains laid in Highway without Statutory Powers—Subsequent Act giving Authority—Compensation.]—A limited gas company, acting without any statutory authority, and without the authority of the landowner, but with the permission of the highway authority, laid pipes under the soil of the highway. Subsequently a gas company was constituted by a private act, which incorporated the Gasworks Clauses Acts, 1847 and 1871. The private act of this company provided for the dissolution of the limited company, and enacted that all lands, gasworks, easements, mains, pipes, plant, and apparatus placed by, vested in, or which were the property of the limited company immediately before the passing of the act, should be similarly vested in the incorporated company, and the incorporated company were empowered to maintain the existing gasworks and to lay down and maintain additional mains and pipes. The Gasworks Clauses Act, 1847, gives power to undertakers of gasworks to open the soil within their district, to lay and repair pipes therein, and to do other acts necessary for supplying gas, making compensation for any damage done in the execution of such powers. The Gasworks Clauses Act, 1871, renders it compulsory on undertakers of gasworks to supply gas on certain conditions and within certain limits. The defendants, the lessees of the minerals under and adjacent to the highway under which the plaintiffs had laid their pipes, had by working the coal thereunder let down the soil of the highway and caused injury to the plaintiffs' pipes :—Held, that the plaintiffs were entitled to support for their pipes, and that the landowner was entitled to compensation for the burden thus imposed upon him; that the plaintiffs could therefore recover damages by action for any injury caused to their pipes, while the owner of the minerals could recover compensation in an arbitration for the limitation thus put upon the user of his lands. *Normanton Gas Co.*, v. *Pope*, 52 L. J., Q. B. 629; 49 L. T. 798; 32 W. R. 134—C. A. Affirming, 47 J. P. 181.

Injury to Pipes under Roads by Steam Roller.]—The plaintiffs, a gas company, laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the street and houses in the streets. The streets were vested in the defendants, the vestry of the parish, by certain statutes which gave them the authority

of the surveyor of highways, and with the duty to repair, but without prescribing any particular mode of repair. The defendants used steam-rollers for the repair of the streets, as being a mode of repair most advantageous to both the ratepayers and the public, but the rollers they used were so heavy as to frequently injure the plaintiffs' pipes, though the pipes were sufficiently below the surface so as not to have been injured by the ordinary mode of repair if such rollers had not been used:—Held, that the plaintiffs were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain the defendants from using steam rollers in such a way as to injure the pipes of the plaintiffs. *Gas Light and Coke Co.* v. *St. Mary Abbott's Vestry*, 54 L. J., Q. B. 414; 15 Q. B. D. 1; 53 L. T. 457; 33 W. R. 892; 49 J. P. 469—C. A. Affirming, 1 Cab. & E. 368.

Failure to properly reinstate Roadway after laying Gas Main—Nuisance—Liability.]—The defendants, a gas company, had been laying down a gas main, and for that purpose had dug a trench along the side of a public road, which they filled up so carelessly and defectively that the wheel of the vehicle in which the plaintiff was sank suddenly into the trench, causing the vehicle to be upset, and throwing out the plaintiff and thereby causing the injuries in respect of which the action was brought:—Held, that the defendants were liable in damages, notwithstanding the provisions of section 11 of the Gasworks Clauses Act, 1847. *Goodson* v. *Sunbury Gas Consumers' Co.*, 75 L. T. 251; 60 J. P. 585.

b. Creating Nuisance.

Fouling Wells and Streams.]—A statute constituting a gas company, and giving them great powers, contained an enactment to the effect, that if the company should "cause or suffer to be conveyed or to flow into any stream," any refuse matter from their works, so as to foul such water they should forfeit for every such act 200*l.*; and another that they should be liable, in addition, to "a penalty of 20*l.* a day for each day such refuse shall be so conveyed or flow, or the act by which such water shall be fouled, shall continue after notice:—Held, that the meaning was to give the public a guarantee that the company should be bound to take every possible care that the consequences of their works should not be hurtful to the water of the neighbourhood. *Birmingham and Staffordshire Gas Light Co.*, v. *Hipkins*, 6 H. & N. 250; 30 L. J., Ex. 60; 7 Jur. (N.S.) 213; 9 W. R. 168—Ex. Ch.

—— **Percolations.**]—When noxious matter percolates through the soil from gasworks, so as to foul a well, such percolation will render the defendants liable under the 3 & 4 Will. 4, c. 90, which imposes a penalty of 200*l.* on any gas company, "who shall suffer any washings, &c., to be conveyed into any well." *Millington* v. *Griffiths*, 30 L. T. 65.

—— **Disuse of Wells.**]—A well which, on account of its having become contaminated, has been disused by the owner for several years, and has been covered over, does not cease to be a well within the meaning of the act. *Ib.*

Non-user, and closing of his own well in consequence of its being polluted, even coupled with the acceptance by the plaintiff of the use of substituted wells of the defendants, is not such an abandonment of the former as to alter its character and make it no longer a well, nor can any licence to pollute be inferred from such a state of facts. *Ib.*

—— **Who to Recover Penalty.**]—By a local act a penalty was imposed on any gas or other company for suffering any impure matter to flow into any stream, to be sued for by a common informer. Afterwards, by the Gasworks Clauses Act (10 & 11 Vict. c. 15, s. 21), a like penalty is imposed for the same offence, such penalty "to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act":—Held, that the latter provision was pro tanto a repeal of the former. *Parry* v. *Croydon Commercial Gas Co.*, 15 C. B. (N.S.) 568; 10 Jur. (N.S.) 172; 9 L. T. 694; 12 W. R. 212—Ex. Ch.

Indictment.]—In an indictment against a gas company for a nuisance in conveying the refuse of gas into a great public river, whereby the fish are destroyed and the water is rendered unfit for drinking, the question for the jury is, whether the acts done by the company complained of amount to a nuisance. *Rex* v. *Medley*, 6 Car. & P. 292.

The circumstance, that, by the diminution of fish, a considerable number of fishermen are thrown out of employ, is not of itself a sufficient ground to sustain an indictment. *Ib.*

Liability of Directors.]—The directors of a gas company are answerable for an act done by their superintendent and engineer, under a general authority to manage the works, though they are personally ignorant of the particular plan adopted, and though such plan is a departure from the original and understood method, which the directors had no reason to suppose had been discontinued. *Ib.*

Action to Restrain Nuisance.]—In an action to restrain a gas company from creating a nuisance at its gas manufactory:—Held, that the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), is incorporated with the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), except so far as its provisions are inconsistent with that act; and a company performing the obligations of the act of 1860 cannot justify creating a nuisance by setting up incapacity to make or supply gas without so doing. *Att.-Gen.* v. *Gas Light and Coke Co.*, 47 L. J., Ch. 534; 7 Ch. D. 217; 37 L. T. 746; 26 W. R. 125.

Held, also, that, even if the company was at liberty to justify itself, the burden of proof rested on it both by the ordinary law and by the act of 1860, s. 52, and that they had failed to discharge that burden by their evidence. *Ib.*

Injunction to restrain the erection of gasworks in the vicinity of the plaintiff's residence refused, it being uncertain whether upon the completion of the works the manufacture of gas would prove a nuisance. Where a work is going on, which, though not in itself a nuisance, will manifestly end in operations presenting such a nuisance as this court restrains, this court will interfere at once. A motion for an injunction to restrain a contingent nuisance was refused:—Held, that the motion ought to be refused with costs, and not stand over. *Haines* v.

Taylor, 2 Ph. 209; 11 Jur. 73. Affirming, 10 Beav. 75.

A gas company granted a lease of a piece of ground abutting on the Regent's Canal at Hackney, with a covenant by the lessee to erect a lime kiln and keep up a road, and by the lessors to make the road, and, if it should be necessary to remove it (which they had power to do), to make a new one of like materials. The lessee built the kiln and premises, and the lessors made the road. In 1865 the lessors (having built two gasholders) proposed to erect a third, and enlarge a basin or lay-by, which would render the diversion of the road necessary, but it was proposed to reinstate it with a slight curve. The lessee filed a bill to restrain the erection of the gasholder and the alteration of the road; as to the gasholder, on the ground of nuisance and obstruction of the view of the plaintiff's premises; and as to the road, that it was a mere device to alter the road. On motion, an injunction as to the gasholder was refused; but that as to the road granted, on the usual undertaking as to damages. The bill was afterwards dismissed with costs. An inquiry was then asked for as to damages, and the order of dismissal was made without prejudice to any application as to damages. *Butt* v. *Imperial Gas Light and Coke Co.*, 14 W. R. 508.

A market gardener, whose premises adjoined those of a gas company, brought an action against the company for the injury done to his crops, by reason of the noxious matter issuing from the company's works. During the trial, the judge suggested a reference to an arbitrator, who was to determine as to the injury, and as to "what should be done" between the parties. The reference having taken place, the arbitrator made his award in respect of the damage sustained up to the date of the award, and no evidence having been adduced before him as to prospective damage, a verdict was entered up for the sum awarded. The company subsequently increased their works. On a bill filed by the market gardener:—Held, that he was entitled to a perpetual injunction to restrain the further manufacture of the gas in a manner injurious to his crops, the award of the arbitrator being, under the circumstances, equivalent to the verdict of a jury. *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 De G. M. & G. 436; 26 L. J., Ch. 276; 2 Jur. (N.S.) 1132; 3 Jur. (N.S.) 221. Affirmed next case.

Acquiescence.]—A plaintiff brought an action to recover damages for an injury to his business occasioned by the erection of gasworks; the action was referred to arbitration; nearly two years elapsed before the award was made; in the course of which time alterations in the mode of carrying on the business complained of were effected; two months after the date of the award an injunction was applied for:—Held, that there had not been any such acquiescence as to deprive the plaintiff of his right to the injunction. *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. Cas. 600; 29 L. J., Ch. 377; 5 Jur. (N.S.) 1319.

c. For Explosions.—*See* infra.

3. RATABILITY OF WORKS. *See* RATES.

4. OTHER MATTERS.

Annual Accounts.]—By s. 2 of the Dudley Gas Act, 1853 (16 Vict. c. 2), the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15) is incorporated with that act. By the Gasworks Clauses Act, 1847, s. 49, nothing therein or in the special act contained is to exempt the undertakers from any general act relating to gasworks passed in any future session of parliament. By s. 1 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), the Gasworks Clauses Act, 1847, and this act shall be construed together, and the provisions of this act shall be held to repeal and supersede such of the provisions of that act as are inconsistent with this act"; and by s. 3, "the provisions of this act shall apply to every gas undertaking authorised by any special act hereafter passed. . . .":—Held, that the Gasworks Clauses Act, 1871, being a general act relating to gasworks, applied to the Dudley Gas Act, 1853, which was a special act incorporating the Gasworks Clauses Act, 1847; and that therefore the company was liable to a penalty for not keeping and selling the annual statement of accounts, imposed by s. 35 of the Gasworks Clauses Act, 1871. Held, further, that the complaint was in time. *Dudley Gas Light Co.* v. *Warmington*, 50 L. J., M. C. 69; 44 L. T. 475; 29 W. R. 680; 45 J. P. 649.

The Leamington Priors Gas Company's Act, 1865 (28 Vict. c. cxxviii.), which incorporated the Gasworks Clauses Act, 1847, except so far as it might be varied by any provision of the special act, prescribes by s. 32 a special form in accordance with which the annual accounts of the company were to be made up, in lieu of provisions as to accounts contained in s. 38, of the Act of 1847. By s. 49 of the Act of 1847, undertakers are not to be exempted from any general act relating to gasworks which may be passed in any future session. By s. 1 of the Gasworks Clauses Act, 1871, that act and the act of 1847 are to be construed as one act, and by s. 35 of the act of 1871, the undertakers are to make an annual statement of accounts in the form prescribed by that act, and to furnish copies of the same to any applicant. The appellants made out their annual statement of accounts in the form prescribed by s. 32 of their special act, and did not furnish to the respondent on application, a copy of an annual statement of their accounts made out in the form prescribed by the act of 1871:—Held, that as the appellants' special act prescribed the form in which the annual statement of accounts was to be made up, the provisions relating to the form of accounts in s. 35 of the Gasworks Clauses Act, 1871, did not apply. *Dudley Gasworks Co.* v. *Warmington* (50 L. J., M. C. 69) distinguished. *Leamington Priors Gas Co.* v. *Davis*, 56 L. J., M. C. 14; 18 Q. B. D. 107; 55 L. T. 734; 35 W. R. 123; 51 J. P. 360.

Gas-stoves let for Hire—Exemption from Distress.]—By s. 14 of the Gasworks Clauses Act, 1847, "The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, and any fittings for the gas . . . and such meters and fittings shall not be subject to distress . . . for rent of the premises where the same may be used":—Held, that a gas-stove let for hire was within the words "fittings for the gas," and therefore was not subject to distress for rent. *Gaslight and Coke Co.* v. *Hardy*, 56 L. J., Q. B. 168; 17 Q. B. D. 619; 55 L. T. 585; 35 W. R. 50; 51 J. P.

5. Injury by Explosions.

Duty of Company — Construction of stop-cock.]—In the absence of any statutory enactment, there is no precise duty imposed upon a gas company supplying gas to a dwelling-house to construct a stop-cock on the pipe outside the house, so that, upon receiving a notice no longer to supply the gas, the company may cut off the supply completely from the house. *Holding* or *Holden* v. *Liverpool Gas Co.*, 3 C. B. 1; 15 L. J., C. P. 301; 10 Jur. 883.

Where, therefore, a fire occurred in an uninhabited house, owing to the escape of gas, a previous notice having been given to the gas company, that no further supply was wanted, and it appeared that there was a stop-cock inside the house, which, if turned, the escape could not have taken place:—Held, that the owner of the house could not recover against the company for the damage done by the fire. *Ib.*

—— **Escape of Gas.**]—A declaration stated that the plaintiff was possessed of premises; that the defendant was employed in laying on gas to the premises adjoining; and that he did the work so negligently, that the gas escaped and ignited, and the premises adjoining the plaintiff's were set on fire, and thereby his premises were set on fire and burnt:—Held, that the declaration disclosed a good cause of action; that it was unnecessary to negative negligence in the owner of the adjoining house in putting out the fire before it communicated with the plaintiff's premises. *Blenkiron* v. *Great Central Gas Consumers' Co.*, 3 L. T. 317.

In an action against a gas company for negligently allowing the escape of gas from their main into premises where lights were known to be burning, the case was that the gas found entrance through an open window nearly level with the trench from the main, after a hole had been made in the main for the insertion of the service-pipe:—Held, that even if the jury thought the gas so entered, it was a question for them whether the company's men might reasonably have foreseen it, and were bound to have the window closed. *S. C.*, 2 F. & F. 437.

—— **Evidence of Negligence.**]—Owing to excavations made by the Commissioners of Sewers within two and a half feet of a gas main embedded in a highway at a depth of ten and a half inches, one of the gas pipes was deprived of support from beneath. The weight of traffic above cracked the pipe, and an escape and accumulation of gas occurred for two or three days, resulting in an explosion which injured a man passing. The gas company were unaware of the escape of gas, as well as of the excavation, of which they had received no notice:—Held, that the character of the crack in the pipe, the length of time the gas was escaping, and the absence of anyone on behalf of the gas company at the time of the excavation, constituted evidence of negligence on their part. *Price* v. *South Metropolitan Gas Co.*, 65 L. J., Q. B. 126.

—— **Inspection of Mains.**]—A gas company is bound to keep up such a reasonable inspection of their mains and pipes, as may enable them to detect when there is such an escape of gas, by fracture or imperfection of pipes, as may lead to danger of an explosion; and if an explosion takes place from a fracture or defect, which has existed for several days, during which time it has also been discoverable (by reason of the smell of the escaped gas), and would have been discovered by proper inspection, that is evidence of negligence on the part of the company; nor is it enough to relieve them from liability that, upon notice of the escape, they sent a workman to repair the defect, he arriving too late to do so. *Mose* v. *Hastings and St. Leonards Gas Co.*, 4 F. & F. 324.

—— **Defect in Pipe.**]—A gas company contracted to supply B. with a proper service-pipe to convey gas from the main outside to a meter inside the premises. Gas escaped from the pipe laid down under the contract into his shop. The servant of a gasfitter employed by B. happened to be at work in another room at the time of the escape, and went into the shop upon hearing of it with a view of finding out its cause. He was carrying a lighted candle in his hand, and immediately on entering the shop an explosion took place, doing damage to B's stock and premises. On the trial of an action against the gas company for their breach of contract in not supplying a proper service-pipe, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied; and, secondly, that there was negligence on the part of the gasfitter's servant in carrying a lighted candle:—Held, that B. was entitled to recover, and that the gas company was not relieved from liability by the negligent act of the gasfitter's servant. *Burrows* v. *March Gas and Coke Co.*, 41 L. J., Ex. 46; L. R. 7 Ex. 96; 26 L. T. 318; 20 W. R. 493—Ex. Ch.

Liability of Municipal Corporation for Acts of Servant.]—A municipal corporation was empowered by act of parliament to construct gasworks and to supply gas, and sell and dispose of the coke, the surplus profits to go in reduction of the water-rates, and otherwise towards the improvement of the town. In an action against the corporation, the declaration alleged that the corporation employed workmen to lay down pipes, who so negligently conducted themselves, that a piece of metal was projected against the plaintiff. Plea, that the grievances were bonâ fide done by the corporation in the course of executing the powers conferred on them by their act, and without any neglect, misconduct, or default of the corporation, otherwise than by their workmen, or one of them, and that their workmen were all skilled and qualified, and proper persons to be employed:—Held, that the plea was no answer to the action. *Scott* v. *Manchester Corporation*, 2 H. & N. 204; 26 L. J., Ex. 406; 3 Jur. (N.S.) 590; 5 W. R. 598—Ex. Ch.

A local authority who employ a contractor to do work which they are empowered by statute to execute, and which is likely to prove dangerous to others, are bound to see that the work is properly carried out, and are not relieved from liability for injuries caused by the negligent execution of the work by the fact of having employed a contractor. *Hardaker* v. *Idle District Council*, 65 L. J., Q. B. 363; [1896] 1 Q. B. 335; 74 L. T. 69; 44 W. R. 323; 60 J. P. 196—C. A.

Liability of Gas-fitter.]—A builder was employed by a committee of a club to execute alterations at the club-house, including the preparation and fixing of gas-fittings. He made a

sub-contract with B., a gas-fitter, to execute this part of the work. In the course of doing it, through B.'s negligence, the gas exploded, and injured the plaintiff:—Held, that the builder was not liable for this injury. *Rapson* v. *Cubitt*, 9 M. & W. 710; Car. & M. 64; 11 L. J., Ex. 271; 6 Jur. 606.

The defendant, a gasfitter, was employed by the plaintiff's master to repair a gas meter upon his premises, and for the purpose of doing so took away the meter and in lieu of it made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. The plaintiff having gone in the ordinary performance of his duty with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him. The jury found that the work had been negligently done, and that the injury to the plaintiff proceeded entirely from such negligence:—Held, that the defendant was liable. *Parry* v. *Smith*, 48 L. J., C. P. 731; 4 C. P. D. 325; 41 L. T. 93; 27 W. R. 801.

J. M.

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GIFT.

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1. CHATTELS.

Delivery Necessary.]—In order to transfer property by gift, there must be either a deed of gift or an actual delivery. 2 Saund. 47 a, n. (*d*).

A gift of chattels unaccompanied by delivery passes no property. *Reeves* v. *Capper*, 5 Bing. (N.C.) 56; 6 Scott, 877; 2 Jur. 1067. *S. P.*, *Bourne* v. *Fosbrooke*, 18 C. B. (N.S.) 515; 34 L. J., C. P. 164; 11 Jur. (N.S.) 202; 13 W. R. 497.

A verbal gift of a chattel, without actual delivery, does not give the property to the donee. *Irons* v. *Smallpiece*, 2 B. & Ald. 551; 21 R. R. 395.

A gift of a chattel capable of delivery, made per verba de presenti by a donor to a donee, and assented to by the donee, whose assent is communicated to by the donor, does not pass the property in the chattel without delivery. *Cochrane* v. *Moore*, 59 L. J., Q. B. 377; 25 Q. B. D. 57; 63 L. T. 153; 38 W. R. 588; 54 J. P. 804—C. A.

A clear intention on the part of the donor to give, acted upon by the donee, constitutes a valid gift inter vivos, without actual delivery. Dictum of Parke, B., in *Ward* v. *Audland* (16 M. & W. 871), followed. *Irons* v. *Smallpiece* (2 B. & Ald. 551), not followed. *Harcourt, In re*, *Danby* v. *Tucker*, 31 W. R. 578.

If apparel is put on a boy, it is a gift in law. *Haynes' Case*, 12 Coke, 113.

If a father makes to a son under age an absolute gift of an article of dress or of ornament, e. g. a watch, he cannot afterwards, without the son's consent, reclaim the gift. *Smith* v. *Smith*, 7 Car. & P. 401.

A father gave his son a watch, some printed books, and several articles of wearing apparel:—Held, that, although the son was under age (viz. sixteen years old), the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son. *Hunter* v. *Westbrook*, 2 Car. & P. 578.

In 1850, G. quitted England for Australia, leaving behind him, in the charge and custody of his wife (the defendant), a sword which had come into his possession and ownership on the death of his father, a general in the army, to whom it had been originally presented by the officers of his regiment. G.'s only son having died, G. wrote a letter, from Australia, to his brother H. (the plaintiff) in England, dated 14th September, 1863, expressing a desire for him to have possession of the sword, in the following terms: "You only anticipate my wish that you should have charge of our father's sword, which, of course, you will keep in our family if I should not have a son to inherit, which does not seem probable. I have inclosed an order unsealed to Mary" (the defendant, G.'s wife) "to hand it over to you." This order was as follows: "On receipt of this letter you will be so good as to deliver our father's sword to my brother Henry"; and in a subsequent letter to the plaintiff of 28th September, 1863, G. said, "I shall expect a long letter in reply from you. Tell me how the old sword looks." These letter

and order were communicated to the defendant, and applications were made to her by the plaintiff for delivery of the sword to him, but without success. G. died in Australia in December, 1865 :—Held, that the words of the letter of the 14th September, 1863, were not words of gift at all, but amounted merely to a desire by G. that the plaintiff should have charge of the sword, a charge which was revocable at G.'s pleasure, and did not constitute an out and out gift, or pass any property in the sword to the plaintiff. *Douglas* v. *Douglas*, 22 L. T. 127.

Parol Gift of Jewels for Life—Request that after Death Jewels be left as Heirlooms—Precatory Trust.]—The owner of certain jewels presented them to her daughter-in-law on her marriage with the donor's son, who was heir-presumptive to a title. The donee's account of the manner in which the gift was made was as follows: "When I married she gave them to me for life, with the request that at my death they might be left as heirlooms." The donee by will left the jewels to the holder of the title for life, and after his death to each and every of the persons who should in turn succeed to the title and dignity severally and successively as they should in turn succeed to such title and dignity :—Held, that the original gift was an absolute gift; that the words of request did not create a precatory trust, and were not intended to fetter the donee's disposition of the jewels in the least degree, but were a mere indication of the manner in which the donor thought that the donee might best dispose of them; and that the donee had therefore power to dispose of them in the manner directed by her will, or in any other manner she might think fit. *Hill* (*Viscount*) v. *Hill* (*Dowager Viscountess*), 66 L. J., Q. B. 329; [1897] 1 Q. B. 483; 76 L. T. 103; 45 W. R. 371—C. A.

Possession taken by Donee.]—On a gift of a chattel inter vivos, it is not necessary that there should be any formal delivery by the donor to the donee; it is sufficient if the donee takes possession of the chattel as owner in pursuance of the gift. *Winter* v. *Winter*, 4 L. T. 639; 9 W. R. 747.

Change of Possession—Passing of Property.]—A barge, while in the possession of the donee, and worked by him as a servant to the owner, was given to him by the owner; afterwards the donee worked it, and paid the wages of the crew on his own account until the donor's death :—Held, that the property thereby became vested in the donee. *Winter* v. *Winter*, 4 L. T. 639; 9 W. R. 747.

Household furniture, which was the property of the claimant's father, was in the possession of the claimant's husband, and was in a house where the husband resided with his wife, the claimant. The father, being at the time with the claimant in a room where some of the furniture was, verbally gave the furniture to the claimant by words of present gift. The father then went away from the house leaving the claimant in the room. There was no manual delivery of the furniture to the claimant, and after the gift the furniture still remained in the house where the claimant and her husband continued to live :—Held, that manual delivery of the furniture was not necessary to complete the verbal gift, and that there had been such a change of possession from the claimant's husband to the claimant, consequent upon the gift, as was sufficient to effectuate it. *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582; 66 L. T. 797; 40 W. R. 479; 56 J. P. 565.

Delivery first, Gift afterwards.]—Delivery first and gift afterwards of a chattel capable of delivery is as effectual as gift first and delivery afterwards. *Alderson, In re, Alderson* v. *Peel*, 64 L. T. 645.

A mere verbal gift of a chattel to a person in whose possession it is, does not pass the property to the intended donee. *Sharr* v. *Pilch*, 4 Ex. 478; 19 L. J., Ex. 113. S. P., *Smith* v. *Smith*, 2 Str. 955.

2. Choses in Action.

a. Bonds.

What sufficient.]—The delivery of a bond on which judgment had been entered is not sufficient to constitute a valid donatio inter vivos. *Patterson* v. *Williams*, Ll. & G. t. Plunk. 95.

The obligee of a bond, five days before her death, signed a memorandum, not under seal, which was indorsed upon the bond, and which purported to be an assignment of the bond without consideration, to a person to whom the bond was at the same time delivered. The circumstances of the transaction did not constitute, in the opinion of the court, a donatio mortis causâ :—Held, that the gift was incomplete, and that, as it was without consideration, the court could not give effect to it. *Edwards* v. *Jones*, 1 Myl. & C. 226; 5 L. J., Ch. 194.

J. being indebted to P. by bond, P., by deed, poll, in consideration of natural love, &c., for E., the wife of J., agreed that this bond, and all benefit and advantage to be derived thereby, should, after his death, be wholly for use of E., and her issue by J.; P. afterwards puts bond in suit, but dies before payment of it :—Held, a revocation of gift. *Richardson* v. *Sedgwicke*, 2 Bro. P. C. 123.

A. made a voluntary assignment of turnpike bonds and shares in companies to B., in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B., but did not observe the formalities required by the Turnpike Road Act, and the deeds by which the companies were formed, to make the assignment effectual :—Held, on his death, that no interest in either bonds or shares passed by the assignment, and that B. ought to deliver them to his executors. *Searle* v. *Law*, 15 Sim. 95; 15 L. J., Ch. 187; 10 Jur. 191.

A bond was assigned to trustees, in trust as a married woman should appoint, and in default thereof to her separate use. She afterwards, by deed of indenture, appointed her interest in the bond to certain persons, as an indemnity to them for the fraudulent appropriation made by her husband, who was their solicitor, of certain sums belonging to them :—Held, that the assignment would be supported, though without consideration, as a trust executed. *Collinson* v. *Patrick*, 2 Keen, 123; 7 L. J., Ch. 83.

A., in 1852, signed a memorandum, in which he particularised some Russian bonds, and to whom he should give them. In 1853 he made his will, not noticing the bonds. In November following he signed another memorandum, to the same effect as the former, and at the same time delivered the bonds to B., and under a

declaration verbally that he was to pay A. the interest for life, and hold the bonds for the persons named in the paper after his death :—Held, that there was a valid delivery and disposition of the bonds in favour of the parties named in the memorandum. *Langley* v. *Thomas*, 26 L. J., Ch. 609.

A. from time to time purchased debentures, amounting altogether in value to between 2,000*l.* and 3,000*l.*, and deposited them with B., who lived with him as his wife. As they were purchased, B. received the stockbroker's receipts. She cut off the coupons as they were wanted, and accompanied A. to receive the dividends. Before purchasing the debentures A. had promised them to B., and had said she must keep them ; and subsequently he had frequently alluded to them as her property. A. bequeathed 3,000*l.* to B. during her life and widowhood, and 3,000*l.* for her daughter by him :—Held, that there was a good gift inter vivos. *M'Culloch* v. *Bland*, 2 Giff. 428 ; 6 Jur. (N.S.) 1183 ; 3 L. T. 357 ; 9 W. R. 65.

The deceased (a person above eighty) delivered the key of a box containing Dutch bonds and title deeds to J., but retained the box in his own possession, and on several occasions directed J. to open it for the purpose of taking out the deeds, etc. ; he also told a third party that the contents of the box belonged to J., and a few weeks before his death desired his nurse to deliver the box to J., which was done, and kept till his death. The bonds were found in an envelope, with a letter attached, addressed to J.'s wife's sisters, with a direction for its being delivered unopened, and the letter stated which of the bonds each was to have, and that he took that course to evade the legacy duty, and that he recommended perfect silence on that subject :—Held, to amount neither to a gift inter vivos, nor to a donatio causâ mortis to the wife and sisters of J. *Farquharson* v. *Cave*, 2 Coll. 356 ; 15 L. J., Ch. 137 ; 10 Jur. 63.

Gift of money due on mortgage and bond by testator some time before his death to a daughter, not sustainable by fact of merely changing the securities from one drawer of a bureau to another, proved by his widow, who sought to discharge herself by payments as executrix under the will. *Bryson* v. *Brownrigg*, 9 Ves. 1.

Upon the death of a testator ten Austrian bonds were found, amongst other securities, in a box at his house, with the following indorsement : "The first five numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was his housekeeper, and the key of the box was given into her custody :—Held, that as there had been no actual transfer or delivery of the bonds to H. D., they still remained part of the testator's assets. *Trimmer* v. *Darby*, 25 L. J., Ch. 424 ; 4 W. R. 399.

K. alleged that the testator had given her in his lifetime two Egyptian bonds, which, together with one admitted to be hers, were found in the testator's safe after his death. Upon one of the bonds in question was written in her handwriting "given to me with bonds, 18th April, 1870, A. B. K." The coupons on these bonds were proved to have been carried to the testator's account at the bank. K. alleged that these bonds were in the testator's safe for safe keeping only, and that the cash for the coupons carried over to the testator's account, had been regularly paid to her. The only evidence proving the delivery of these bonds, and explaining the fact of their being in the testator's safe, was that of K. herself and her sister. K. was appointed executrix :—Held, that the evidence of the gift by delivery was sufficiently established, and the fact of their being found in the testator's safe satisfactorily explained, and K.'s claim to them allowed. *Bottle* v. *Knocker*, 46 L. J., Ch. 159 ; 35 L. T. 545 ; 25 W. R. 209.

b. Cheques and Notes.

Cheque—Presentation in Lifetime.]—C. voluntarily gave a cheque on her bankers to B., and B. forthwith presented it, but payment was refused by the bankers, although they held funds of C.'s sufficient for the purpose. On the next day, and before the cheque had been cashed, C. died :—Held, that as everything in their power had been done, both by the donor and the donee of the cheque, to make the gift complete, and the failure had arisen solely from the acts of third parties, the gift was an effectual gift inter vivos, and B. was entitled to be paid out of the assets in the hands of C.'s executor. *Bromley* v. *Brunton*, 37 L. J., Ch. 902 ; L. R. 6 Eq. 275 ; 18 L. T. 628 ; 16 W. R. 1006.

—— **Invalid within Statute of Mortmain.**]—A lady gave a cheque for 5,000*l.* to the surgeon who attended her, to be laid out in the erection, establishment, and support of a hospital. The money was invested by the surgeon in consols in the names of himself and another as trustees, and both immediately afterwards executed a deed of trust declaring the objects of the gift. The declaration of trust was not made known to the donor, who died a few days after its execution :—Held, that the object of the gift did not exclude the acquisition of land : and that the donor, having died within twelve months after the execution of the deed, the gift was invalid under 9 Geo. 2, c. 36. *Hawkins* v. *Allen*, 40 L. J., Ch. 23 ; L. R. 10 Eq. 246 ; 23 L. T. 465 ; 18 W. R. 748.

—— **Gift to a Baby.**]—A father put a cheque into the hand of his son nine months' old, saying, "I give this to baby for himself," and then took back the cheque, and put it away. He also expressed his intention of giving the amount of the cheque to the son. Shortly afterwards the father died, and the cheque was found amongst his effects :—Held, that there had been no gift to, or valid declaration of trust for, the son. *Jones* v. *Lock*, 35 L. J., Ch. 117 ; L. R. 1 Ch. 25 ; 11 Jur. (N.S.) 913 ; 13 L. T. 514 ; 14 W. R. 149.

—— **Son constituted Trustee.**]—Where a lady, having some money belonging to her in the hands of her son, drew a cheque upon him in favour of his wife, and a few days afterwards she told him to take the cheque, and to invest the money for the benefit of his wife and children, he took it accordingly ; and after his mother's death he invested the money in the names of himself and his wife :—Held, that a valid trust of the 500*l.* was constituted by the mother in favour of the son's wife and children. *Roberts* v. *Roberts*, 11 Jur. (N.S.) 992 ; 15 L. T. 260 ; 15 W. R. 117—L.JJ.

A lady drew a cheque for 500*l.* upon her son-in-law (who was not a banker, but who had moneys of hers in his hands) in favour of her daughter Jane, his wife. Afterwards she told him to hold the money in trust for Jane during

her life, and afterwards for the children of Jane. The lady died shortly afterwards, and the money was claimed on behalf of the wife and children: —Held, that the objects of the gift were not sufficiently ascertained, and that the 500*l.* must be treated as assets of the deceased. *Hughes* v. *Stubbs*, 11 Jur. (N.S.) 913; 13 L. T. 492.

Promissory Notes.]—When an instrument is in form a complete and an immediate assignment, and of such a nature as to give the assignee a right as between him and the assignor to take or receive the property comprised in it presently, it will, although voluntary, be supported in equity and considered as a perfect declaration of trust of such of the property as was not assignable at law. *Richardson* v. *Richardson*, 36 L. J., Ch. 653; L. R. 3 Eq. 686.

Therefore, where A., by a voluntary deed, assigned to B. all her personal estate, and appointed him her attorney to recover, receive and give receipts for the same:—Held, after her death, that two promissory notes, one payable to A., and the other to A. or order, and the moneys secured thereby, passed to the donee. *Ib.*

A., in India, on his own responsibility, invested money belonging to his brother B. in England, in indigo, which he consigned to B., and he recommended him, in consideration of his (A.) not charging commission, to settle 1,000*l.* on each of his two sisters, which he suggested should be invested in spelter, and consigned to him for sale. B. acceded to this, and A. sold the spelter, and remitted the proceeds (nearly 4,000*l.*) to B. on account of his sisters. B. retained the money, and gave his promissory notes to his sisters for the amount:—Held, that the 4,000*l.* belonged to the sisters, and that the gift of it could not be recalled. *Mackintosh* v. *Stuart*, 36 Beav. 21.

The holder of a promissory note given without consideration does not stand in the same position as the holder of a voluntary bond, and is not entitled to claim against the estate of the giver after payment of the creditors for value. *Whitaker, In re*, 58 L. J., Ch. 487; 42 Ch. D. 119; 61 L. T. 102; 37 W. R. 673—C. A.

Voluntary assignment of a chose in action (a promissory note), by indenture which also contained a provision appointing the assignee the irrevocable attorney of the assignor for the recovery of the amount due on the note, will, as the transaction is complete by the execution of the deed, be carried into execution. *Blakely* v. *Brady*, 2 Dr. & Wal. 311. S. P., *Gannon* v. *White*, 2 Ir. Eq. R. 207.

A payee of three promissory notes executed the following indorsement, preceded by the delivery of them to the indorsee:—"I bequeath—pay the within contents to Simon Smith, or his order, at my death." There was a single witness to the payee's signature. In the act of delivery of the notes, the payee expressed an intention to be "master of them as long as he lived." Semble, that but for the payee's expressed intention to keep the ownership for life, the disposition might have been construed as a gift inter vivos, in trust for him for life, and afterwards for the indorsee absolutely. *Patterson, In re, Mitchell* v. *Smith*, 4 De G. J. & S. 422; 33 L. J., Ch. 596; 10 L. T. 801; 12 W. R. 941.

C., in 1858, bought in the Incumbered Estates court an estate for 3,025*l.*, and had it conveyed absolutely to his daughter, H. C. She owned 1,525*l.* of the purchase money; C. contributed 1,500*l.* At the time of the purchase C. used some expressions as to his intention to give this sum to his daughter, but he soon after took from her a promissory note, payable seven days after date, in respect of the interest on which accounts were regularly stated and settled between the father and daughter during his life. In December, 1873, C. signed an indorsement on the note, as follows:—"I direct that this promissory note be delivered up to be cancelled after my death, to the intent that my daughter, H. C., shall be exonerated from payment of same. Dated 10th December, 1873.—P. C." This was attested by only one witness. There was reliable evidence that at various times, particularly when ill, the father told his daughter to take possession of the note when he was dying. He had the conveyance and the note tied together and placed in his deed-box, and he had a label on them, "These belong to H. C." C., having recovered from former illnesses, died after a few days' illness in 1876. In his last illness he said nothing as to the note. About an hour before his death, when he was insensible, the daughter got his keys and opened the deed-box, and found the conveyance and the note, as above described, and on reading the indorsement she replaced them in the box: —Held, that there was no gift of the note inter vivos, nor donatio of it mortis causâ, nor any valid testamentary disposition of it in the daughter's favour, and that it still remained part of C.'s assets. *Cross* v. *Cross*, 1 L. R., Ir. 389.

c. Stocks and Shares.

What Sufficient.]—Receipt for a subscription to a navigation, with an indorsement signed by owner, declaring that he thereby assigned to his daughter A. all his interest, found among the papers of his executrix, no evidence that he ever parted with the paper, and a declared intention of satisfaction by a marriage portion; bill for an assignment dismissed. *Antrobus* v. *Smith*, 12 Ves. 39; 8 R. R. 278.

A. in extremis gave all his shares in a particular bank to his son, on condition of his paying a debt which the testator owed upon the shares to the bank, and wrote a letter to the manager of the bank, directing that the shares should be transferred into the name of the son. The certificates of some of the shares were delivered to the manager as a preliminary to the preparation of the necessary deed of transfer. Before the deed was prepared, the testator died:—Held, that the transaction was incomplete, and that the shares formed part of his general estate. *Lambert* v. *Overton*, 11 L. T. 503; 13 W. R. 227.

A father by deed-poll, expressed to be made in consideration of natural love and affection, declared among other things that he transferred and assigned to his daughter, upon trust for her and her children, some East India stock and shares in a company, with full power in his name to sue for and recover such part of the property comprised in the deed as a mere assignment would not enable her to recover and receive. The deed was sealed and delivered in the usual way, but was retained in possession of grantor till his death, when it was found enclosed in a paper with an indorsement in his handwriting describing it as "papers concerning Mrs. C. and her children," and directing it to be given up to Mrs. C. at his death, and immediately:—Held, that as to the stock and shares, the deed-

poll was inoperative. *Dillon* v. *Coppin*, 4 Myl. & C. 647; 9 L. J., Ch. 87; 4 Jur. 427.

A voluntary assignment by deed of the assignor's interest in a sum of stock standing in the names of trustees, upon trust for him, is a complete transfer of such interest as between the donee and the representatives of the donor, although no notice of the deed was given to the trustees in the donor's lifetime, because no further act on the part of the donor was requisite to complete the gift. In such a case the donee could compel the trustees to transfer the stock to him without making the donor or his representative parties to the suit. If, however, the trustees, before notice of the deed, transferred the stock to another person, the donee would have no remedy against them. *Donaldson* v. *Donaldson*, 1 Kay, 711; 23 L. J., Ch. 788; 2 W. R. 691.

An intended gift, which, for lack of the necessary formalities, was not completed during the intending donor's life, will not be carried into effect by treating him as a trustee of the subject-matter of the intended gift, if there is no proof that he meant to retain such subject-matter as a trustee thereof for the intended donee. *Heartley* v. *Nicholson*, 44 L. J., Ch. 277; L. R. 19 Eq. 233; 31 L. T. 821; 23 W. R. 374.

A. B. directed the certificates of some United States Bank shares standing in his name to be delivered to his nephew, and in a letter to him stated that "he made a free gift of them" to him. A. B. also executed a power for transferring the shares, but it was not acted on in A. B.'s life. The shares, being found in A. B.'s name at his death, were held to form part of his personal estate. *Weale* v. *Ollive*, 17 Beav. 252.

Some consols belonging beneficially to A. for life, with remainder to B., stood in the names of two trustees, of the survivor of whom B. was the representative. B. voluntarily assigned the stock to A., but no transfer was made. The court refused either to declare B. a trustee of the stock for A., or to compel her to transfer it. *Beech* v. *Keep*, 18 Beav. 285; 23 L. J., Ch. 539; 18 Jur. 971; 2 W. R. 316.

The distinction between an assignment for the benefit of a volunteer and a declaration of trust in his favour, though very thin, yet pervades the cases. *Ib.*

If the legal owner of stock execute a declaration of trust in favour of a volunteer, equity will compel the execution of the trust; but if he merely assigns the stock, and makes no transfer, the court will afford him no assistance. *Bridge* v. *Bridge*, 16 Beav. 315; 16 Jur. 1031.

If the beneficial owner of stock standing in the name of trustees assign it in favour of a volunteer, and notice is given to the trustees, who act upon it, equity will enforce the performance of the trust in favour of the volunteer. *Ib.*

When the owner of property, vested in A. and B. as trustees, purported to assign it to himself and others, in trust for volunteers, but no legal transfer was made, or recognition of the trust by A. and B.:—Held, that the relation of trustee and cestui que trust had not been created in favour of such volunteers. *Ib.*

A feme sole purchased 1,000*l.* consols in the name of her niece, and informing her of the fact, and that she intended this sum should be for her benefit, procured her to execute a power of attorney to enable the aunt to transfer the stock, and to receive the dividends:—Held, that a trust was well created for the benefit of the niece after her aunt's death. *Beecher* v. *Major*, 13 L. T. 54; 13 W. R. 1054—L. JJ.

On the 20th July, 1840, M., then in extremis, executed an ordinary bank power of attorney, and delivered it to her sister E., whereby the latter was empowered to transfer into her own name government stock standing in her name. M. died on the 21st July, 1840, and on the 23rd the transfer was made under the power:—Held (the evidence showing a clear intention on the part of M. to give the legal and beneficial interest in the stock to her sister), that the gift was valid and effectual in favour of E., as against the other next of kin of the donor. *Kidâill* v. *Farnell*, 26 L. J., Ch. 818; 3 Jur. (N.S.) 786; 5 W. R. 793—L.JJ. See also *Gason* v. *Rich*, infra.

In order to render a voluntary settlement valid and effectual, the settlor must do everything which, according to the nature of the property comprised in the settlement, is necessary to transfer the property, and under the settlement binding upon him; as by actually transferring the property to the persons for whom he intends to provide, or to trustees for the purposes of the settlement, or by declaring that he himself holds the property in trust for those purposes; and if the property is personal the trust may be declared either by writing or by parol; but there is no equity to protect an imperfect gift. If, however, the gift is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust. *Milroy* v. *Lord*, 4 De G. F. & J. 264; 31 L. J., Ch. 798; 8 Jur. (N.S.) 806; 7 L. T. 178.

.d. Other Cases.

Specialty Debt.]—A gift of a specialty may be good in law, although there is no legal transfer of the debt or property of which it is the security. *Barton* v. *Gainer*, 3 H. & N. 387; 27 L. J., Ex. 390; 4 Jur. (N.S.) 715; 6 W. R. 624.

I O U—Intention of Donor.]—A. held certain bank shares in trust for his father B., under a written acknowledgment of the trust. B. indorsed on the acknowledgment: "I transfer these shares to my daughter C. for her sole use and benefit." B. also held two I O U's, one from A., the second from another person indebted to him. Upon each of these B. indorsed: "I transfer the debt of *l.* to my daughter C., for her sole use and benefit." B. signed these indorsements, and handed the acknowledgment and I O U's to C. There was no consideration for the transfer. B. did not give any notice of it to A. or the debtor upon the second I O U, and continued till his death, five years later, to receive the dividends on the shares and the interest on A.'s I O U:—Held, that, although the indorsements, accompanied by the delivery of the acknowledgment and I O U's were capable, if followed by notice to the trustees and debtors, of operating as equitable assignments, yet as it appeared, having regard to the evidence and especially to B.'s receipt of the subsequent dividends and interest, that he did not intend at the time of the indorsement to divest himself absolutely of his property in the shares or debts, but attempted at most to effect a disposition to become operative only at his death, and in the meanwhile to be ambulatory and revocable, they did not constitute a complete gift enforceable in equity. *Gason* v. *Rich*, 19 L. R. Ir. 391—C. A.

Mortgage Debt — Assignment.]—Held, that neither a voluntary assignment by deed of a mortgage debt, accompanied by a grant not specifying the particular estate, but of all estates held in mortgage, and by a covenant for further assurance, and without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, and without notice given to the grantor, though accompanied by a covenant for further assurance, can be considered as a complete and effectual assignment to be acted upon and enforced by the assignee without any further or other act to be done by the assignor. *Ward* v. *Audland*, 8 Beav. 201; 14 L. J., Ch. 145; 9 Jur. 384.

—— **Letters to Cancel.**]—Letters written by a mortgagee to the mortgagor, and persons interested under him, containing the expressions, "I now give this gift, to become due at my death, unconnected with my will"; "I hereby request my executors to cancel the mortgage deed"; "I again direct and promise that my executors shall comply with my former request, that is, to cancel all deeds and papers I may have chargeable on the R. estate,"—do not operate either as a declaration of trust, or as a valid gift. *Scales* v. *Maude*, 6 De G. M. & G. 43; 25 L. J., Ch. 433; 1 Jur. (N.S.) 1147; 4 W. R. 109.

Insurance Policy.]—In detinue by an administratrix for a policy of insurance, the evidence was that the intestate had given the policy to the defendant. No assignment was executed, but the defendant retained the policy, and had possession of it at the time of the intestate's death:—Held, that the action was not maintainable, for though there had been no assignment of the policy and the right to the money secured by it might not be affected, the right to the document itself passed by the gift to the defendant. *Rummens* v. *Hare*, 46 L. J., Ex. 30; 1 Ex. D. 169; 34 L. T. 407; 24 W. R. 385—C. A.

I. B. made a voluntary assignment by deed of a policy of assurance upon his own life for 1,000*l.* to trustees, upon trust for the benefit of his sister and her children, if she or they should outlive him. The deed was delivered to one of the trustees, and the grantor kept the policy in his possession. No notice of the assignment was given to the assurance office, and I. B. afterwards surrendered for a valuable consideration the policy and a bonus declared upon it to the insurance office. Upon a bill filed by the surviving trustee of the deed, to have the value of the property replaced, the court held, that upon the delivery of the deed no act remained to be done by the grantor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed. *Fortescue* v. *Barnett*, 3 Myl. & K. 36; 2 L. J., Ch. 98.

Credit at Bankers.]—Where A., having certain funds standing to his credit at his banker's, by letter directed them to carry some parts of such funds to the account of certain persons as trustees for his wife, and after her decease, for his son, and other parts thereof to the account of certain persons as trustees for his son, and such sums were accordingly carried over by the bankers to the account of such persons in their books, and the dividends were, from time to time, carried to the same accounts; but the testator never communicated the facts to the trustees, and there was some evidence that the testator had directed the transfer under an impression that he should be able, by that means, to evade the legacy duty, and that he had shown an intention to exercise some acts of ownership over the funds; the court held that the appropriation was void, and that the testator might, at any time, have revoked them. *Gaskell* v. *Gaskell*, 2 Y. & J. 502.

Reversionary Interest in Personalty.] — M. G., having died intestate, possessed of considerable personal property, and entitled, after the death of his wife, to the principal of certain bank stock, standing in the name of a trustee, his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the widow, executed to the trustee (transferring to the widow) a release of the bank stock, and directed the preparation of a release of the general personal estate, the execution of which was prevented by his death, but his wish to execute it continued to his last hour; the release of the stock is effectual in favour of the intestate's widow, but the intention to relinquish the share of the general personal estate not being perfected, amounts not to a gift, and she, as administratrix, must account to the representatives of the brother, but without interest. *Hooper* v. *Goodwin*, 1 Swan. 485; 1 Wils. 212; 18 R. R. 125.

A testator bequeathed a sum of money to trustees in trust for his daughter for life, and in case she died without leaving issue, for her next-of-kin, exclusive of her husband. During the lifetime of the daughter, her mother, as presumptive next-of-kin, by a voluntary deed assigned her expectant interest in reversion to the husband:—Held, on the death of the daughter, without leaving issue, that the assignment operated only as an agreement to assign, and, consequently, being voluntary, a court of equity would not enforce it. *Meeke* v. *Kettlewell*, 1 Ph. 342; 13 L. J., Ch. 28; 7 Jur. 1120.

A voluntary assignment by deed of an equitable reversionary interest in personal property is valid. *Voyle* v. *Hughes*, 2 Sm. & G. 18; 23 L. J., Ch. 238; 18 Jur. 341; 2 Eq. R. 42; 2 W. R. 143.

The assignment by deed of an equitable reversionary interest in personal property is not to be treated as a mere agreement; and, although it be voluntary, is not an incomplete gift, but is a transfer of the beneficial interest of the assignor. *Ib.*

An owner of an equitable reversionary interest under a settlement executed a voluntary assignment of it. No person had notice of the deed, except the solicitor who prepared it, and who was also the solicitor to the trustees of the settlement. The settlor retained the deed in her own possession, and afterwards destroyed it. She disposed of the property by will:—Held, that the deed was ineffectual to pass the property. *Way's Trusts, In re*, 34 L. J., Ch. 49; 10 Jur. (N.S.) 836; 13 W. R. 149.

3. Leaseholds and Freeholds.

Copyholds.]—Feme seised of a copyhold, on marriage of her daughter to J., surrenders it to the use of J., and his intended wife, and the heirs of their bodies, remainder to J. in fee. The marriage takes effect; the husband signs a writing, whereby he owns that the limitation of the

remainder in fee to him was a mistake, and that it was intended to be to the wife; and accordingly, covenants to stand seised of the remainder in fee in trust for the wife in fee. This is not a mere voluntary covenant, and equity will compel the performance of it. *Randall* v. *Randall*, 2 P. W. 464.

A. voluntarily agrees to give certain houses to his niece and the heirs of her body after the death of himself and his wife, in case they should have no issue; but no conveyance was executed by A., though he lived about twenty years afterwards. In the meantime, A. becomes indebted by mortgage, judgment, &c., and by his will devises all his estate, both real and personal, to his wife. This agreement is not good against a purchaser for valuable consideration, although he had notice by being a subscribing witness to it. *Powell* v. *Pleydell*, 1 Bro. P. C. 124.

Freeholds.]—A., being seised in fee, executed a deed-poll, whereby he voluntarily granted it to his wife as her sole and absolute property for ever:—Held, that this was an imperfect voluntary gift; that the relation of trustee and cestui que trust had not thereby been created, and that a court of equity would not interfere to assist either party. *Price* v. *Price*, 14 Beav. 598. Affirmed 1 De G. M. & G. 308; 21 L. J., Ch. 53.

B. by a deed-poll, after reciting his intention to settle certain freehold and leasehold ground rents upon his wife, continued as follows:—"I do hereby settle, assign, transfer, and set over unto her, my said wife, as though she were a single woman," the said property:—Held, that though the deed purporting to be an assignment from husband to wife was invalid as an assignment, yet it contained a sufficient declaration of trust in favour of the wife; and she was declared entitled to the property absolutely. *Baddeley* v. *Baddeley*, 48 L. J., Ch. 36; 9 Ch. D. 113; 38 L. T. 906; 26 W. R. 850.

W. the plaintiff exhibited documents of which the first was in the following terms and addressed "Warriner, Kendall. The contents of this box is a deed of gift to John Warriner, Kendall, and all the things in the house in Stramongate and my mother's portrait to be preserved and kept in the family, also my mother's wish, in care of John Hayston. My watch and trinkets for Miss Warriner, also in care of John Hayston. This is a free gift, my mother's wish, that John Warriner of this town is to have those three houses in Stramongate, outhouses, gardens, &c., and also field called Little Mint Feet, and fields at Lancaster, Stizaker and Hatch, as tenants, also 100*l.* each for all of Warriner's children; if anything happened among them the other to be divided among the rest.—November 6th, 1871." A few days afterwards W. found another document, also addressed to him, and written and signed by B., which was as follows:—"Again, Warriner,—The deeds, writings, or documents for property in Stramongate and fields you will find in a large tin box at Greenside, and to be handed over to you free, and all expenses to be paid out of the bulk and writings of Mislet, &c. You have all complete which is intended for you, and 100*l.* to be paid down at once to you for repairs at Mislet and property of Stramongate.—Nov. 6th, 1871." On a bill by W. to obtain declaration that these documents constituted a declaration of trust in his favour:—Held, that the documents amounted to an imperfect voluntary gift, not perfected by a complete disposition of the property, and were also of a testamentary nature and consequently void. *Warriner* v. *Rogers*, 42 L. J., Ch. 581; L. R. 16 Eq. 340; 28 L. T. 863; 21 W. R. 766.

A., by will, in 1847, devised his real estates to his wife for life, remainder to his son for life, remainders over. During A.'s lifetime, his son requiring a place for his residence, he signed the following memorandum:—"H., together with my other freehold estates, are left in my will to my wife; but it is her wish, and I hereby join in presenting the same to my son for the purpose of furnishing him with a dwelling-house." The son took possession of H., and expended during the lifetime of the father, and with his knowledge, a large sum of money in the erection of a house and buildings thereon:—Held, that the son was entitled to the inheritance of H. *Dillwyn* v. *Llewelyn*, 4 De G. F. & J. 517; 8 Jur. (N.S.) 1068; 6 L. T. 878; 10 W. R. 742.

The subsequent expenditure by the son supplied a valuable consideration, originally wanting, independently of which, the memorandum itself disclosed a plain intention, on the part of the father, to vest in his son the absolute ownership of the estate. *Ib.*

—— **Advance—Possession of Deeds.**]—In 1878 A. entered into a contract for the sale to him of two freehold houses at the price of 650*l.* The deposit of 50*l.* was paid by him, and 360*l.*, part of the balance, was obtained from his niece B., to whom he gave his I O U. On the 21st August, 1878, the wife of A., by his direction, wrote to B. as follows:—"A. bought two houses yesterday, and he is going to have them settled and signed in your name, and give them to you. I send you the conditions of sale for you to look at, and I should like you to come and see A. . . . . Bring your bank book with you, as what you have might as well go into them as for us to pay interest. It is all right, I can assure you. I sent the 50*l.* by cheque last night, on deposit." On the 25th October, 1878, the two houses were duly conveyed to A., and he directed his wife to hand over the title deeds to B., and he also said to his wife that the deeds belonged to B., and were of no use to his wife. The deeds were sent to B. by A.'s wife. Subsequently A. died intestate, and his eldest brother and heir-at-law commenced an action against B., claiming a declaration that he, the plaintiff, was entitled to the rents and profits of the two houses and the delivery up of the title deeds:—Held, that there was evidence of an intention on the part of A. to give the property to B.; but that no gift of it had in point of law been made; but held, that there was sufficient evidence of a contract to create an equitable mortgage in favour of B., and upon which the possession of the title deeds by B. originated; and that there should be a redemption decree upon that footing, the costs of B. being added to her security. *McMahon, In re, McMahon* v. *McMahon*, 55 L. T. 739.

Leaseholds.]—A person entitled to a leasehold mill, with plant, machinery, and stock-in-trade, indorsed on the lease a memorandum: "This deed and all thereto belonging I give to A. from this time forth with all the stock-in-trade"; and he signed the memorandum and handed the deed to A.'s mother. After his death A. claimed the mill and appurtenances, on the ground that the memorandum amounted to a valid declaration of trust:—Held, that this claim was bad, on the ground that words importing a present intention

to give cannot be held to amount to an intention to retain as trustee. *Richards* v. *Delbridge*, 43 L. J., Ch. 459 ; L. R. 18 Eq. 11 ; 22 W. R. 584.

A father, being possessed of a lease of tithes from a dean and chapter, which was renewable by custom, upon receiving notice to renew, signified verbally to his son that he wished him to take the renewal for his own benefit. The son paid the fine : the father died, having made the son his executor. After the father's death, the son took the new lease to himself ; and in a creditors' suit against the estate of the father, the court refused to consider the new lease as part of the father's assets. *Lee* v. *Flood*, 17 Jur. 544.

K. claimed a leasehold messuage, which she alleged the testator had built for her. The land on which this house was built was to be held on a long lease from the Dover Harbour Board, to be granted to the testator upon the completion of the house. This lease, however, had not been granted at the time of the testator's death, but there was a duplicate copy in an envelope amongst the testator's papers, on which was written, "for A. K." Proposals for a lease of a part of this house had been made and accepted, and on the envelope, which contained the letter of acceptance, was written, "The lease of twenty-one years to C. F. T., of London, to be made out in A. B. K.'s name," also, "T.'s rent to be paid to A. B. K., making, without harbour rent, 45*l*." Evidence of the testator's intention was given. K. was appointed executrix :—Held, that the gift was an imperfect gift, which could not be perfected without the aid of the court, and that aid, according to the principles laid down in *Milroy* v. *Lord* (4 De G. F. & J. 264), could not be given. *Bottle* v. *Knocker*, 46 L. J., Ch. 159 ; 35 L. T. 545 ; 25 W. R. 209.

A., the owner of a leasehold house, verbally agreed to allow B. to occupy the house during her life, that she might maintain herself by letting lodgings, B. paying the ground-rent and rates and taxes. B. accordingly broke off certain negotiations for a business she was then contemplating, and entered into possession of the house, and there remained until A.'s death, maintaining herself by letting lodgings, and duly paying the ground-rent and rates and taxes. A.'s residuary legatee having brought an action of ejectment against B., and pleaded the Statute of Frauds :—Held, that there was a good gift of the house to B. for life, she having, on the face of A.'s representations, not only altered her mode of life, but also entered into possession. *Coles* v. *Pilkington*, 44 L. J., Ch. 381 ; L. R. 19 Eq. 174 ; 31 L. T. 423 ; 23 W. R. 41.

4. Gift or Loan.

W., the uncle of the plaintiff's wife, was applied to by a friend of the plaintiff to advance 1,000*l*. to defray some expenses connected with the plaintiff's election as member of Parliament. W. declined to make the advance, but said he would give the plaintiff 500*l*., and deduct it from the legacy he intended to leave to his wife. Shortly afterwards W. sent the plaintiff a cheque for 500*l*. The plaintiff wrote to thank W., saying that he would gladly repay it at an early opportunity, and hoped shortly to be able to do so. A few weeks afterwards, a conversation took place between him and W., and it was agreed, at the plaintiff's instance, that the plaintiff should pay banker's interest on the sum during W.'s life ; and the plaintiff, for the purpose of effectuating this agreement, signed and gave to W. a promissory note for 500*l*., with interest at 1*l*. per cent., on the understanding that payment of the principal was not to be enforced, but only payment of interest, during W.'s life. After his death, his executors sued the plaintiff on the note for the 500*l*. :—Held, that (although, if there had been a complete gift of the 500*l*. it could not afterwards have formed a consideration for a promissory note) the executors were entitled to recover ; for that, as the plaintiff had not, before the giving of the promissory note, agreed to accept the 500*l*. as a gift, it remained open whether it should be a gift or loan ; and the giving the promissory note was conclusive evidence that the parties agreed upon its being a loan ; and the court could not allow the documentary evidence to be rebutted by the parol evidence given by the plaintiff on his own behalf. *Hill* v. *Wilson*, 42 L. J., Ch. 817 ; L. R. 8 Ch. 888 ; 29 L. T. 238 ; 21 W. R. 757.

Certain advances of money and goods made by a very wealthy man, through the medium of his bankers and partners, to his favourite nephew, during the last few years of his life, were held, under the circumstances, in a suit for the administration of the uncle's estate, to have been only loans. *Mortimer* v. *Trezevant*, 4 Cl. & F. 657 ; 11 Bli. (N.S.) 191.

A son acted as his mother's solicitor, and with her consent lent 2,500*l*. belonging to her, with other money, on a bond conditioned for payment to himself absolutely of the amount thereby secured, without any declaration of trust except a memorandum, whereby the son acknowledged that he held the 2,500*l*. and undertook to pay the interest thereof to the mother during life. The son died in his mother's lifetime, and his executors claimed the principal sum, subject to a life interest in the mother, as a gift from her to the son :—Held, that the relation of solicitor and client between the son and mother excluded the ordinary presumption in favour of the transaction being a gift. *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

5. Joint-Survivorship.

Promissory Note.]—A. holding a promissory note from B. for a debt, directed B. to transfer it in his books to the names of A. and his wife, expressing an intention to benefit his wife, and he cancelled the note and took a fresh one to him and his wife. A. died, leaving his wife surviving him :—Held, that the debt belonged to the wife, and did not form part of the testator's general personal estate. *Gosling* v. *Gosling*, 3 Drew. 335.

Stocks and Shares.]—Transfer of stock of an intestate into the name of himself jointly with that of the husband of one of his two nieces, accompanied with proof of his having said in his lifetime that it was his intention to give the husband the stock at his death in consideration of affection, etc., and that he had transferred it for that purpose (if not repelled by counter testimony), held to be sufficient proof of gift of such stock ; and court will not continue injunction granted to restrain husband who had administered, from disposing of it. *George* v. *Howard*, 7 Price, 646 ; 21 R. R. 775.

A. by her will gave all her estate to her sister ; afterwards she transferred stock into their joint names, as it appeared for the purpose of saving legacy duty. The will was void :—Held, that

the transfer was intended to vest the beneficial estate by survivorship in the sister, and that she took the stock to the exclusion of A.'s next-of-kin. *Deacon* v. *Colquhoun*, 2 Drew. 21 ; 23 L. J., Ch. 16 ; 2 Eq. R. 319 ; 2 W. R. 67.

In 1843 A. purchased fifty shares in a bank with her own money, and caused them to be transferred into the joint names of herself and B. In 1846 ten of these shares were sold, and the purchase-money was received by A. The dividends on the shares were received by A. during her life. A. died in 1847, leaving B. surviving. It appeared that A. had often said that she was anxious and desirous of making a provision for B., in case B. survived her ; and that she also said her wish and intention in making the purchase of the shares was, that they should go to the survivor of herself and B. :—Held, that there was not a resulting trust of the forty unsold shares in favour of A., and that B. was entitled to them by survivorship. *Garrick* v. *Tayler*, 4 De G. F. & J. 159 ; 31 L. J., Ch. 68 ; 7 Jur. (N.S.) 1174 ; 4 L. T. 404 ; 10 W. R. 49. Affirming 29 Beav. 79.

Shares were purchased in a banking company, the rules of which provided that no benefit of survivorship should take place between the shareholders. The purchaser caused the transfer of them to be made to herself and another person who lived with her, and was called her niece, but was not related to her :—Held, that the rules did not exclude the benefit of survivorship at law between the two. *Ib.*

A testator, having first made a will in favour of the person with whom he was cohabiting, afterwards transferred stock into the joint names of himself and that person. Subsequently to this transfer he revoked his first will and made another in favour of a third person, a daughter of the original legatee, to whom by the second will nothing was given :—Held, that there was no resulting trust for the testator in the stock, and that the joint transferee was entitled by survivorship. *Tumbridge* v. *Care*, 25 L. T. 150 ; 19 W. R. 1047.

A sum of money was invested in the funds in the joint names of husband and wife, and the wife by power of attorney from the husband, sold out a portion, and with his knowledge kept it locked up in her own special custody till his death :—Held, that the portion which remained in the funds in the joint names of the husband and wife survived to the wife, but that the other portion, which was sold out by her, and kept in her custody, formed, on the husband's death, a part of his personal estate. *Gadbury, In re*, 32 L. J., Ch. 780 ; 11 W. R. 895.

6. Conditional.

Lottery Ticket.]—A. gives lottery tickets amongst her servants, on condition if any of them came up a prize of 20*l.* or more, they should give one-half to her daughter ; the ticket given to the footboy came up a prize of 1,000*l.* ; on a bill by the daughter, a moiety of the 1,000*l.* decreed to her. *Scot* v. *Haughton*, 2 Vern. 560.

On Marriage.] — If a person, who makes addresses with a view to marriage, on reasonable expectation of success, give presents, and the lady deceive him afterwards, the presents ought to be returned, or the value of them allowed ; but where made to introduce a person only to a woman's acquaintance he is looked upon in the light of an adventurer. and, if he lose by the attempt, must take it for his pains, especially when there is a disproportion between the lady's fortune and his. *Robinson* v. *Cumming*, 2 Atk. 409.

Purchase of Commission.]—A sum of money was paid by A. to B., for the purpose of purchasing C. a promotion in the army, and it remained unapplied in the hands of B. at the death of A. C. having been compelled from the bad state of his health to quit the army and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche* v. *Kilmorey (Lord)*, Turn. & R. 207.

Money advanced by plaintiff to the defendant to procure him a commission in the marines, decreed to be refunded with interest ; plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged ; first, upon grounds of public policy, and secondly, as plaintiff had been imposed upon, defendant knowing that he was incapable of holding the commission. *Morris* v. *M'Culloch*, 2 Eden, 190; Ambl. 432.

7. Other Cases.

A widow of a freeman of London, who left children and died intestate, was entitled to four-ninths of his personal estate, and having, by deed, assigned over her four-ninths for her separate use, in case of marriage, and to such persons as she should appoint, and for want of such appointment then to her children ; the widow intending to marry a second husband, by another deed, to which the husband was a party, in consideration of the intended marriage, and of a settlement made on her by him, recites that if she did not dispose of her four-ninths, the husband would be entitled thereto, and then assigns it over to trustees, in trust, for the intended husband, during their joint lives, subject to her control and disposal by writing ; after which she dies, without disposing of it. Decreed, the second husband is as a purchaser, and the recital, that he would be entitled to it, if the wife should not dispose of it, was a gift. *Poulson* v. *Wellington*, 2 P. W. 533.

A gift of a moiety of the donor's goods, to be enjoyed after his death, affects those only of which he was then possessed. *Anon.*, 3 Swan. 400.

Letters to executor, expressing consent that 1,000*l.* was proper to be given to daughter, held not to amount to gift of so much in their hands, the gift not being completed. *Cotteen* v. *Missing*, 1 Madd. 176.

Return of.] — Plaintiff sueth for tokens, delivered to defendant as suitor in marriage, and obtains them. *Young* v. *Eurrel*, Cary, 54. And see *Robinson* v. *Cumming*, 2 Atk. 409, supra.

Whether Revocable.]—Where a verbal representation of an intended absolute gift of property is made, in order to influence the conduct of another, and is acted on by that person, although it is of the essence of the representation that the gift be made by a revocable instrument, the gift is rendered irrevocable. *Loffus* v. *Maw*, 8 Jur. (N.S.) 607 ; 6 L. T. 346 ; 10 W. R. 513.

8. Relief in Equity.

Voluntary Deed.]—Equity will not assist the donee of a bond to recover the amount of it,

if the gift was made without consideration. *Edwards* v. *Jones*, 7 Sim. 325; 4 L. J., Ch. 163.

Equity will not assist a party claiming under a voluntary deed of covenant, by enabling him to use the deed either at law or in this court. *Fletcher* v. *Fletcher*, 4 Hare, 78; 14 L. J., Ch. 66; 8 Jur. 1040.

The court of chancery will not assist a volunteer by making effectual an incomplete gift. *Weale* v. *Ollive*, 17 Beav. 252.

Court, in general, will not decree performance of voluntary agreements. *Wycherley* v. *Wycherley*, 2 Eden, 177. S. P., *Brownsmith* v. *Gilbourne*, 2 Stra. 738.

In general, a court of equity will not interpose in voluntary agreements made without fraud. *Morris* v. *Burroughs*, 1 Atk. 401.

A mother gives a promissory note to a trustee for the benefit of a child of which she is enciente. This not sufficiently nudum pactum for the court to allow a demurrer to a bill by the child, and the trustee to have it carried into execution. *Seton* v. *Seton*, 2 Bro. C. C. 610.

A. executed an instrument purporting to convey to B. all the household furniture, plate, watches, clocks, books, moneys, securities for money, and other effects, which at the time of A.'s decease should be in two specified rooms in his mansion house, except an iron chest and its contents, and the contents of a certain closet. A. lived almost exclusively in the two rooms mentioned in the instrument, and B. at the time of the execution of it, and from thenceforth until A.'s death, was his bailiff and confidential agent. Two years after the date of this instrument, A. made his will, by which he bequeathed his plate, jewels, household furniture, and money to trustees, upon certain trusts, for the benefit of C. and his issue. In a suit for the administration of A.'s estate, B. claimed the benefit of the prior instrument, but without either producing probate of it, or showing for what consideration, or under what circumstances it it was executed:—Held, that if the instrument was to be considered as testamentary, this court could not act upon it without probate, and that if it was to be considered as a deed inter vivos, this court could not give effect to it without further evidence in its support; and this court being of opinion that under the circumstances of the case such further evidence could not be obtained, declined to direct any inquiry on the subject. *Consett* v. *Bell*, 1 Y. & Coll. C. C. 569; 11 L. J., Ch. 401; 6 Jur. 869.

—— **Legal Debt.**]—Where a donor creates a legal debt in favour of a volunteer, and the trustee declines to act, this court will enforce payment of the debt for the benefit of the volunteer. *Bridge* v. *Bridge*, 16 Beav. 315; 16 Jur. 1031.

—— **Property not Assignable at Law.**]—When an instrument is in form a complete and an immediate assignment, and of such a nature as to give the assignee a right as between him and the assignor to take or receive the property comprised in it presently, it will, although voluntary, be supported in equity and considered as a perfect declaration of trust of such of the property as was not assignable at law. *Richardson* v. *Richardson*, 36 L. J., Ch. 653; L. R. 3 Eq. 686.

Property Restored—Motive.]—When, after an alleged gift, the donee restored the control of the property to the donor, mere evidence of motive for the gift is insufficient to establish the donee's right to it. *James* v. *James*, 19 L. T. 809.

Untrue Consideration.]—Conveyance for consideration, not afterwards to be set up as a gift. And being for fictitious consideration inserted by grantor himself, though found by a jury, set aside in equity. *Bridgman* v. *Green*, 2 Ves. 627.

When a grantee, under a deed purporting to be a conveyance for valuable consideration, attempts to support the grant as a gift, the onus of proving that such a gift was intended and made is thrown upon the grantee, and clear evidence in support of the gift will be required. *Coultwas* v. *Swan*, 19 W. R. 485.

A testator with a view of placing property out of the control of liquidators, conveyed it to his stepdaughter absolutely, and, as she alleged, by way of gift. The conveyance purported to be for a valuable consideration, but was in fact voluntary. Subsequently the claims of the liquidators were satisfied out of other property belonging to the testator:—Held, that there was a resulting trust in favour of the testator, and that the property must be reconveyed for the benefit of his estate. *S. C.*, 22 L. T. 539; 18 W. R. 746.

Formalities not Complied With.]—An intended gift, which, for lack of the necessary formalities, was not completed during the intending donor's life, will not be carried into effect by treating him as a trustee of the subject matter of the intended gift, if there is no proof that he meant to retain such subject-matter as a trustee thereof for the intended donee. *Heartley* v. *Nicholson*, 44 L. J., Ch. 277; L. R. 19 Eq. 233; 31 L. T. 821; 23 W. R. 374.

The court will not enforce the transfer of stock in favour of a volunteer, to whom it has been merely assigned. *Beech* v. *Keep*, 18 Beav. 285; 23 L. J., Ch. 539; 18 Jur. 971; 2 W. R. 316.

Executor never called upon to do any act to perfect a gift inter vivos, except in the particular cases of supplying a defective execution of a power, and the want of a surrender of a copyhold. *Antrobus* v. *Smith*, 12 Ves. 47; 8 R. R. 278.

Declaration of Trust.]—A testator gave a policy of assurance to two trustees "to hold the same upon uses appointed by letters signed by them and myself." No such letter existed at the date of the will, but the testator had previously asked the trustees, who had consented, to accept the bequest for the benefit of persons or objects then named by the testator. Long after the date of his will the testator wrote a letter addressed to his executors, stating that he had by his will left the policy to the two trustees, to be delivered up to them for the purposes they had agreed to carry out. At the same time the testator signed an unattested memorandum, declaring the trusts on which the trustees were to hold the policy given to them by his will. The trustees retained the letter and the memorandum until after the testator's death. Upon a claim by one of the persons beneficially interested under the memorandum against the executors and trustees:—Held, that the testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will, and that the letter

would not operate as a gift inter vivos; and that the trustees held the proceeds of the policy in trust for the residuary legatees under the testator's will. *Johnson* v. *Ball*, 5 De G. & Sm. 85; 21 L. J., Ch. 210; 16 Jur. 538.

A parol declaration of trust may, in the absence of fraud, be perfectly good, and when it amounts to a trust executed, it will be enforced in equity, although in favour of a volunteer; but an imperfect gift will receive no aid from the court. *Jones* v. *Lock*, 35 L. J., Ch. 117; L. R. 1 Ch. 25; 11 Jur. (N.S.) 913; 14 W. R. 149.

See also TRUST AND TRUSTEE.

J. M.

GLEBE.

See ECCLESIASTICAL LAW.

GOLDSMITH.

Licence for.]—*See* REVENUE.

GOODS.

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GOODWILL.

1. *General Principles*, 575.
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5. *Trade Name, Right to Use, on Dissolution of Partnership.*—*See* PARTNERSHIP.

1. GENERAL PRINCIPLES.

Definition of.]—Goodwill must mean every possible advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business.—Per M.R. in *Ginesi* v. *Cooper*, 49 L. J., Ch. 601; 14 Ch. D. 596; 42 L. T. 751.

Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. *Austen* v. *Boys*, 2 De G. & J. 626; 27 L. J., Ch. 714; 4 Jur. (N.S.) 719; 6 W. R. 729.

Goodwill is something distinct from the profits of a business, although in determining its value the profits are taken into account, and it is usually estimated at so many years' purchase. *Ib.*

The goodwill which attaches to a house from its being well known or situated in a good thoroughfare adds to the value of the house and would pass to the mortgagee under a mortgage of the house; but the goodwill which attaches to the personal reputation of the owner of the house would not pass to the mortgagee. Per Cotton, L.J. *Cooper* v. *Metropolitan Board of Works*, 53 L. J., Ch. 109; 25 Ch. D. 472; 50 L. T. 602; 32 W. R. 709—C. A.

—— **Solicitor's Business.**]—The term goodwill is inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in the integrity and ability of the solicitor to conduct their legal affairs. *Ib.*

As a general rule, and in the absence of express contract, there is not, in a partnership between solicitors, any partnership asset which is capable of being sold or valued as the "goodwill" of the partnership business—Per Jessel, M.R. *Arundell* v. *Bell*, 52 L. J., Ch. 537; 49 L. T. 345; 31 W. R. 477. *See* cols. 579, 586, 594.

What Comprised in.]—The goodwill of a business comprises all the advantages that may be desired from the purchasers holding themselves out to the public as the persons interested in that business, which has been identified with the name of a particular firm. *Churton* v. *Douglas*, Johnson, 174; 28 L. J., Ch. 841; 5 Jur. (N.S.) 887; 7 W. R. 365.

Therefore, though it is well settled that the sale of a goodwill does not imply a contract on the part of the vendor not to set up again in a similar business, he is not at liberty to hold out to the public that he is continuing the same business by using the name of the old firm, even though his own name may be the only one that appeared in that firm. *Ib.*

In the absence of specific and definite stipulations, an assignment of the "goodwill" of a solicitor's business does not carry with it the right to the custody of deeds and papers belonging to the clients of the assignor—Per Denman, J. *James* v. *James*, 58 L. J., Q. B. 300; 22 Q. B. D. 669; 60 L. T. 569; 37 W. R. 495.

Rights of Partners.]—An agreement to share the profit and loss of a business entitles each party as against the other to the general rights of a partner, including an interest in the goodwill; and the agreement would have this legal effect notwithstanding a stipulation that the parties should not be partners. *Pawsey* v. *Armstrong*, 50 L. J., Ch. 683; 18 Ch. D. 698; 30 W. R. 469.

See col. 585, *and* PARTNERSHIP.

Survivorship—Business Carried on by Wife before Marriage.]—The goodwill of a business carried on by a wife before marriage, and afterwards by the husband and wife, survives to her. She may dispose of it, and receive the purchase-money for her own benefit, even though it is carried on upon leasehold premises, forming a part of the estate of the testator, which were dis-

posed of by his will. *Morris* v. *Moss*, 25 L. J., Ch. 194.

Covenant against Rival Trading part of Goodwill.]—W. entered the service of C. as a shopman at weekly wages, and covenanted not to carry on business within one mile of the shop at any time thereafter. The business was afterwards moved to another shop close by, and sold by C. to J., together with the goodwill and beneficial interest thereof. W. then left the shop, and set up business within a mile of the old shop :—Held, that the covenant was not unreasonable, and endured for the life of W., though the original convenantee should cease to carry on business altogether, and that the covenant was not affected by the removal of the business to another shop near at hand, though it might have been otherwise if the business had been removed to quite a different neighbourhood :—Held, also, that such a covenant added to the value of the goodwill, and, therefore, was part of the goodwill, and assignable with it, and did, in fact, pass by the sale of the goodwill and beneficial interest to J., so as to give him a right of action. *Jacoby* v. *Whitmore*, 49 L. T. 335 ; 32 W. R. 18.

Surgeon Dentist's Business.]—A surgeon dentist, by his will appointed his wife his sole executrix, and she proved the same. The testator was tenant from year to year of the house in which he carried on his business. A few days after the testator's death his widow entered into agreements, in which she was described as one of the executors of the testator, by which it was agreed that A. B. should pay her 500*l.* for the goodwill of the business, and he was to have the advantage of being introduced to the patients of the testator, to take his house, and to buy his furniture and surgical instruments at a stipulated price. On a reference to the Master, evidence was given for the widow, that the agreement as to the 500*l.* was not entered into with her in her character of executrix, and that the intention of the parties was, that that sum was to be paid to her as the value of her influence with the patients and her personal trouble in introducing them to the purchaser A. B. The Master found that the whole of the 500*l.* belonged to the widow ; but on exceptions to the report the same was sent back for review, with a declaration that the whole or part of the 500*l.* belonged to the estate of the testator. *Smale* v. *Graves*, 19 L. J., Ch. 157 ; 14 Jur. 662.

Public-house.]—Goodwill an element in the value of a reversionary interest in a public-house. *Edwards* v. *Edwards*, 1 Jur. 654.

The goodwill of a victualler's business held, under the circumstances, to be incident to the stock and licence, and not to the premises on which the business was carried on. A widow carried on the business of a licensed victualler on premises held by her from year to year ; prior to her second marriage she assigned her household goods, furniture, stock-in-trade, brewing utensils, and all other her effects upon trusts, excluding her husband ; she married :—Held, that the goodwill of the trade, which was afterwards sold, passed by the deed as incident to the stock and licence, and not to the husband with the premises. *England* v. *Downs*, 6 Beav. 269 ; 12 L. J., Ch. 85 ; 6 Jur. 1075.

In the administration of the estate of an intestate, a public-house belonging to him in fee, and in which he had carried on business, was sold as a lease :—Held, that as between the heir-at-law and next-of-kin, any portion of the amount realised representing goodwill could not be separated from the interest of the heir-at-law. *Booth* v. *Curtis*, 20 L. T. 152 ; 17 W. R. 393.

—— **Mortgage of.**]—The goodwill of a mortgaged public-house is not a personal goodwill, but belongs to the mortgagor's trustee in liquidation as against the mortgagee. *Punnett, Ex parte, Kitchin, In re*, 50 L. J., Ch. 212 ; 16 Ch. D. 226 ; 44 L. T. 226 ; 29 W. R. 129.

The defendant mortgaged, by demise, a leasehold public-house, with the goodwill of the business carried on there, to the plaintiff. The deed contained a covenant for further assurance. Default was made, and the plaintiff in a foreclosure action obtained a receiver :—Held, that the defendant was bound under the terms of the mortgage to assign his licence to the receiver. *Rutter* v. *Daniel*, 30 W. R. 801—C. A. Affirming 46 L. T. 684.

And see INTOXICATING LIQUORS.

Equitable Mortgagee of Lease.]—The unexpired term in a house, and the goodwill of a business established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt :—Held, that the equitable mortgagee was entitled to the whole of the purchase-money, whether arising from the value of the goodwill, or from the value of the lease, independently of the goodwill. *Chissum* v. *Dewes*, 5 Russ. 29 ; 29 R. R. 10.

Pawnbroking Business.]—A., a pawnbroker, sold to B. his trade and business, and stock-in-trade, and all profits, benefits, advantages, and emoluments resulting therefrom for 600*l.*, which sum was allowed to remain in the purchaser's hands, and for which he was to pay A. 30*l.* a year, as secured by deed. By a lease of the premises on which the business was carried on, bearing even date with the deed securing the payment of 30*l.* a year, the rent reserved on the premises was 120*l.* B. became bankrupt ; and when A. sought to put his debt on the file, the premises were sworn not to have been worth more than 60*l.* It was held that the additional 60*l.*, unaccounted for, did not necessarily make the original transaction between the parties usurious, so as to prevent A. from filing his proof against B.'s estate, but that the 60*l.* a year above the rent might well be put down to the account of certain "facilities" afforded by A. to B., and which were in the nature of "goodwill," although "goodwill" was not expressed in terms to have been sold. *Lynn, Ex parte, Tovey, In re*, 5 Jur. 1089.

2. SALE AND TRANSFER.

a. Generally.

What passes to Purchaser on.]—When a business is sold, the entire goodwill and right to use trade marks pass to the purchaser without any express mention of them being made in the deed of assignment. And the court will restrain any attempt on the part of the vendor to dispose of them either for his own benefit or use. *Shipwright* v. *Clements*, 19 W. R. 599.

Assignment of Licence of Public-house.]—The defendant mortgaged, by demise, a leasehold public-house, with the goodwill of the business carried on there, to the plaintiff. The deed contained a covenant for further assurance. Default was made, and the plaintiff in a foreclosure action obtained a receiver:—Held, that the defendant was bound under the terms of the mortgage to assign his licence to the receiver. *Rutter* v. *Daniel*, 30 W. R. 801—C. A. Affirming 46 L. T. 684.

Goodwill of Mortgaged Public-house.]—The goodwill of a mortgaged public-house belongs to the mortgagor's trustee in liquidation as against the mortgagee. *Punnett, Ex parte. Kitchin, In re*, 50 L. J., Ch. 212; 16 Ch. D. 226; 44 L. T. 226; 29 W. R. 129—C. A.

Solicitor's Business—Right to Papers.]—In the absence of specific and definite stipulations, an assignment of the "goodwill" of a solicitor's business does not carry with it the right to the custody of deeds and papers belonging to the clients of the assignor. *James* v. *James*, 58 L. J., Q. B. 300; 22 Q. B. D. 669; 60 L. T. 569; 37 W. R. 495.

Partnership, In case of.]—*See* col. 592.

b. Competition by Vendor.

Right of.]—Sale of a trade, with the goodwill, does not prevent the vendor's setting up again in a similar trade, without express covenant; or fraud by representing it as a continuation of the old trade, or by conduct encouraging others to involve themselves, in the confidence that he would not trade again, etc. Sale under a commission of bankruptcy of the waggon trade from B. to L., with the goodwill. Another concern from B. to W. and S. being purchased in trust for the bankrupt, having obtained his certificate, he commenced trade again to L., by that road, soliciting customers by advertisement and cards, stating generally, that being reinstated by the friends in the carrying business, his waggons set out at the usual hours, etc. An injunction was refused. *Crutwell* v. *Lye*, 17 Ves. 335. And see *Davies* v. *Hodgson*, 25 Beav. 177.

Though it is well settled that the sale of a goodwill does not imply a contract on the part of a vendor not to set up again in a similar business, he is not at liberty to hold out to the public that he is continuing the same business by using the name of the old firm, even though his own name may be the only one that appeared in that firm. *Churton* v. *Douglas*, 1 Johns. 174; 28 L. J., Ch. 841; 5 Jur. (N.S.) 887; 7 W. R. 365.

Soliciting Customers of Old Firm.] — The vendor of a business and the goodwill thereof may, in the absence of express stipulation to the contrary, set up a business of the same kind either in the same neighbourhood, or elsewhere, and may publicly advertise the fact of his having done so; but he must not solicit the customers of the old business to cease dealing with the purchaser, or to give their custom to himself. *Labouchere* v. *Dawson*, 41 L. J., Ch. 427; L. R. 13 Eq. 322; 25 L. T. 894; 20 W. R. 309.

A partner who has no share in the goodwill of the business is not entitled during the partnership to extract from the books of the firm the names and addresses of customers for the purpose of soliciting such customers on his own behalf after the termination of the partnership. *Labouchere* v. *Dawson* (41 L. J., Ch. 427; L. R. 13 Eq. 322) approved. *Pearson* v. *Pearson*, infra, overruled. *Trego* v. *Hunt*, 65 L. J., Ch. 1; [1896] A. C. 7; 73 L. T. 514; 44 W. R. 225—H. L. (E.)

A trader who has sold his business and goodwill to another for value must abstain not only from soliciting orders from but also from dealing from the old customers. Form of injunction. *Ginesi* v. *Cooper*, 49 L. J., Ch. 601; 14 Ch. D. 596; 42 L. T. 751.

Where two partners dissolve partnership on the terms that one shall have the goodwill and continue the business, and the retiring partner sets up a similar business in the neighbourhood, the court will grant an injunction to restrain the retiring partner from soliciting the old customers of the firm, but will not restrain him from dealing with them. *Ginesi* v. *Cooper* (14 Ch. D. 596) disapproved. *Leggott* v. *Barrett*, 51 L. J., Ch. 90; 15 Ch. D. 306; 43 L. T. 641; 28 W. R. 962—C. A.

Semble (per Brett, L.J.), that the doctrine of *Labouchere* v. *Dawson* (L. R., 13 Eq. 322) is correct in the case of a sale of goodwill, and of a dissolution of partnership for a valuable consideration—that is, that there is an implied contract on the part of the vendors in the one case, and of the retiring partner who receives the consideration in the other, that he will not solicit the former customers. *Ib.*

T. P., as trustee of a will, carried on a business which had been carried on by the testator under the name of James P. By an agreement made to compromise a suit, James P., a son of the testator and a beneficiary under his will, agreed to sell to T. P. all his interest in the business, and in the property on which it was carried on. And it was provided that nothing in the agreement should prevent James P. from carrying on the like business where he should think fit, and under the name of James P. T. P. brought this action to enforce this agreement, and to restrain James P. from soliciting the customers of the old firm. An injunction was granted on the authority of *Labouchere* v. *Dawson* (L. R. 13 Eq. 322), and the cases in which it had been followed:—Held (dissentiente Lindley, L.J.), that *Labouchere* v. *Dawson* was wrongly decided, and ought to be overruled, and that even apart from the proviso in the agreement, the plaintiff was not entitled to the injunction which he had obtained:—Held, by the whole court, that the proviso in the agreement authorised the defendant to carry on business in the same way as any stranger might lawfully do, and took the case out of the authority of *Labouchere* v. *Dawson*, supposing that case to have been well decided. *Pearson* v. *Pearson*, 54 L. J., Ch. 32; 27 Ch. D. 145; 51 L. T. 311; 32 W. R. 1006—C. A. followed. *Vernon* v. *Hallam* 56 L. J., Ch. 115; 34 Ch. D. 748; 55 L. T. 676; 35 W. R. 156.

Expelled Partner.]—A partner who has been expelled under a provision in the articles of partnership, and has been repaid his share of the capital, will not be restrained from carrying on the business on his own account, and soliciting the old customers of the firm. *Dawson* v. *Beeson*, 22 Ch. D. 504; 48 L. T. 407; 31 W. R. 537—C. A.

Trustee under Liquidation.]—The rule of *Labouchere* v. *Dawson*, which precludes the vendor of the goodwill of a business from soliciting the former customers is not to be extended to the case of a compulsory alienation. Therefore, where the trustee of liquidating debtor sold the goodwill of the debtor's business, and the debtor having obtained his discharge, started a similar business in the same town, and solicited the customers of his old firm:—Held, that no injunction could be granted to restrain such solicitation. *Walker* v. *Mottram*, 51 L. J., Ch. 108; 19 Ch. D. 355; 45 L. T. 659; 30 W. R. 165—C. A.

The decision of *Labouchere* v. *Dawson* is founded on an implied contract by the vendor of the goodwill of a business not to injure the property for which he has received consideration, but the obligation enforced by that case is purely personal, and not a mere incident to the transfer of property. *Ib.*

The assignment of a business and its goodwill, in the absence of any covenant, carries with it now as much and no more than in the days of Lord Eldon. *Ib.*

The concurrence of a bankrupt in the assignment o fhis property by his trustee is immaterial, inasmuch as, being bound by every lawful disposition of his property by his trustee, he is bound to respect whatever rights such a disposition confers on the purchaser. *Ib.*

In substance there is no distinction between the sale of a business and goodwill by a trader himself, and a sale by his assignees in bankruptcy. *Hudson* v. *Osborne*, 39 L. J., Ch. 79.

Right to Use Old Name.]—A vendor who had carried on a business under the name of "Madame Elise," which was the name of his wife, sold the goodwill and interest of the business, together with the exclusive right of using the name of "Madame Elise and Company:"—Held, that the purchaser was not entitled to trade under the old name alone, inasmuch as it would lead people to believe that the old business was still being carried on, and might cause the vendor to incur liability. *Chatteris* v. *Isaacson*, 57 L. T. 177.

Circulars.]—A partnership between M. and C., who carried on the business of wine merchants, having determined at the end of seven years by effluxion of time, and M. being entitled to the goodwill, C. proposed to issue a circular to all the customers of the firm and the trade generally, which, after announcing that he had joined another firm of wine merchants, and drawing attention to one of their circulars which was annexed, continued, "I take this opportunity to thank you for your valued support during the last seven years, and to solicit a continuance of the same in future." The annexed circular was an announcement by T. & Co., an old-established firm of wine merchants, that C. had joined their firm, and concluded as follows:—"Thanking you for your support in the past, and soliciting a continuance in the future to the new firm." M. having objected to these circulars being issued, C. proposed to omit the words "and to solicit a continuance of the same in future":—Held, that the circulars amounted to a suggestion that the new firm were the successors in trade of the old firm, and that C. must be restrained from issuing either of the three, and from applying to any person who was a customer or correspondent of the old firm, and asking them to deal with him, or not to deal with M. *Mogford* v. *Courtenay*, 45 L. T. 303; 29 W. R. 864.

Form of Decree.]—Form of decree in *Cook* v. *Collingridge* (Jacob, 607) containing a declaration of the rights of surviving partners to carry on the same trade after the sale of the partnership premises and business; but that notwithstanding this, the chance of a purchaser of the partnership property to retain the old customers could not be treated as of no speculative value. *Cook* v. *Collingridge*, 27 Beav. 456, n.

Covenant by Vendor.]—Contracts entered into between two persons to restrain one of them from setting up or exercising a particular trade or employment within a certain limited district, and for valuable consideration, are valid. *Chesman* v. *Nainby*, 1 Bro P. C. 234.

The defendant agreed to sell his business premises and goodwill to the plaintiff, and not to set up in the same business in the neighbourhood, the plaintiff agreeing to employ the former. The sale was carried out, the defendant employed for a short time, and then dismissed for alleged neglect of his work. Some months afterwards the defendant committed a breach of the negative covenant. A bill having been filed for specific performance of such covenant, the court, at the hearing, granted an injunction to restrain the breach, but, not being satisfied as to the bonâ fides of the dismissal and the evidence of neglect, without costs. *Daggett* v. *Ryman*, 17 L. T. 486; 16 W. R. 302.

A covenant by vendor of a business and the goodwill thereof that he would not for a term of years carry on the business of a manufacturer, either by himself or jointly with any other persons, under the name or style of J. H., or H. Brothers, the name of the business which he had sold, is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and an injunction was granted to restrain a breach of the covenant. *Vernon* v. *Hallam*, 56 L. J., Ch. 115; 34 Ch. D. 748; 55 L. T. 676; 35 W. R. 156.

—— **Coach Master.**]—A coach master having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from R. to London, or prejudicial to the business which he had sold; an injunction was granted, restraining him from running a coach from P., through R., to London. *Williams* v. *Williams*, 2 Swan. 253; 1 Wils. 473. n.

—— **General Merchant.**]—Upon the sale of the business of a general merchant in a country place, the vendor agreed to give a bond for a sum of 1,600*l.* as liquidated damages, if he should be thereafter concerned in any "trading establishment" within a neighbouring district, comprising a considerable section of the county of Cornwall:—Held, that this was not too general a restraint of trade, and specific performance of the agreement was decreed at the suit of the vendor. *Avery* v. *Langford*, 1 Kay. 663; 23 L. J., Ch. 837; 18 Jur. 905; 2 W. R. 615.

In construing the condition of such a bond, a court of law would take into consideration the surrounding circumstances at the time of executing the bond, and would consider the words "trading establishment" to mean an establish-

ment for any trade likely to interfere with the goodwill, which was the subject of the sale. *Ib.*

—— **Solicitor.**]—An agreement by a solicitor, made for valuable consideration on the sale of his business, not to practise as solicitor in any part of Great Britain for twenty years without the consent of the purchaser, held valid, and an injunction granted to restrain the seller accordingly from practising, and from endeavouring to induce any persons who were clients of the former and present firm to cease to employ the latter. An injunction was also granted to restrain the seller from detaining or destroying certain papers and documents belonging to the firm which he had got in his possession. *Whittaker* v. *Howe*, 8 Beav. 383.

—— **Tailor.**]—D. sold his business, goodwill, fixtures, &c., to N., and covenanted not to carry on or be concerned or interested in the business of a tailor within five miles of the former shop. D. then engaged himself to his nephew, carrying on the same trade within a quarter of a mile of the former place of business, and whose name was the same as his own, as a journeyman, at a weekly salary:—Held, that this was within the spirit and letter of the covenant, and an injunction was granted. *Newling* v. *Dobell*, 19 L. T. (N.S.) 408.

—— **Wine Merchant.**]—Agreement, by which, in consideration that plaintiff would purchase defendant's premises and stock of wine, and would pay 2,000*l.* as a premium for the goodwill of defendant's business of a wine merchant, defendant agreed that he would not, by himself or agent, or otherwise howsoever, either directly or indirectly set up, embark in, or carry on the business or trade of a wine and spirit merchant at C., or at any other town or place within the three counties of C., A., and M.:—Held, that defendant had broken the agreement by supplying wine to persons resident in C. and in other towns and places within the counties of C., A., and M., solicited by him, within C. and the other towns and places, personally, and by his agents, though he had no place of residence, warehouse, cellars, or place of business within C. or the other towns and places. *Turner* v. *Evans*, 2 De G. M. & G. 740; 17 Jur. 1073.

—— **Damages.**]—Bill for an account under covenant upon sale of goodwill not to carry on the trade; the usual course, a bill of discovery for an action. *Scott* v. *Mackintosh*, 1 Ves. & B. 503.

Undertaking, upon sale of the goodwill of a trade, not to carry on the same business, and to use the best endeavours to assist the purchaser, &c.; the remedy for a breach is an action, or issue quantum damnificatus; and an injunction against proceeding under a judgment for the consideration upon affidavits before answer was refused. *Shackle* v. *Baker*, 14 Ves. 468.

And see CONTRACT.

c. Sale by Court.

Notice of Liability to Competition.]—The goodwill of a partnership business having been ordered to be sold by the court in a suit instituted by the surviving partner, it was directed that the advertisements and particulars of sale should contain a notice that a sale would not prevent any person interested in the business from carrying on the like business in the same town. *Johnson* v. *Helleley*, 2 De G. J. & S. 446; 34 L. J., Ch. 179; 10 Jur. (N.S.), 1041; 11 L. T. 581; 13 W. R. 220.

d. Specific Performance.

When Decreed.]—Specific performance decreed of agreement to sell goodwill of trade, and exclusive use of secret therein. *Bryson* v. *Whitehead*, 1 Sim. & S. 74; 1 L. J. (O.S.) Ch. 42.

The court will not execute a contract for the sale of a goodwill, but will leave the parties to law. *Baxter* v. *Connolly*, 1 Jac. & Walk. 576.

Specific performance of an agreement to purchase the business of an attorney refused upon a bill by the vendor, there being no express stipulations by which the court might be enabled to carry it into effect on his part, in return for the defendant's purchase-money, and there being no conditions generally applicable to transactions of this nature, so as to come within the description of "usual clauses" to be inserted in an instrument to be drawn up in pursuance of the agreement. *Bozon* v. *Farlow*, 1 Mer. 459.

Whether such an agreement void, at law, upon ground either of morality or of public policy. *Ib.*

Quære, if legally a valid agreement, whether it is of such a nature as is capable of being enforced in equity. *Ib.*

—— **No Agreement as to Price.**] — An agreement to sell the goodwill of the business of a solicitor, without any stipulation as to the amount to be paid for it, or otherwise, cannot be enforced by specific performance. *Austin* v. *Boys*, 2 De G. & J. 626; 27 L. J., Ch. 714; 4 Jur. (N.S.) 719; 6 W. R. 729.

—— **Fixtures at Valuation.**]—An agreement for sale of leasehold premises and the goodwill of a trade, and certain fixtures to be taken at a valuation to be made by two gaugers, to be named, or their umpire:—Held, that the court could not decree specific performance of an agreement, one part of which was left to be determined by arbitration. *Darbey* v. *Whitaker*, 4 Drew. 134.

—— **Uncertainty.**]—The terms "goodwill, &c.," in a contract for the sale of a foundry are not so uncertain as alone to prevent a decree for specific performance of it, for the words "et cætera" point to things necessarily connected with, and belonging to, the goodwill, and to be defined in the conveyance. *Cooper* v. *Hood*, 26 Beav. 293; 28 L. J., Ch. 212; 4 Jur. (N.S.) 1266; 7 W. R. 81.

Specific performance of an agreement to purchase one-third of a foundry, refused, on the ground of uncertainty, the contract not specifying what portion of the purchase-money was to be left in the business, but only a large portion, and not stating when it was to be paid, or how to be secured, and what interest was to be allowed in the meanwhile. *Ib.*

—— **Time of the Essence of Contract.**]—In an agreement by a tenant at will of a public-house for the sale of possession, trade, and goodwill of the house at a fixed sum, and of the stock and furniture at a valuation; one of the terms being that possession should be taken, and the money paid on a given day, time is of the essence of the

contract; and a purchaser was not in a condition to fulfil his part of the contract on that day cannot compel a specific performance, though he was ready on the following day to have proceeded to complete the purchase. *Coslake* v. *Till*, 1 Russ. 376.

—— **Terms of Decree.**]—By agreement entered into with executors, for the purchase of a leasehold public-house, and the goodwill and licences connected with it, the household furniture, stock in trade, and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th September, 1821. The valuation was made, but on the 29th September the purchaser, alleging that there was a defect in the title to the leasehold, refused to perform his contract. The executors filed a bill for specific performance; but in the meantime remained in possession of the house, and carried on the business:—Held, that though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September, 1821; that he could not be compelled to take that portion of the stock-in-trade on the premises at the time of the decree which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business; that the purchaser ought to be charged with rent and taxes, and other outgoings paid by the executors since September, 1821, and with interest, on the same so paid by them; that the purchaser was not entitled to any occupation-rent, or other allowances, for the use of the house and furniture, by the executors, during the period that elapsed after the 29th September, 1821. *Dakin* v. *Cope*, 2 Russ. 170.

3. PARTNERSHIP, IN CASE OF.

An Asset of the Partnership.]—It is now settled that goodwill is ordinarily a distinct part of the property of a trading partnership; and therefore under a provision in partnership articles for valuation of the partnership property and effects at its close, the goodwill is a matter for valuation. *Reynolds* v. *Bullock*, 47 L. J., Ch. 773; 39 L. T. 443; 26 W. R. 678.

No Survival.]—The goodwill in a partnership business does not on the death of one partner survive beneficially to the others; when it has any value a due proportion belongs to the estate of the deceased partner, but the surviving partner has still the right to carry on the same business and at the same place. *Smith* v. *Everett*, 27 Beav. 446; 29 L. J., Ch. 236; 5 Jur. (N.S.) 1332; 7 W. R. 605. Quære now *Farr* v. *Pearce*, 3 Madd. 74; and *Hammond* v. *Douglas*, 5 Ves. 539.

An agreement to share the profit and loss of a business entitles each party as against the other to the general rights of a partner, including an interest in the goodwill and the agreement, would have this legal effect, notwithstanding a stipulation that the parties should not be partners. *Pawsey* v. *Armstrong*, 50 L. J., Ch. 683; 18 Ch. D. 698; 30 W. R 469.

Partnership stock includes the goodwill of the business and the right to use the trade mark; and on the purchase, by a surviving partner from the executors of a deceased partner, of the partnership stock at a valuation, the value of the goodwill and the trade mark must be taken into account. *Hall* v. *Barrows*, 4 De G. J. & S. 150; 33 L. J., Ch. 204; 10 Jur. (N.S.) 55; 9 L. T. 561; 12 W. R. 322.

By articles of partnership it was provided, that if either of the partners should die before the expiration of the co-partnership, the surviving partner should have the option of taking to himself all the stock belonging thereto, on paying to the executors of the partner dying the value of his share. The firm was in the habit of using as a trade-mark the initial letters of the names of the original manufacturers of the articles sold; but the mark had ceased to be a representation that the articles on which it was impressed were the manufacture of the persons whose initials it bore, and had come to be a mere brand, denoting the quality of the articles. In taking the value of the partnership stock, for the purpose of purchase by a surviving partner:—Held, that the exclusive right to the trade-mark belonged to the partnership as part of its property, and must be included in the valuation. *Ib.*

—— **Wife's Business before Marriage.**]—The goodwill of a business carried on by a wife before marriage, and afterwards by the husband and wife, survives to her. She may dispose of it, and receive the purchase-money for her own benefit, even though it is carried on upon leasehold premises forming part of the estate of the testator which were disposed of by his will. *Morris* v. *Moss*, 25 L. J., Ch. 194.

Dissolution—Original Price of Goodwill—Return.]—Upon the dissolution of a partnership and a notice as provided in the partnership articles, if there has been no misconduct nor breach of the articles on the part of the partner so giving notice, the price originally paid by the continuing partner for his share in the goodwill will not be returned him, although the goodwill may have become valueless, and the business may have suffered by the retiring partner setting up a similar business in his own name, and on the adjoining premises. *Bond* v. *Milbourn*, 20 W. R. 197.

Solicitors' Business.]—As a general rule, and in the absence of express contract, there is not, in a partnership between solicitors, any partnership asset which is capable of being sold or valued as the "goodwill" of the partnership business. *Arundell* v. *Bell*, 52 L. J., Ch. 537; 49 L. T. 345; 31 W. R. 477.

In 1877 the three partners in a firm of solicitors agreed that the partnership should be dissolved, that two of them should continue to carry on the partnership business, and should employ the third as a clerk at a salary, and that all the books, papers, and other property of the firm should vest in and be the property of the two continuing partners. The third partner died shortly afterwards, and in an action by his administratrix against the two continuing partners, an order was made directing the partnership accounts to be taken as from January, 1874. In taking the accounts the plaintiff claimed that a sum should be allowed in respect of the interest of the deceased partner in the "goodwill" of the partnership business, which was put at 10,000*l.*,

being five years' purchase of the estimated annual profits of the business:—Held, that, under the circumstances, no sum could be allowed in respect of the alleged "goodwill" of the business. *Ib.*

The term "goodwill" seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs. *Austin* v. *Boys*, 2 De G. & J. 626; 27 L. J., Ch. 714; 4 Jur. (N.S.) 719; 6 W. R. 729.

Where articles of partnership between London solicitors provided that either partner might retire, and that in that case the continuing partner should pay the retiring partner for his share and goodwill the fair marketable value, and the retiring partner should not practise within one hundred miles of the General Post Office, but should use his best endeavours to promote the interests of the existing partners:—Held, that the goodwill must be taken to mean only the interest which the retiring partner would have had if he had remained in the partnership till the expiration of it by effluxion of time. *Ib.*

Stockbrokers' Business.]—The plaintiff, the defendant, and T. W., deceased, carried on the business of stockbrokers in partnership, under articles dated 8th March, 1881, for five years from 1st February, 1881, and thereafter from year to year. The partnership was dissolved in the lifetime of the partners by notice on the 31st October, 1889; and the plaintiff instituted this action for an account of the partnership dealings and profits to 31st October, 1889, and claimed to have the goodwill in the partnership business valued and included in the account. There were no covenants in the articles restricting the right of the continuing partners to carry on the business or to use the firm name:—Held, that there was no saleable goodwill in the business, and that in taking the accounts, which were directed by the judgment, the goodwill should be excluded. *Wilson* v. *Williams*, 29 L. R. Ir. 176.

Surgeon—Agreement not to carry on the Profession of a Surgeon.]—M. became assistant to H. and P., surgeons at N., and entered into a bond, which recited that he was taken into their employment on the terms "that he should not at any time set up or carry on the business or profession of a surgeon" in N., or within ten miles thereof. The condition of the bond was that M. "shall not at any time hereafter directly or indirectly, and either alone or in partnership with or as assistant to any other person or persons, carry on the profession or business of a surgeon" in N., or within ten miles thereof. The partnership having been dissolved, both partners continued to practise in N., and H. engaged M., as his assistant at a salary. P. brought his action to restrain M. from acting as such:—Held, that as the agreement recited in the bond was for the protection of the business carried on by H. and P., and they had in the business a joint interest during the partnership, and several interests in the event of a dissolution, the agreement must be taken to be several as well as joint, and that P. could sue alone for a breach of it:—Held, also, that there had been a breach of it, for that a person acting as a surgeon was carrying on the profession of a surgeon, although he only acted as salaried assistant to a surgeon who carried it on for his own benefit. *Allen* v. *Taylor* (19 W. R. 556) distinguished. *Palmer* v. *Mallet*, 57 L. J., Ch. 226; 36 Ch. D. 411; 58 L. T. 64; 36 W. R. 460—C. A.

Deceased Partner—Right of Estate to Share.]—The estate of a deceased partner is entitled to participate in the goodwill of a business which does not belong to the surviving partners except by express agreement. *Wedderburn* v. *Wedderburn*, 22 Beav. 84; 25 L. J., Ch. 710; 2 Jur. (N.S.) 674.

By articles of partnership, on the death of a partner the survivors were entitled to the goodwill. A., a partner, died in 1801, having appointed his co-partners executors. They continued the trade, having made out an account, from which it appeared that the assets (consisting nearly wholly of outstanding debts) were 496,000*l.*, the liabilities 410,000*l.*, and the surplus 85,900*l.*, of which A.'s share was 55,000*l.* The survivors carried this to the credit of the deceased partner's account, and they paid the amount with interest to the cestuis que trustent as they came of age. In 1831 the children claimed to participate in the profits of the subsequent trading, which in thirty years had amounted to 308,000*l.*, on the ground that their capital had been employed therein. At the hearing, inquiries were directed with a view to charge them; but on the Master's report, the court having come to the conclusion that at the testator's death the surplus was merely nominal, that the business to wind up was insolvent, and that the subsequent profits were attributable to goodwill and the personal exertions and capital of the surviving partners:—Held, that the plaintiffs were not entitled to participate in the profits, so far as those profits were attributable to the goodwill and connection in trade of the old firm, and that their share in the portion of which they would be entitled to participate could not be estimated higher than the interest already paid. *Ib.*

If the goodwill of a business belongs wholly to surviving partners, the representatives of a deceased partner are not entitled to participate in the profits made by the surviving partners, though as a new firm they debited themselves with the general assets of the whole firm, including those of the deceased partner, and carried on the trade through a series of years, and through several changes in the firm; when, from the nature of the trade, and the state of the accounts of the old firm, and its liabilities, it appeared that neither the assets of the deceased partner, nor the assets of the old firm, could have been realised, except by a continuance of the business. *Ib.*

If two or more partners carry on business, and one dies, his share of the goodwill is assets, as part of his estate, but the value of his share will be computed with reference to his interest, limited, however, by any rights which may survive to his co-partners. *Smith* v. *Everett*, 29 L. J., Ch., 236; 27 Beav. 446; 5 Jur. (N.S.) 1332; 7 W. R. 605.

Where, therefore, after the death of a partner, his co-partner could carry on business alone, or by a slight alteration in the name of the firm, and upon the same premises, and a beneficial privilege vested solely in the surviving partner, who alone could confer that right on other per-

sons :—Held, that the value of the share of the deceased partner must be a proportion of the net value, after deducting the amount at which the surviving rights were valued. *Ib.*

After the death of one of two partners in a bank, the survivor sold the business for 10,000*l.* :—Held, that the estate of the deceased was entitled to a share of so much of the 10,000*l.* as was attributable to the goodwill, and special inquiries were directed to ascertain the value, having regard to the fact, first, that the partnership premises belonged to the survivor ; secondly, that he had still the right to carry on the same business in the same locality ; and, thirdly, that the sole right of issuing notes, under the 7 & 8 Vict., c. 32, belonged to him. *Ib.*

B., the surviving partner in a business, being also the executor of the deceased partner, carried on for eight years the business, which was insolvent at the death of the deceased partner, and then sold the business for 1,700*l.* In a suit for the administration of the deceased partner's estate against B., as executor :—Held, that the value of the goodwill ought to be ascertained at the time of the deceased partner's death, and not at the time of sale. *Broughton* v. *Broughton*, 44 L. J., Ch. 526 : 23 W. R. 970.

In 1877 the three partners in a firm of solicitors agreed that the partnership should be dissolved, that two of them should continue to carry on the partnership business, and should employ the third as a clerk at a salary, and that all the books, papers, and other property of the firm should vest in and be the property of the two continuing partners. The third partner died shortly afterwards, and in an action by his administratrix against the two continuing partners, an order was made directing the partnership accounts to be taken as from January, 1874. In taking the accounts, the plaintiff claimed that a sum should be allowed in respect of the interest of the deceased partner in the "goodwill" of the partnership business, which was put at 10,000*l.*, being five years' purchase of the estimated annual profits of the business :—Held, that, under the circumstances, no sum could be allowed in respect of the alleged "goodwill" of the business. *Arundell* v. *Bell*, 52 L. J., Ch. 537 ; 49 L. T. 345 ; 31 W. R. 477—C. A.

—— **Death before Yearly Account taken—Showing Purchase-money.**]—Four persons carried on business in partnership under articles which provided that on the death of one partner his share was to be taken over by the survivors at the value put upon it in the last balance-sheet. Negotiations for a sale of the business premises to a railway company were in progress when one partner died :—Held, that, in taking the accounts, the deceased partner was entitled to be credited with his share of the premises, plant, fixtures, &c., at the price which was subsequently given for them by the railway company, but not with a share of the goodwill, although that was included in the sale, and a value put upon it. *Hunter* v. *Dowling*, 64 L. J., Ch. 713 ; [1895] 2 Ch. 223 ; 13 R. 474 ; 72 L. T. 653 ; 43 W. R. 619.

—— **Legatee of Share.**]—A legatee of the share of the mere goodwill of a deceased partner cannot support a bill against the surviving partner to obtain the benefit of his legacy, even after assent by the executor. *Robertson* v. *Quiddington*, 28 Beav. 529.

—— **Articles as to.**]—By articles of partnership between A. and B., it was agreed (Art. 24) that for the purposes of the articles the goodwill of the business should be deemed to be of the value of 6,000*l.* and to belong to the partners in the same proportions as those in which they respectively were entitled to the capital of the partnership ; but the value of the goodwill was not to be taken into account in any of the accounts between the partners, or between the partnership and either of the partners. It was also provided (Art. 49) that on the determination of the partnership, at whatever time and by whatever means, a general account and valuation of all the property, effects, and liabilities of the partnership should be made up and settled by and between the partners, as the case might be, or the surviving partner and the executors or administrators of the deceased partner, and their respective claims on, or shares and interests in, the partnership and the property and effects thereof should be ascertained ; also, that if either partner died, the partnership should thereupon determine. A. was entitled to five-ninths, and B. to four-ninths of the capital. A. died :—Held, that in taking a general account and valuation of the partnership property and effects (under Art. 49) between A.'s executor and B., the value of the goodwill was properly to be included in the account. *Wade* v. *Jenkins*, 2 Giff. 509 ; 30 L. J., Ch. 633 ; 7 Jur. (N.S.) 39 ; 3 L. T. 464.

When three brothers entered into a partnership for seven years, "or for such further time as the partners might agree upon," and at the end of the seven years a general account was taken, but nothing was mentioned about continuing the partnership, and the general account did not include the plaintiff's share of the goodwill :—Held, that although he had signed the account he was not bound by it, as it was not according to the terms of the articles, and no mention of the goodwill was made in the account. *Barrow* v. *Barrow*, 27 L. T. 431.

—— **Purchase of Business by Surviving Partner—Valuation.**]—Two persons agreed to carry on the business of a brewery for twenty-one years under partnership articles, which provided that, on the death of a partner without nominating a son to succeed him (which event happened), "the property, stock, goods, and effects of the said partnership" were to be valued, and the surviving partner was to have the option to purchase at such valuation. The articles further provided that immediately on the determination of the partnership by any of the contingencies mentioned in the articles the partners should join in making up a final account of all the property, joint-stock, money, goods, and effects belonging to the partnership, and that after such account should have been so made up "the property, stock, goods, and effects then employed or used in carrying on the said business" should be valued as therein mentioned. The partnership was continued upon the same articles by a deed of covenant for a further period of seven years, and afterwards without any written or verbal agreement. One partner died, and the surviving partner exercised his option to purchase the business at the valuation :—Held, that although the articles said nothing about goodwill in terms, yet the words "then employed or used in carrying on the said business" could not be construed in so narrow a way as to

exclude the goodwill in valuing the business; and that, therefore, the goodwill must be valued separately. *Hall* v. *Barrows* (4 De G. J. & S. 150; 33 L. J., Ch. 204) applied. Held also, that the executors of the deceased partner were entitled to a share of profits down to the date of the valuation. *Page* v. *Ratliffe*, 76 L. T. 63—C. A.

—— **"Susceptible of Valuation."**]—Partnership articles executed in India on the plaintiff and defendants going into partnership as commission merchants, gave power to the majority to inforce the retirement of any partner, if they should be so desirous, on giving six calendar months' notice. It was provided by the articles that an account should be taken as soon as possible after the 30th April in each year of the stock, moneys, debts, and partnership assets, and a valuation should be made of all the particulars included in such accounts, which might be in their nature "susceptible of valuation." On the 30th April, 1875, the majority of the partners gave due notice of inforced retirement to the plaintiff. After the notice, but before the date fixed for his retirement, they furnished him with an account to ascertain the sum due to him under the articles, but in such account made no valuation or allowance of or in respect of the goodwill of the business:—Held, that the goodwill of the business was rightly omitted from the account, as not being a partnership asset "susceptible of valuation." *Steuart* v. *Gladstone*, 10 Ch. D. 626; 40 L. T. 145; 27 W. R. 512—C. A. Reversing 47 L. J., Ch. 423.

When, after the expiration of a term limited by partnership articles, the business is carried on by the partners without the execution of fresh articles, all those provisions of the old articles which are not inconsistent with a partnership at will continue to apply to the partnership at will thus constituted. Under such circumstances:—Held, that a provision in the articles that, on the decease of one of the partners before the expiration of the partnership term, the surviving partner should pay to his executors the sum of 1,500*l.*, as the purchase-money for his interest in the goodwill of the business, applied to the partnership at will constituted by the carrying on of the business without fresh articles after the expiration of the partnership term. *Essex* v. *Essex* (20 Beav. 442) followed; *Cookson* v. *Cookson* (8 Sim. 529) not followed. *Cox* v. *Willoughby*, 49 L. J., Ch. 257; 13 Ch. D. 863; 42 L. T. 125; 28 W. R. 503.

—— **Silence as to Goodwill — Dissolution — Use of Name of Firm.**]—A firm of solicitors consisting of three partners, carried on business under the style of "Chappell, Son, & Griffith." The senior partner having died, the business was continued by the son and the junior partner under the same style for upwards of three years. The partnership was then dissolved, an agreement being executed providing for the dissolution, but containing no reference to the goodwill of the business or the sale or disposal thereof. After the dissolution, the business of a solicitor was carried on by Chappell, the son, on the premises held by the original firm under the style of "Chappell & Son." Griffith, having taken offices a few doors off, also carried on the business of a solicitor, under the style of "Chappell & Griffith." To this Chappell objected, and having commenced an action to restrain Griffith from carrying on business under the style referred to, moved for an interim injunction. It was proved that immediately before the dissolution of the partnership, Griffith had written to Chappell, stating that he intended carrying on business under the style of "Chappell & Griffith," and making suggestions as to the style Chappell should adopt. Circulars were also forwarded by Griffith to all the clients of the old firm, informing them that he proposed to carry on the business of a solicitor by himself, and stating the style that he intended to adopt:—Held, that the primâ facie right of the defendant was to use the name of the old firm, no arrangement having been made as to the goodwill of the business; that from the nature of the business, and from the fact that the style of the original firm had been used with a variation, there was practically no risk that the plaintiff would be exposed to injury by what the defendant was doing: and that, therefore, no case had been made for the intermediate interferance of the court. *Chappell* v. *Griffith*, 53 L. T. 459; 50 J. P. 86.

See PARTNERSHIP.

Retiring Partner—Share of Goodwill.]—Claim of retiring partner to a share in the value of the goodwill of the business disallowed. *Hall* v. *Hall*, 20 Beav. 139.

Two persons entered into partnership for twenty-one years, but in consequence of disagreements and misconduct, disputes ensued. The partnership was dissolved by decree, one consenting to retire, and the other to take the stock and effects at a valuation:—Held, that the retiring partner was not entitled to any allowance for his share of the goodwill, no provision being made by the partnership articles for such an allowance on a dissolution by death or by retirement of one partner by notice during the term. *Ib.*

—— **Implied Agreement not to Compete.**]—Award made of 500*l.* to B., a retiring partner, as consideration for goodwill, etc., on understanding not expressed in award that he should not set up same trade in the vicinity; on parol evidence, injunction was granted to enforce award and such understanding. *Harrison* v. *Gardner*, 2 Madd. 198; 17 R. R. 207.

Sale of Goodwill.]—A. and B. carried on the business of country bankers, with the right to issue notes, in premises belonging to A. There were no articles of partnership, but the capital of the bank was contributed by the partners equally. B. died, and A. continued to carry on the business for some time after his death, when he sold the goodwill of the business:—Held, that the representatives of the deceased partner were entitled to a portion of the purchase-money, but in apportioning the proceeds of the sale regard must be had to the circumstances that the banking premises belonged to A., that he was entitled to carry on the business of a banker in the same premises, though not under the name of the old firm, and that the right of issuing notes survived. *Smith* v. *Everett*, 27 Beav. 446; 29 L. J., Ch. 236; 5 Jur. (N.S.) 1332; 7 W. R. 605.

—— **With Book Debts.**]—Upon the sale of the goodwill of a partnership business which had been carried on by the surviving partner and the deceased partner, the book debts were directed to be sold together with the goodwill. *Johnson* v. *Helleley*, 34 Beav. 63; 34 L. J., Ch. 32; 10 Jur.

(N.S.) 1041 ; 11 L. T. 295 ; 13 W. R. 38. Affirmed 2 De G. J. & S. 446 ; 34 L. J., Ch. 179 ; 11 L. T. 581 ; 13 W. R. 220.

—— **Sale by One Partner to Other or Others.**]—Primâ facie the sale of his share in a going business by one partner to the others imports a sale of the vendor's interest in the goodwill of that business. *Churton* v. *Douglas*, 1 Johns. 174; 28 L. J., Ch. 841 ; 5 Jur. (N.S.) 877 ; 7 W. R. 365.

It is perfectly settled that the mere sale of the goodwill neither implies a contract on the part of the vendor not to set up again in a similar business, nor restricts him as to the place of carrying on that business. *Ib.*

Upon a sale, goodwill means every positive advantage (as contrasted with the negative advantage of the vendor not carrying on the business himself) which has been acquired by the vendor's firm in carrying on its business, everything connected with the premises or the name of the firm, and everything connected with, or carrying with it the benefit of the business ; but it does not follow that the purchaser has a right to use the name of the vendor's firm simpliciter. *Ib.*

A. and B. carried on the business of chemists upon leasehold premises belonging to A. By the partnership articles, upon A.'s retirement B. was to have the right of purchasing the premises at a valuation :—Held, that the premises were to be valued irrespective of the advantages to be derived from the fact that the business of chemist had been carried on there for thirty years. *Burfield* v. *Rouch*, 31 Beav. 241.

—— **Receiver—Interference with.**]—By an agreement for a dissolution of partnership between A. and B., it was provided that the machinery, plant, stock-in-trade, goodwill, and existing contracts should be offered for sale ; and two persons should be receivers of the partnership estate and act in the winding up of the same under the direction of the partners. A notice was issued, announcing the dissolution of the partnership ; and afterwards B. used portions of the partnership property for the purpose of carrying on a business of his own of the same kind, thereby diminishing the value of the goodwill of the partnership. Injunction granted to restrain him from carrying on the business on his own private account, and from impeding the receiver. *Turner* v. *Major*, 3 Giff. 442 ; 8 Jur. (N.S.) 909 ; 5 L. T. 600 ; 10 W. R. 243.

Sale by Court—Notice of Liability to Competitors.]—The goodwill of a partnership business having been ordered to be sold by the court in a suit instituted by the surviving partner, it was directed that the advertisements and particulars of sale should contain a notice, that a sale would not prevent any person interested in the business from carrying on the like business in the same town. *Johnson* v. *Helleley*, 2 De G. J. & S. 446 ; 34 L. J., Ch. 179 ; 10 Jur. (N.S.) 1041 ; 11 L. T. 581 ; 13 W. R. 220.

And see PARTNERSHIP.

4. PRINCIPLE OF VALUATION.

Partners, as Between.]—As to the principle on which the value of the goodwill of a business should be ascertained as between the partners on a dissolution. *Mellersh* v. *Keen*, 28 Beav. 453.

When, on a dissolution, one partner obtains exclusively the benefit of the goodwill, and is made accountable for it, the court, in ascertaining its value, considers what it would have produced, if sold in the most advantageous manner, and at the proper period of time. *Ib.*

The value of the goodwill of a banking business assessed at one year's average net profits. *Ib.*

On the purchase by a surviving partner of the goodwill of a business, the goodwill should be valued on the footing that such surviving partner is entitled to set up the same description of business without purchasing. *Hall* v. *Barrows*, 4 De G. J. & S. 150 ; 33 L. J., Ch. 204 ; 10 Jur. (N.S.) 55 ; 9 L. T. 561 ; 12 W. R. 322.

As to time for ascertaining value. See *Broughton* v. *Broughton*, col. 588.

—— **Benefit of Advertisements Paid for.**]—The payment of the expenses of advertisements out of partnership funds is not necessarily a ground for giving to each partner, at the expiration of the partnership, a continuing share in the advantages of publicity produced by the advertisements, the partnership having had, during its continuance, the benefit of the expenditure. *Morison* v. *Moat*, 9 Hare, 266.

Banking Business.]—The value of the goodwill of a banking business assessed at one year's average net profits. *Mellersh* v. *Keen*, 28 Beav. 453.

Solicitors — Seven Years' Term.]—Solicitors agreed to become partners for seven years, and stipulated that if either retired, the continuing partners should pay him the fair marketable value of his goodwill. One gave notice two days before the expiration of the seven years :—Held, that he was only entitled to the value of the goodwill as for two days, and not as of a going business. *Austen* v. *Boys*, 24 Beav. 598 ; 27 L. J., Ch. 243 ; 3 Jur. (N.S.) 1285. Affirmed 2 De G. & J. 626 ; 27 L. J., Ch. 714 ; 4 Jur. (N.S.) 719; 6 W. R. 729.

In 1839, a retiring partner stipulated with the continuing partners that they should at a future period take his grandson T. into the business. In 1846, the continuing partners entered into articles for seven years, and by one clause (which formed no part of the partnership contract prior to that time), it was stipulated that any partner might retire, and the continuing partners should then pay him the value of his share in the "goodwill." Afterwards, in 1849, T. was admitted, but the memorandum arranging his admission specified little more than the share he was to take, and it was agreed that it should not annul the articles of 1846, as between the former partners. T. had no notice of the stipulation as to retirement :—Held, that T. was not bound by it, though the former partners were, and assuming that under it the value of the goodwill was to be calculated as a perpetuity, still that the arrangements of 1849 had cut it down and limited it to so much of the seven years as were unexpired at the time of the notice to retire. *Ib.*

Tobacco Broker's Business.]—The goodwill of a tobacco broker, whose brother had been actively engaged in the business and survived him, and continued the business :—Held, to be valueless. *Davies* v. *Hodgson*, 25 Beav. 177.

Damages for Breach of Agreement.]—In August, 1845, the defendant's testatrix granted to the plaintiff a lease of a public-house in London Road, Liverpool, for fourteen years, at a rent of 70*l.* per annum, the latter paying 300*l.* for the goodwill; and before the expiration of that lease, viz., in March, 1858, she granted him a further lease for fourteen years at a rent of 80*l.* per annum. Each of these leases contained the following proviso:—"Provided also, and it is agreed and declared that, at the expiration or other sooner determination of the term hereby granted, all such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the premises from an incoming tenant, shall be received by and belong to the lessee, his executors, &c." The second lease being about to expire, negotiations took place betwen the plaintiff and the defendant for a renewal, but they failed to come to terms; and the defendant, with notice of the plaintiff's claim under the above proviso, granted a lease of the premises to a new tenant for a term of fourteen years, at a rent of 160*l.* per annum, and a premium of 1,300*l.* Upon a case stated for the opinion of the court by an arbitrator, to whom it was to be referred to assess the amount of damages the plaintiff was entitled to recover for the breach (if any) of the above proviso, upon the principles to be laid down by the court, it was found as a fact that "the rental of 160*l.* per annum reserved in the lease granted to the new tenant was, without any premium, bonus or other payment whatever, a full and sufficient rental for the premises under such a lease, whether intended for a licensed victualler's business or not;" and, further, that "the goodwill of the business carried on by the plaintiff would, if belonging to the owner of the house, have had a very considerable value, and if such owner had in that case been willing to grant a lease similar to that granted to the new tenant, a sum exceeding 1,300*l.* would without difficulty have been obtained for the goodwill":—Held, that the proviso was broken; and that the arbitrator was to estimate the damages the plaintiff was entitled to recover for such breach, in the same manner as one accustomed to value the goodwill as between outgoing and incoming tenants would estimate them, and in so doing was not to disregard the increased value of the property in the neighbourhood generally. *Llewellyn* v. *Rutherford*, 44 L. J., C. P. 281; L. R. 10 C. P. 456; 32 L. T. 610.

GRAND JURY.

See CRIMINAL LAW.

GRANT.

See CROWN—DEED AND BOND—EASEMENT—INTERNATIONAL LAW.

GUARANTEE AND INDEMNITY.

See PRINCIPAL AND SURETY.

GUARDIAN.

Ad Litem.]—*See* INFANT—LUNATIC.

Of Children.]—*See* HUSBAND AND WIFE—INFANT.

Of Lunatic.]—*See* LUNATIC.

Of the Poor.]—*See* POOR LAW.

GUERNSEY.

See COLONY.

HABEAS CORPUS.

See CROWN OFFICE.

HACKNEY CARRIAGE.

1. *Licences*, 596.
2. *Obstruction in Streets*, 598.
3. *Proprietor and Customer*, 599.
4. *Driver and Customer*, 601.
5. *Proprietor and Driver*, 602.

1. LICENCES.

"Hackney Carriage."]—By a local act (4 Vict. c. 16), s. 145, if the driver of any hackney carriage shall be found standing or plying for hire within the limits of the act without a licence, he shall be liable to a penalty. There is no definition of a hackney carriage in the act:—Held, that the words "hackney carriage" must be taken to mean a carriage exposed for hire to the public, whether standing in the public street or in a private yard. *Bateson* v. *Oddy*, 43 L. J., M. C. 131; 30 L. T. 712; 22 W. R. 703.

Section 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888, imposes a duty upon every hackney carriage as thereinafter defined, and by sub-s. 3 a "hackney carriage" means "any carriage standing or plying for hire":—Held, that an ordinary omnibus running along a fixed route is a "hackney carriage" within the meaning of the act. *Hickman* v. *Birch*, 59 L. J., M. C. 22; 24 Q. B. D. 172; 62 L. T. 113; 54 J. P. 406.

Where a conviction alleged that a coachmaster, not being licensed, did drive and let to hire a certain coach and two coach-horses, being within the bills of mortality, and within and upon the paved streets of London and Westminster, and, in the information on which the conviction was founded, it was stated that the defendant did drive for hire a certain coach and two coach-horses, within or upon such paved streets; and that the driver conveyed a person in the coach for hire within the limits aforesaid:—Held, that such conviction could not be supported under any of the statutes by which hackney coaches were licensed or regulated, as it was not alleged to be a hackney coach within 9 Anne,

c. 23, nor was it driving for hire with a coach, within 1 Geo. 1, c. 57. *Cloud* v. *Turfery*, 9 Moore, 595; 2 Bing. 318; 3 L. J. (O.S.) C. P. 16.

—— **Plying for Hire.**]—A proprietor of an unlicensed omnibus who makes no charge for fares but receives money as voluntary contributions from passengers, is a person who "permits a carriage to be used as a hackney carriage plying for hire" within s. 45 of the Town Police Clauses Act, 1847. *Cocks* v. *Mayner*, 10 R. 467; 70 L. T. 403; 17 Cox, C. C. 745; 58 J. P. 104.

A carriage, whilst on the premises of a railway company, under a contract with them to await the arrival of their trains, for the conveyance of any passenger by railway who chooses to hire it, is plying for hire within the Metropolitan Public Carriage Act, 1869, s. 4, and is therefore a hackney carriage, and must be licensed. *Clarke* v. *Stanford*, 40 L. J., M. C. 151; L. R. 6 Q. B. 357; 24 L. T. 389; 19 W. R. 846. S. P., *Allen* v. *Tunbridge*, 40 L. J., M. C. 197; L. R. 6 C. P. 481; 24 L. T. 796; 19 W. R. 849.

In a district to which the Local Government Act, 1858, applied, a piece of ground adjoining a railway station, and belonging to the company, metalled and separated from the highway only by a gutter, was used as an approach to the railway station. Private carriages were allowed to stand there, but no hackney or public carriages, except those of C.; C., by agreement with the company, having the sole right of standing carriages there for the purpose of plying for hire. He having been convicted in a penalty for allowing his carriages to ply there for hire without a licence:—Held, that the place was not a street within the Towns Police Clauses Act, 1847, s. 3, for that the places included by that section in the word "street" were places over which the public had a right of passage; and that the conviction was therefore wrong. *Curtis* v. *Embrey*, 42 L. J., M. C. 39; L. R. 7 Ex. 369; 21 W. R. 143.

Application by Employer of Driver—Personal Attendance of Driver required.]—An information was laid by an inspector against the defendant for unlawfully driving a stage coach without having obtained a licence from the Improvement Commissioners of Llandudno. Defendant was in the employ of a carriage proprietor as a stage coach driver. The licensing committee appointed by the commissioners passed a resolution requiring drivers who desired their licences renewed to apply to the committee in person. The manager of the said carriage proprietor applied to the licensing committee for a renewal of, amongst others, the defendant's licence. The committee refused to consider any application unless the applicants attended personally. No complaint was made against the defendant personally. The defendant subsequently acted as a driver without a licence. The justices held that the defendant had failed to obtain a licence in consequence of the committee refusing to hear his application, although they had no complaint against him, and that under those circumstances the charge was trivial, and they accordingly dismissed it. The inspector who preferred the information appealed:—Held, that the justices were wrong and should have convicted, for there had been a breach of the law, and that the commissioners had a right to insist on the personal attendance of the applicants, the possession of a driver's licence being a personal privilege. *Banton* v. *Davies*, 66 L. T. 192; 17 Cox, C. C. 469; 56 J. P. 294.

Police and Revenue Licences.]—A licence for hackney carriages, granted by the commissioners of stamps, under 2 & 3 Will. 4, c. 120, does not dispense with the necessity of a licence under the Towns Police Clauses Act of 1847, s. 37; the first being required for the purpose of revenue, the second for the purpose of police. *Buckle* v. *Wrightson*, 5 B. & S. 854; 34 L. J., M. C. 43; 11 Jur. (N.S.) 280; 11 L. T. 341; 13 W. R. 92.

Discretion of Police Commissioner.]—Notwithstanding the terms of 6 & 7 Vict. c. 86, s. 8, a commissioner of police may exercise a discretion in granting licences to metropolitan omnibus drivers and conductors, and may propose such questions to them with relation to their application for such licences as he may think proper, and is not bound to renew such licences upon the bare production of a certificate of the good conduct and fitness of the applicant. *Mitcham, Ex parte*, 5 B. & S. 585; 33 L. J., Q. B. 325; 10 Jur. (N.S.) 1254; 10 L. T. 573; 12 W. R. 983.

2. Obstruction in Streets.

Plying for Hire at Place other than a Cab-stand.]—A licensed driver of a hackney carriage had been convicted under 6 & 7 Vict. c. 86, s. 33, of plying for hire elsewhere than at some standing or place appointed for that purpose. He was the servant of a cab proprietor, who was also the occupier of a public-house immediately opposite to the Putney railway station. In front of the public-house, and between it and the road, is an open piece of ground, part of the land attached to the public-house, and private property. Here he stood with his master's cab, and when hailed from the station drove across the street and picked up a fare. This place was not appointed by the commissioners of police as a standing for hackney carriages under s. 29:—Held, that these facts did not constitute an offence under 6 & 7 Vict. c. 86, or under 1 & 2 Will. 4, c. 22. *Skinner* v. *Usher*, 41 L. J., M. C. 158; L. R. 7 Q. B. 423; 26 L. T. 430; 20 W. R. 659.

The urban sanitary authority of E. made a by-law that every driver of a hackney carriage, when plying for hire, should station his carriage on one of the appointed stands. In the city of E. there was a square in front of a hotel which was not inclosed, and where the public could pass freely, except when the hotel-keeper's carriages stood there, as the square was let with the hotel, and used for the hotel cabs standing when plying for hire:—Held, that the driver when plying for hire there incurred the penalty imposed by the by-law, as this place was part of the street. *Marks* v. *Ford*, 45 J. P. 157.

By an order in council the entire area, places, and parts of places comprised within the boundaries of a township were constituted a district, for the purposes of the 11 & 12 Vict. c. 63. An improvement act empowered the local board from time to time to make by-laws for regulating the conduct of the drivers of hackney carriages plying within the district, and for fixing the stands of such hackney carriages. The local board made the following by-law: "That the several places in the district where painted boards shall from time to time be placed by the local board, to distinguish them as stands, shall be the stands for

such number of carriages, horses, asses, and mules, &c., as shall be mentioned on such boards; and no driver of any such carriage, &c., shall place the same on any other than some one of such stands, or shall ply for hire in any of the streets or places within the district (except on one of such stands) under a penalty not exceeding 40*s*." A licensed driver was convicted of plying for hire off a stand. On appeal, the justices stated that it was proved to their satisfaction that he was driving a licensed carriage on the beach, within the district; that he got off, and spoke to some people, and took them up, having then passed a stand:—Held, first, that the by-law was valid, although it did not, on the face of it, specify the exact localities where the stands were to be. *Blackpool Local Board* v. *Bennett*, 4 H. & N. 127; 28 L. J., M. C. 203; 7 W. R. 382.

Held, secondly, that the seashore between high and low-water mark was within the district. *Ib.*

Held, thirdly, that the driver was properly convicted of plying for hire off a stand. *Ib.*

Removal of Cabstand.]—A paving act authorised the commissioners to direct and regulate the hackney coach stands within their district:—Held, that they might remove a hackney coach stand altogether if it obstructed the public street. *Rex* v. *Rawlinson*, 9 D. & R. 7; 6 B. & C. 23; 5 L. J. (O.S.) M. C. 16.

3. Proprietor and Customer.

Negligence of Driver—Liability of Registered Proprietor.]—Where, according to the ordinary law, the master of the driver of a hackney carriage would be liable for damage caused by the negligence of the driver, an action will lie, under the provisions of the Metropolitan Hackney Carriage Act, 1843, against the registered proprietor of the carriage, notwithstanding that, by the ordinary law, the driver is not his servant. *King* v. *Spurr* (8 Q. B. D. 104) was overruled by *King* v. *London Improved Cab Co.* (23 Q. B. D. 281). *Keen* v. *Henry*, 63 L. J., Q. B. 211; [1894] 1 Q. B. 292; 9 R. 102; 69 L. T. 671; 42 W. R. 214; 58 J. P. 262—C. A.

Under the Metropolitan Hackney Carriage Act, 1843, so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master and servant existed between them. *Venables* v. *Smith* (2 Q. B. D. 279) approved. *King* v. *London Improved Cab Co.*, 58 L. J., Q. B. 456; 23 Q. B. D. 281; 61 L. T. 34; 37 W. R. 737; 53 J. P. 788—C. A.

The relation of the proprietor and the driver of a cab quoad the public is that of master and servant; inter se that of bailor and bailee. Where there is no wrongful user of the cab by the driver, the proprietor is responsible for his negligence. *Venables* v. *Smith*, 46 L. J., Q. B. 470; 2 Q. B. D. 279; 36 L. T. 509; 25 W. R. 584.

A driver, who had no specified time for starting from or leaving the proprietor's stables, made a short deviation for his own convenience at the close of his day's work and while returning to the stables. After such deviation he was again returning when he ran over and injured the plaintiff:—Held, that the driver was not on an independent journey, and must be considered to be in the proprietor's employ at the time of the accident. *Ib.*

The plaintiff's cart and pony were injured by a cab plying in the streets of London, owing to the negligence of the cab-driver. The defendant was proprietor of the cab and licensed to ply it for hire. He had let the cab to the driver for a weekly payment, the horse, harness and whip being provided by the driver, with whom the defendant had nothing to do beyond receiving money from him:—Held, that under the circumstances there was nothing in the Metropolitan Hackney Carriage Acts (1 & 2 Will. 4, c. 22, and 6 & 7 Vict. c. 86), to make the defendant liable for the negligence of the driver. *Powles* v. *Hider* (6 El. & Bl. 207) and *Venables* v. *Smith* (2 Q. B. D. 279) considered. *King* v. *Spurr*, 51 L. J., Q. B. 105; 8 Q. B. D. 104; 45 L. T. 709; 30 W. R. 152; 46 J. P. 198. *See* supra.

In an action against the registered proprietor of a cab for the loss of luggage by a licensed driver, it appeared that the driver paid each morning a fixed sum for the use of the cab and horse, and was allowed to keep for himself the money he received. The cab had upon it the name of the proprietor, but the proprietor exercised no control over the driver as to where he should ply with the cab:—Held, that, under the circumstances, and the 1 & 2 Will. 4, c. 22, and 6 & 7 Vict. c. 86, the driver was the servant or agent of the proprietor, with authority to make contracts, on which the proprietor was liable; and therefore the action was rightly brought against him. *Powles* v. *Hider*, 6 El. & Bl. 207; 25 L. J., Q. B. 331; 2 Jur. (N.S.) 472.

—— **Form of Action.**]—In an action against a cab proprietor, the declaration stated that the plaintiff hired the vehicle, and that, in consideration of the premises, and that the plaintiff with his luggage would become a passenger, and of certain reward, the defendant promised the plaintiff to carry and convey him and his luggage safely and securely, and alleged a loss of part of the luggage by the negligence of the defendant's servant:—Held, that the declaration was sufficient to charge the defendant for a breach of his implied duty to use an ordinary degree of care, the words "safely and securely" not necessarily importing a more extended liability. *Ross* v. *Hill*, 2 C. B. 877; 3 D. & L. 788; 15 L. J., C. P. 182; 10 Jur. 435.

A declaration alleged that the defendant, at the time of the promise and negligence therein alleged, was the owner of a hackney cab at the time of the promise conducted by his servant; that the plaintiff at his request hired it of him, and the defendant promised to convey the plaintiff's luggage safely, but not regarding his duty or promise negligently lost the same:—Held, that the action was founded on contract, and that as a sum not exceeding 20*l*. was recovered, the plaintiff was deprived of costs under 30 & 31 Vict. c. 142, s. 5. *Baylis* v. *Lintott*, 42 L. J., C. P. 119; L. R. 8 C. P. 345; 28 L. T. 666.

Award by Magistrate against Driver—Bar to Action against Proprietor.]—An award of compensation by a magistrate against the driver of a hackney or metropolitan stage-carriage upon an information for furious driving under 6 & 7 Vict. c. 86, s. 28, is a bar to a subsequent action against such driver's employers by the party injured in respect of his injuries. *Wright* v. *London General Omnibus Co.*, 46 L. J., Q. B. 429; 2 Q. B. D. 271; 36 L. T. 590; 25 W. R. 647.

If the party injured accepts such compensation he is barred from further proceedings, even where he did not lay the information or, in the first instance, request the magistrate to award compensation. *Ib.*

4. Driver and Customer.

Refusing to Drive.]—Under 10 Geo. 3, c. 44, s. 7, a justice of the peace, after convicting a hackney coachman for refusing to go with his coach, might immediately commit him to the house of correction if he did not pay the penalty. *Duck* v. *Addington*, 4 Term Rep. 447.

A hackney carriage whilst on the premises of a railway company by their leave for the accommodation of passengers by their trains, is not plying for hire in any street or place within the meaning of the Hackney Carriage Acts, 1 & 2 Will. 4, c. 22, s. 35, and 16 & 17 Vict. c. 33, s. 17, and the driver of such carriage cannot under those acts be compelled to convey any person desirous of hiring it. *Case* v. *Storey*, 38 L. J., M. C. 113; L. R. 4 Ex. 319; 20 L. T. 618; 17 W. R. 802.

The word "place" in s. 17, sub-s. 2 of the London Hackney Carriage Act, 1853, means any place to which the driver of a hackney carriage is required by a fare to drive where he can gain admittance, even though such a place may be private property, as, for instance, a railway station. *Kippins, Ex parte*, 66 L. J., Q. B. 95; [1897] 1 Q. B. 1; 75 L. T. 421; 45 W. R. 188; 18 Cox, C. C. 459; 60 J. P. 791.

Fare — Non-payment — Civil Debt — Towns Police Clauses Act.]—A cab fare is a civil debt, and upon complaint by a cabman under s. 66 of the Towns Police Clauses Act, 1847, the justices have no power to order the defendant to be imprisoned in default of payment of the sum claimed and costs. *Reg.* v. *Kerswill*, 64 L. J., M. C. 70; [1895] 1 Q. B. 1; 10 R. 476; 71 L. T. 574; 43 W. R. 59; 18 Cox, C. C. 49; 59 J. P. 342.

—— **Extra Persons.**]—The 16 & 17 Vict. c. 127, s. 14, provides that when more than two persons shall be carried inside any hackney carriage or cab drawn by one horse only, a sum of 6*d.* for each person shall be paid for the whole hiring, in addition to the fare directed to be paid for two persons under 16 & 17 Vict. c. 33, and that two children under ten years of age shall be considered as one adult person:—Held, that if two children under ten years of age are carried in excess of two persons, they shall be counted and paid for as one adult; but that if one child only be so conveyed in excess, he shall still be considered as an extra person within the meaning of the act, and paid for accordingly. *Norton* v. *Jones*, 8 L. T. 241; 11 W. R. 573.

—— **Notice of.**]—Under 32 & 33 Vict. c. 115, a secretary of state made an order that the application for a licence for a hackney carriage should specify the proposed fares; that the carriage should be examined and numbered; that a licence specifying the number and the fares should be granted; and that such fares should be put on a flag on the carriage; and provided a penalty for breach of the order:—Held, that the order was valid, and the penalty for not having a flag inscribed with the fares enforceable. *Bocking* v. *Jones*, 40 L. J., M. C. 19; L. R. 6 C. P. 29; 23 L. T. 739; 19 W. R. 227.

5. Proprietor and Driver.

Injuries Due to Bad Horse.]—When a cab-driver hires from a cab proprietor a horse and a cab at a certain sum per day, the relationship of master and servant does not exist between the proprietor and the driver so as to deprive the driver of his remedy for personal injuries sustained by him, by reason of the proprietor hiring out to him a horse not reasonably fit and safe to drive, and notice of action, under 6 & 7 Vict. c. 86, s. 47, is not necessary in such a case. *Gibbons* v. *Standon*, 16 L. T. 497.

The plaintiff was the driver of the defendant's cab, for which he paid 18*s.* a day, and kept the remainder of what he earned for his own benefit. The plaintiff could do what he liked with the cab during the day, and was not under the control of the defendant. In an action by him against the defendant for an injury sustained by reason of the plaintiff having been supplied with a vicious and unmanageable cab horse, it was proved that the horse supplied had never before been driven in a hansom cab, and was fresh from the country. The jury found for the plaintiff, and the court discharged a rule to enter the verdict for the defendant:—Held, on appeal, that there must be a new trial, and the jury ought to be asked whether or not the plaintiff took the risk upon himself. *Fowler* v. *Lock*, 43 L. J., C. P. 394, n.; 30 L. T. 800—Ex. Ch.

The plaintiff was the driver of the defendant's cab, for which he paid 18*s.* a day, and kept the remainder of what he earned for his own benefit. The plaintiff could do what he liked with the cab during the day, and was not under the control of the defendant. In an action by the plaintiff against the defendant for an injury sustained by reason of the plaintiff having been supplied with a vicious and unmanageable cab horse, it was proved that the horse supplied had never before been driven in a hansom cab, and was fresh from the country. The jury found specially that the horse was not reasonably fit; that the plaintiff did not take upon himself the risk of the horse being reasonably fit; that the defendant did not take reasonable precautions to supply a horse reasonably fit, and that the horse and cab were intrusted by the defendant to the plaintiff as bailee and not as servant; whereupon a verdict was entered for the plaintiff:—Held, that the finding of the jury amounted to a finding of negligence in the defendant, and a rule to enter the verdict for the defendant was refused. *Fowler* v. *Lock*, L. R. 10 C. P. 90; 31 L. T. 844; 23 W. R. 415.

Proprietor Indorsing Licence—Action for.]—By 6 & 7 Vict. c. 86, s. 8, the registrar is empowered to grant a licence to parties to act as drivers of hackney carriages. By s. 21, the proprietor of every such hackney carriage "who shall permit or employ any licensed person to act as driver, shall require to be delivered to him, and shall retain in his possession, the licence of such driver, whilst such driver shall remain in his service." In an action by a driver of a hackney carriage against the proprietor, for defacing his licence whilst so retained in the possession of such proprietor, the declaration alleged that the defendant "wrongfully and unjustly wrote in ink, in and upon the licence, certain words, pur-

porting to give, and being intended to give, a character of the plaintiff, as an improper person to act as a driver of hackney carriages (that is to say, 'Discharged, having been guilty of the most reckless, careless act') " :—Held, that case was the proper form of action, and that it was unnecessary to allege that the defendant "maliciously" wrote the words. *Hurrell* v. *Ellis*, 2 C. B. 265 ; 15 L. J., C. P. 18 ; 9 Jur. 1013.

A proprietor of a metropolitan public carriage, employing a licensed conductor, is not justified in writing on his licence, deposited with him pursuant to 6 & 7 Vict. c. 86, s. 8, the ground on which he discharges the conductor. *Rogers* v. *Macnamara*, 14 C. B. 27 ; 2 C. L. R. 569 ; 23 L. J., C. P. 1 ; 17 Jur. 1166 ; 2 W. R. 19.

—— **Right to Notice of Action.**]—To entitle a person to notice of action under 6 & 7 Vict. c. 86, s. 47, on the ground that he bonâ fide believed that he was entitled under that act to do what he did, the belief must not only be bonâ fide, but also reasonable ; and, therefore, where the act gave a cab-proprietor power to summon a cab-driver before a magistrate for any misconduct, and the proprietor, instead of doing so, made an indorsement on the driver's licence, which had the effect of depriving him of employment as a cab-driver :—Held, that the proprietor was not entitled to notice of action, on the ground that he believed that he was putting the law in motion. *Heath* v. *Brewer*, 15 C. B. (N.S.) 803 ; 9 L. T. 653.

—— **Jurisdiction of Magistrate—"Matter of Complaint."**]—The addition of a name on a cab-driver's licence to the entries required by the London Hackney Carriages Act, 1843, to appear thereon, is a "defacing" of such licence, and is a "matter of complaint" between the cab-owner and cab-driver which a magistrate has jurisdiction to entertain ; and on evidence that the cab-driver has been prejudiced by such defacing, the magistrate can assess damages. *Norris* v. *Birch*, 64 L. J., M. C. 91 ; [1895] 1 Q. B. 639 ; 15 R. 222 ; 72 L. T. 491 ; 43 W. R. 271 ; 18 Cox, C. C. 123. J. M.

HANDWRITING.

See EVIDENCE.

HARBOURS.

See SHIPPING.

HAWKER AND PEDLAR.

See MARKETS AND FAIRS.

HEALTH (PUBLIC).

See LOCAL GOVERNMENT—METROPOLIS.

HEARSAY.

See EVIDENCE.

HEIR-AT-LAW.

Definition.]—An heir apparent is he who, if he survives his ancestor, must succeed ; an heir presumptive is he who, although heir if the ancestor dies presently, may be ousted by the intervention of a nearer title. *Anon.*, Lofft, 273.

A child born in Scotland of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland (there being no lawful impediment to their marriage either at the time of the birth or afterwards), though legitimate by the law of Scotland, cannot take as heir lands of his father in England. *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895 ; 9 Bligh (N.S.) 32 ; West. 500 ; 4 Jur. 1076. *S. C.*, nom. *Doe* d. *Birtwhistle* v. *Vardill*, 2 Scott (N.R.) 828 ; 6 Bing. (N.C.) 385—H. L. (E.)

An ante-nuptial son, born in Scotland, of Scotch parents, who became legitimatised according to the law of Scotland by the subsequent marriage of his parents, settled in England and purchased freehold property there. The son died intestate and unmarried, leaving his father surviving him :—Held, that the father was incapable under 3 & 4 Will 4, c. 106, s. 6, of inheriting real estate from his son, although the son was legitimate by the law of England as to his personal estate, and the property, therefore, escheated to the crown. *Don's Estate, In re*, 4 Drew. 190 ; 27 L. J., Ch. 98 ; 3 Jur. (N.S.) 1192 ; 5 W. R. 836.

"Heirs" in equity, is construed according to the nature of the subject to which the word has reference. *Gittings* v. *McDermott*, 2 L. J., Ch. 212 ; *Varne* v. *Henderson*, 1 Jac. & W. 388, n. ; 21 R. R. 193 ; *Hayes* v. *Hayes*, 6 L. J. (O.S.) Ch. 141.

—— **Heir Male.**]—Whoever will take as heir male by purchase must be both heir and male. *Groynore* v. *Nooke*, 1 Wils. 30.

Quære, whether a person may take as heir male of the body, without being heir generally. *Wills* v. *Palmer*, 5 Burr. 2615 ; 2 W. Bl. 687.

Disinheriting.]—An heir cannot be disinherited but by the express words of a will, or a necessary implication of law. *Anon.*, Lofft, 396. S. P., *Denn* d. *Gaskin* v. *Gaskin*, Cowp. 657 ; *Right* d. *Mitchell* v. *Sidebotham*, 2 Dougl. 759 ; *Thomas* d. *Evans* v. *Thomas*, 6 Term Rep. 671 ; 3 R. R. 40.

Wherever land, or any interest in land, which would descend to the heir-at-law, is devised for purposes which the law will not permit to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of. The heir-at-law takes whatever is undisposed of, not by force of the intent, but by the rule of law. *Tregonwell* v. *Sydenham*, 3 Dow, 194 ; 15 R. R. 40.

Fraud on Ancestor.]—The heir-at-law may maintain a bill to set aside a sale fraudulently entered into with his ancestor. *Bellamy* v. *Sabine*, 2 Ph. 425 ; 5 L. J., Ch. 36.

Fraud by Ancestor.]—A person who has sold an estate under circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable even by a will made before the passing of the Wills Act. *Gresley* v. *Mousley*, 4 De G. & J. 78; 28 L. J., Ch. 620; 5 Jur. (N.S.) 583; 7 W. R. 427.

Purchase by a solicitor for his client set aside under the circumstances on a bill filed two years after the death of the solicitor, and nearly eighteen years after the death of the client. *Ib.*

Heir Tenant for Life—Maintenance—Incumbrances.]—Tenant for life is bound to keep down the interest of debt, but being an heir-at-law, not otherwise provided for, is, as against the remainderman, entitled to a maintenance. *Burges* v. *Mawbey*, Turn. & R. 167; 24 R. R. 9.

Mesne Profits.]—Bill for account of mesne profits does not lie by heir as such merely, unless there is some impediment at law. *Pulteney* v. *Warren*, 6 Ves. 89; 5 R. R. 226.

Upon a devise to trustees in favour of a corporation to be thereafter formed for a good charitable use, valid under the Statutes of Mortmain, the heir has no right to the rents and profits accrued before the devise is carried into effect. *Att.-Gen.* v. *Bowyer*, 3 Ves. 714; 4 R. R. 132.

A., being seised of real estate, died, leaving his sisters presumptive co-heiresses, his wife being enceinte of a son, born subsequently. The rents from the ancestor's death remaining unreceived by the co-heiresses:—Held, that their seisin being gone on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir. *Goodale* v. *Gawthorne*, 2 Sm. & G. 375; 2 Eq. R. 936; 23 L. J., Ch. 878; 18 Jur. 927; 2 W. R. 680.

A qualified heir is entitled to the rents and profits of realty of which the ancestor dies seised, in fee or in tail, which accrue due between the death of the ancestor and the birth of the ancestor's posthumous and only child, whether such rents be actually received or not. *Richards* v. *Richards*, Johns. 754; 29 L. J., Ch. 836; 6 Jur. (N.S.) 1145.

Conveyance by—Mistake—Confirmation.]—J. S., under the belief that he had the fee simple in an estate subject to a life interest in his mother, conveyed all his interest to trustees for the benefit of his creditors. The conveyance contained covenants for title and for further assurance. It turned out that at the time of the conveyance the mother had the fee simple, which upon her death descended to J. S. as her heir-at-law:—Held, that although no estate passed by the conveyance, yet the transaction amounted to a contract for the sale of the specific estate, and that J. S., unless he could set aside the contract for fraud, was in equity compellable to carry it into execution. *Smith* v. *Baker*, 1 Y. & C. C. C. 223.

Purchase of Incumbrances.]—A. devised an estate to his heir, who, in his own right, had a charge on it. The heir bought up an incumbrance on the estate amounting to 11,555*l.*, for 2,000*l.*:—Held, that he was entitled to the full amount, as against other incumbrances, on the estate. *Davis* v. *Barrett*, 14 Beav. 452.

On a bill by purchaser to redeem a prior mortgage, the heir who had taken assignment of the mortgage to a trustee, and was made a defendant, cannot avail himself of the advantage as resisting an application to the court for its assistance: he must make himself an actor by filing a cross bill, if he seeks to impeach the title; and where the legal estate is outstanding in a trustee, the court will not in such a case remain neuter, nor content itself with awarding a perpetual injunction, but will determine the right definitively, the refusal to make a decree ascertaining the beneficial interest being inconsistent with the nature of trusts. *Scott* v. *Dunbar*, 1 Moll. 442.

Party impeaching a transaction by which an extension of an existing interest was granted, is not entitled to lie by until the original term is expired by efflux of time, before he proceeds effectually to question the additional interest; and that whether it was in the form of a present conveyance merging the original term, or an executory contract to take effect at its termination, to the injury of the other party, and the mere lying out of his money, for a great length of time, will be so accounted. *Ib.*

The purchaser of reversion subject to leases, or estate charged with annuity, does not thereby acquire the equities the original vendor may have had to impeach the leases or cut down the annuity; but purchaser, if also heir, is not precluded from relying on his preferable title as heir, but it must have been put in issue. *Ib.*

Administration—Personal Liability.]—In an action by a bond creditor against the heir of an intestate, the latter pleaded a false plea, the court will, after a decree obtained in a suit by another creditor, for the administration of intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally. *Price* v. *Evans*, 4 Sim. 514.

Retainer of Debt by.]—*See* EXECUTOR AND ADMINISTRATOR.

Effect of Statute of Fraudulent Devises.]—*See* EXECUTOR AND ADMINISTRATOR.

Costs—In Charity Cases.]—*See* CHARITY.

—— **In Lunacy.**]—*See* LUNATIC.

—— **In Administration Suits.**]—*See* EXECUTOR AND ADMINISTRATOR.

—— **Under Trustee Acts.**]—*See* TRUST AND TRUSTEE.

—— **In other Cases.**]—Where an heir-at-law is brought by order before the court, though there is no resulting trust in his favour he shall have his costs. *Att.-Gen.* v. *Haberdashers' Co.*, 4 Bro. C. C. 178.

An heir-at-law, claiming as such, was put to prove, and did prove, his pedigree, as stated in his bill in detail:—Held, that the court might and ought to decide without a jury; and it appearing that the evidence of heirship was, previously to the institution of a suit, submitted to the defendants, the trustees, and was such as they ought to have been satisfied with, the court gave the plaintiff the costs of the suit as against the trustees, including the expenses of the

genealogical evidence. *Lancashire* v. *Lancashire*, 1 De G. & Sm. 288; 11 Jur. 1024. Affirmed 2 Ph. 657; 17 L. J., Ch. 270; 12 Jur. 363.

A. B. contracted to purchase real estate of C. D., but died before completion, intestate. C. D. filed a claim against the infant heir and the administratrix of A. B. for a resale of the estate, and the application of the proceeds in payment of the purchase-money and the expenses:—Held, that the costs of the heir were to be paid by C. D., and added to his own. *Popple* v. *Henson*, 5 De G. & Sm. 318; 21 L. J., Ch. 311.

It is the habit to give costs to the heir-at-law, because the purchaser would object if he was absent, but he is not necessarily a party to a bill, e.g., by the devisee of the inheritance in trust to sell, for specific performance of a contract to purchase. *Nicholson* v. *Falkiner*, 1 Moll. 555.

Where the bill was filed to recover the amount of a judgment debt out of the real and personal estates of the conusor:—Held, that the defendant, who was a minor, and the heiress-at-law of the conusor, was not entitled as against the plaintiff to the costs of putting in an answer. *Downes* v. *Hogan*, 2 Ir. Eq. R. 112.

Where a bill was filed in this court by the conusee to recover the amount of a judgment to which the real and personal representatives of the conusee were made parties:—Held, that the defendants, co-heiresses at law of the conusee, who by their answer did not claim any interest in the premises affected by the judgment, were not entitled as against the plaintiff to their costs of the suit, but only against the surplus fund arising from the sale of the premises decreed to be sold. *Rutherford* v. *Cottnam*, 8 Ir. Eq. R. 391.

De ventre inspiciendo.]—Heir apparent cannot have a writ of de ventre inspiciendo in life of ancestor. *Dursley* (*Lord*) v. *Berkeley*, 6 Ves. 260; 5 R. R. 285.

Writ granted to three sisters, co-heiresses of an intestate, whose widow declared herself with child. *Aiscough*, *Ex parte*, 2 P. Wms. 591; Moseley, 391; 2 Eq. C. Ab. 780.

The effect of writ de ventre inspiciendo, decreed upon a bill in equity, where a sum of money was devised to a charity on the death of A. without issue; A. dying and leaving a widow of ill-fame, who pretended to be with child. *Ib.*

Held to be a writ of common right, being to secure the next heir from a fraudulent and supposititious birth; and lies for a tenant in tail, because at the time it was first allowed an estate tail was a fee-simple conditional. *Ib.*

A widow being admitted to be with child, the court will fix a place agreeable to both parties, where she shall be till delivered, and where the heir may, from time to time, at proper seasons, and on notice, send women to see her, and to be present when the child is born, and in such cases, no need to execute the writ in a strict manner. *Ib.*

A writ de ventre inspiciendo is always applied for by petition. *Bellett*, *Ex parte*, 1 Cox, 297.

Establishing Will and Issue Devisavit vel non.]—*See* WILL.

Limitations to Heirs or Heirs of Body.]—*See* ESTATE — SETTLEMENT — SHELLEY'S CASE, RULE IN—WILL.

Devise to Heir.]—*See* WILL.

Election by Heir.]—*See* ELECTION.

Exoneration of Mortgaged Property.]—*See* EXECUTOR AND ADMINISTRATOR.

Resulting Trust.] — *See* CONVERSION—TRUSTS.

Discovery and Inspection of Deeds.]—*See* PRACTICE.

See also TRUST AND TRUSTEE—VENDOR AND PURCHASER.

A. E. R.

HEIRLOOMS.

See SETTLEMENT.

HEIRS EXPECTANT AND REVERSIONERS.

See FRAUD.

HERIOT.

See COPYHOLD.

HIGHWAY.

See WAY.

HIRING.

Contract.]—*See* BAILMENT.

Custom as to.]—*See* CUSTOM.

HOMICIDE.

See CRIMINAL LAW.

HORSE.

Sale of.]—*See* SALE OF GOODS.

Stealing.]—*See* CRIMINAL LAW.

Hiring.]—*See* BAILMENT.

HOSPITAL.

Foundation.]—Before 39 Eliz. c. 5, hospitals could only be founded by royal licence or letters-patent: by that act they might be incorporated. In 1597, but before the sessions of parliament, B. founded a hospital for bedesmen, and made ordinances for their regulation, in which the feoffees of the hospital were spoken of. The bedesmen were, in effect, appointed during good behaviour:—Held, that a legal foundation of the hospital might be presumed, either by licence or letters-patent, not necessarily investing the bedesmen with a corporate character; and they were entitled to a separate equitable estate of freehold in their respective rooms. *Simpson* v. *Wilkinson*, 1 Lutw. Reg. Cas. 168; 7 Man. & G. 50; 14 L. J., C. P. 49.

The 39 Eliz. c. 5, enables "all and every person and persons" to found hospitals for the poor and to incorporate them. A municipal corporation is included in the words "every person and persons," and may exercise the powers given by the act. *Newcastle Corporation* v. *Att.-Gen.*, 12 Cl. & F. 402.

Trustees of.]—The hospital of St. John, with the chapel of St. Michael annexed, at Bath, is an eleemosynary and not an ecclesiastical foundation; and as the only religious duties which the trustees of it have to perform, are, first, to appoint a clergyman of the Church of England in priest's orders to the incumbency of the chapel; and, secondly, to keep the chapel in repair, they need not be members of the Church of England. *Att.-Gen.* v. *St. John's Hospital, Bath*, 45 L. J., Ch. 420; 2 Ch. D. 554; 34 L. T. 563; 24 W. R. 913.

Right to Present to Living.]—Where a hospital for the relief of the poor, needy, and impotent people is duly incorporated, and consists of a master and twelve poor brethren, and the advowson of a living is conveyed to them to hold to the use of the master and brethren, and their successors for ever, the right to nominate to the living belongs to the majority of the entire body of master and brethren, and the master's concurrence in the act of the majority is not necessary. *Reg.* v. *Kendall*, 1 Q. B. 366; 4 P. & D. 603; 10 L. J., Q. B. 137.

Where the majority has nominated the party at a meeting, and the master refuses to put the common seal to a presentation, the court will compel him to do so by mandamus; and if the master, in his return to the writ, merely insists on his right to withhold his consent, and to refuse to seal it, he cannot object that there was no corporate resolution under seal; or that the writ insufficiently states his custody of the seal; or that no presentation has been actually tendered to him for signature; or that the majority having only voted for the prosecutor of the writ, may retract their resolution. And it is no answer to the writ that there are visitors appointed by the founder, to whom disputes between the master and brethren are to be referred. *Ib.*

Exemption from Land-Tax.]—The 38 Geo. 3, c. 5, s. 25, does not exempt hospitals subsequently built from land-tax; nor crown lands subsequently acquired by the crown. *Colchester (Lord)* v. *Kewney*, 36 L. J., Ex. 172; L. R. 2 Ex. 253; 16 L. T. 463; 15 W. R. 930—Ex. Ch.

An hospital which was erected before the passing of 4 Will. & Mary, c. 1, imposing a land-tax, and the site of which was exempted from that tax by 38 Geo. 3, c. 5, ss. 25 and 29, was by a decree by the court of chancery removed to another site, and the old site was discharged from the charitable trusts to which it was then subject:—Held, that the removal of the hospital and secularisation of the site did not remove the exemption from land-tax conferred on the site as "land belonging to a hospital before the fourth year of William and Mary," by 38 Geo. 3, c. 5, s. 29. *Cox* v. *Rabbits*, 47 L. J., Q. B. 385; 3 App. Cas. 473; 38 L. T. 430; 26 W. R. 483.

Right of Members to Vote.]—A hospital, consisting of a master and three ancient brethren, was incorporated, and by the terms of its constitution, as afterwards regulated by statute, its revenues derived from lands vested in the corporation, were received by the master, who annually, after paying thereout taxes and other outgoings and reserving one-third to himself, was to pay 25*l.* to each of the three ancient brethren, 70*l.* to the chaplain, and after reserving a balance, not exceeding 60*l.*, to meet current expenses, was to divide the residue between certain other brethr n called "younger brethren," who were added to the number of the brethren from time to time, as the revenues of the charity increased, but no younger brother was to take under such division more than 25*l.*, and the surplus, if any, was left to accumulate until further additional brethren were appointed:—Held, that the younger brethren had no equitable estate in the lands of the hospital, and that, the annual payment to which they were entitled not being a rent-charge, nor a free tenement within 8 Hen. 6, c. 7, they were not entitled to the county franchise. *Simey* v. *Marshall*, 42 L. J., C. P. 49; L. R. 8 C. P. 269; 27 L. T. 581; 21 W. R. 123; 2 Hopw. & C. 1. See also *Simpson* v. *Wilkinson*, supra, and ELECTION LAW.

Effect of Mortmain Acts.]—A lady, during her illness, gave a sum of money to trustees to establish a fever hospital. The money was invested in their names, and they executed a trust deed declaring that they held the money for the purpose of establishing (after the decease of the donor) a fever hospital. The donor, who knew nothing of the execution of the deed, died a fortnight after giving the money:—Held, that the gift came within 9 Geo. 2, c. 36, and was void. *Hawkins* v. *Allen*, 40 L. J., Ch. 23; L. R. 10 Eq. 246; 23 L. T. 465; 18 W. R. 748.

And see CHARITY.

Liability for Expenses.]—If a builder does work at an intended hospital on the order of the physician and surgeon, they being announced to deliver lectures there, and being members of the provisional committee, such builder is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the order, unless he was distinctly informed that the dealing was to be on the terms of looking for payment to the funds of the hospital only. *Pink* v. *Scudamore*, 5 Car. & P. 71.

The subscribers who attend a committee for managing the concerns of a hospital, are liable to the creditors of the hospital; and the proper question for the consideration of the jury is, whether the defendant had so acted as to induce

the plaintiff to believe that he was to look to the defendant and the other members of the committee for payment. *Burls* v. *Smith*, 5 M. & P. 735 ; 7 Bing. 705.

When a Nuisance.]—The Metropolitan Poor Act, 1867 (30 Vict. c. 6), authorises the formation of districts and district asylums for the care and cure of sick and infirm poor, creates corporations for that purpose, gives authority to the poor law board (now the local government board) to issue directions to these corporations, enables them to purchase lands and erect buildings for the purposes of the act, and makes the rates of parishes and unions liable for the outlay thus incurred. But it does not, by direct and imperative provisions, order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighbourhood of the place where the land is purchased, or the buildings erected ; it does not afford to these acts a statutory protection. And therefore, where such nuisance was found as a fact :—Held, that the district board could not set up the statute, nor the orders of the poor law board under it, as an answer to an action, or to prevent an injunction issuing to restrain the board from continuing the nuisance. *Metropolitan Asylum District Managers* v. *Hill*, 50 L. J., Q. B. 353 ; 6 App. Cas. 193 ; 44 L. T. 653 ; 29 W. R. 617 ; 45 J. P. 664—H. L. (E.)

J. M.

HOTCHPOT.

See INFANT—PORTION—POWERS—SETTLEMENT.

HOTEL.

See INNKEEPER.

HOUSE.

Inhabited House Duty.]—*See* REVENUE.

Name, User of.]—*See* NAME.

Agent.]—*See* PRINCIPAL AND AGENT—VENDOR AND PURCHASER.

HOUSE OF LORDS.

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HUNDRED.

A. STATUTORY LIABILITY FOR INJURY TO PREMISES.
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B. HUNDRED COURT.—*See* COURT.

A. STATUTORY LIABILITY FOR INJURY TO PREMISES.

See the Riot (Damages) Act, 1886.

1. WHAT PREMISES.

Private Place.]—The words "persons riotously and tumultuously assembled together" in s. 2, sub-s. 1, of the Riot (Damages) Act, 1886, are not to be limited to apply to a private place only. *Gunter* v. *Metropolitan Police Receiver*, 53 J. P. 249.

Buildings—What are.]—An unfinished building never yet inhabited, constructed as and intended for a dwelling-house, and used as a barn, was not a house, outhouse, or barn, within 9 Geo. 1, c. 22, s. 7. *Elsmore* v. *St. Briavells*, 2 M. & Ry. 514 ; 8 B. & C. 461 ; 6 L. J. (o.s.) K. B. 372.

A house, part of which was occupied by the plaintiff as a shop, and the remainder of which was occupied by his lodgers, no part of the family sleeping therein, was a dwelling-house within the protection of the 1 Geo. 1, st. 2, c. 5. *Rea* v. *Wood*, 2 Stark. 269 ; 19 R. R. 717.

Hustings erected to take the poll at a contested election for members to serve in parliament were not a building within 57 Geo. 3, c. 19, s. 38 ; therefore, no action was maintainable against the hundred for the destruction of such property by a tumultuous assembly. *Allen* v. *Ayre*, 3 D. & R. 96.

—— **Position of—Evidence.**]—In an action on 7 & 8 Geo. 4, c. 31, against a hundred, for the demolition of a castle by rioters, the plaintiff produced in evidence certain orders made by the justices at the quarter sessions for the county, in which the castle was described as being in that hundred. No proof was given that the justices who made those orders were resiants in the county :—Held, that the orders were admissible as evidence of reputation, for that the justices, from the nature of their offices, must be presumed cognisant of the subject. *Newcastle (Duke)* v. *Broxtowe*, 4 B. & Ad. 273 ; 1 N. & M. 598 ; 2 L. J., M. C. 47.

It was proved by other evidence, that for nearly two centuries the castle had been reputed to be within the hundred. The defendants attempted to prove that the town had been from the earliest period separated from any jurisdiction of, or connection with, the adjoining hundreds, and for that purpose gave in evidence an extract from Domesday Book, in which the town was mentioned previously to the enumeration or description of the hundreds in the county, and various presentments during the reigns of Edw. 1, Edw. 3, and Hen. 6, by the jurors of the town, of deaths within the castle and its precincts ; and they produced a charter of Hen. 6, whereby the town was made a county of itself, and the castle was specially excepted. The judge, after recapitulating the evidence, told the jury that the excepting of the castle when the town was made a county, did not show in what hundred the castle originally was ; that the evidence of

reputation given by the plaintiff was entitled to great weight, and that when things had gone on for two centuries in one uniform course, it was reasonable to infer that that course had prevailed from the earliest period, unless the evidence to the contrary was certain. It being objected that by this summing up too much weight was given to modern reputation, and too little to the ancient documents:—Held, that the direction was proper. *Ib.*

In Annexed District.]—By an act of parliament a district was taken out of the county at large, and annexed to the county of a city, and was declared to be member and parcel of the county of the city, except for certain purposes. If a house situate in the annexed district is feloniously demolished by rioters, the owner may sue the inhabitants of the county of the city for the amount of his damages, under 7 & 8 Geo. 4, c. 31, if such liability is not mentioned among the exceptions, although it may not clearly appear that the defendants could reimburse themselves by a rate which should embrace the annexed district. *Humphries* v. *Bristol*, 3 N. & M. 74; 2 L. J., M. C. 83.

Mine Buildings.]—Lessees of a mine had constructed a wooden trough or an aqueduct on piles, for conveying water from a spring at a distance from the mine to a pool of water where the mineral was washed after it had been raised to the surface, in order to separate it from the earth. The trough was erected as near to the mine as the nature of the soil would admit of, but neither the trough nor the pool was locally connected with the mine:—Held, that washing the mineral is part of the business of a mine, and that this trough was an erection used in conducting the business of a mine, within 7 & 8 Geo. 4, c. 30, s. 7, and 7 & 8 Geo. 4, c. 31, s. 2. *Barwell* v. *Winterstoke Hundred*, 14 Q. B. 704; 19 L. J., Q. B. 206; 14 Jur. 392.

Engines.]—The riotous demolition of frames for the manufacture of frame-work lace, was not an offence for which 52 Geo. 3, c. 130, s. 3, gave a remedy against the hundred, for such frames were not within the meaning of the word engine, as used in that act. *Orgill* v. *Smith*, 6 M. & S. 182.

Mills.] — The burning of a mill-house, not parcel of any dwelling-house, was not felony within 9 Geo. 1, c. 22, which gave a remedy to the party grieved against the hundred, though within 9 Geo. 3, c. 22, which omitted the remedial clause. *Hiles* v. *Shrewsbury*, 3 East, 457.

In an action on 41 Geo. 3, c. 24, for demolishing mills, it was not necessary to allege in the declaration that the offence was committed feloniously. *Beatson* v. *Rushworth*, 2 Marsh. 362; 7 Taunt. 45; 3 Price, 48; 17 R. R. 537.

Goods—"Beginning to Demolish."]—Where a mob, after beginning to demolish and pull down a house, stole flour therein, or forced the owner to sell it at an under price, the value thereof could not be recovered in an action against the hundred on 1 Geo. 1, st. 2, c. 5, s. 6, such stealing and robbery being substantive felonies, and not within the offence created by s. 4. *Greasley* v. *Higginbottom*, 1 East, 636; 6 R. R. 354.

Where a mob attacked a baker's house, and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves below the marketable value:—Held, this was evidence for the jury of a felonious beginning to demolish the house within s. 4; and that the plaintiff might recover for the damage done to the house, in an action against the hundred, on s. 6; but not for the value of the flour so sold, that not being consequential to the act of demolition; nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house, on the opposite side of the street, of which the lock only was burst, that not being a beginning to demolish, &c., within the act, with the view with which it appeared to have been done. *Burrows* v. *Wright*, 1 East, 615; 6 R. R. 351.

If persons riotously assembled demolished the doors and windows of a house, and having thus riotously obtained an entrance into the house, destroyed the goods and furniture in it, the hundred was answerable in an action on 1 Geo. 1, st. 2, c. 5, s. 6, for the damage done to the furniture as well as to the house. *Ratcliffe* v. *Eden*, Cowp. 485; 2 Dougl. 701, n. S. P., *Hyde* v. *Cogen*, 2 Dougl. 690.

In an action against the hundred they are only liable for things demolished by the rioters, or destroyed in the demolition of the house, and not for any goods stolen from the premises. *Smith* v. *Bolton*, Holt, 201.

—— **Arms.**]—Where the leader of a mob, having entered a gunsmith's shop and demanded arms, was detained, and the mob then declared that unless he was released they would pull the house down, and they did enter and break the windows, window-frames, &c., and for that purpose used some of the arms found in the shop, and carried away others:—Held, that this was evidence of a purpose to demolish the house, and that the owner might recover against the hundred a reparation in damages for the injury done to the house itself, and to the arms actually used in the act of demolishing; but that he was not entitled to recover for the value of the arms carried away, that being a substantive and distinct felony, and therefore not within 1 Geo. 1, st. 2. c. 5. *Beckwith* v. *Wood*, 1 B. & Ald. 487; 2 Stark. 262; 19 R. R. 360.

2. Mode of Injury.

Object and Intention of Rioters.]—A hundred was not liable in an action for damages, brought by the person injured, by a mob beginning to pull down his house, unless the riot was of such a kind as to amount to felony within 1 Geo. 1, st. 2, c. 5 (Riot Act). *Reid* v. *Clarke*, 7 Term Rep. 496; 4 R. R. 505.

In an action against the hundred on 57 Geo. 3, c. 19, s. 88, to recover damages for an injury done to a private dwelling-house by a mob, it was not necessary to show that the object of such mob was seditious. *Clarke* v. *Burdett*, 2 Stark. 504.

A house damaged by rioters is not "feloniously demolished wholly or in part" so as to entitle the person damnified to compensation from the hundred under 7 & 8 Geo. 4, c. 31, s. 2, unless the rioters when attacking the house had an intention wholly to destroy it. During an election riot, and before the Riot Act was read, the rioters attacked many houses, broke the windows and damaged the walls by throwing stones, and stole tobacco from a house so damaged:—Held,

that there was no evidence of felonious demolition for which the hundred was liable to compensate the persons damnified. *Drake* v. *Footitt*, *Drake* v. *Hankin*, 50 L. J., M. C. 141; 7 Q. B. D. 201; 45 L. T. 42; 45 J. P. 798.

Number of Rioters.]—To support an action against the hundred, for damages on 1 Geo. 1, st. 2, c. 5, for the riotous demolition of a house, it was not necessary to prove that twelve rioters were assembled at the time. *Prichit* v. *Waldron*, 5 Term Rep. 14.

"Riot"—What is.]—The 7 & 8 Geo. 4, c. 30, s. 8, not having given any definition of what shall be a riot within the meaning of that enactment, the common law definition of a riot must be resorted to, and in such a case if any one of her majesty's subjects is terrified this is a sufficient terror and alarm to substantiate that part of the charge of riot. *Reg.* v. *Phillips*, 2 M. C. C. 252. *S. C.*, nom. *Reg.* v. *Langford*, Car. & M. 602.

And see CRIMINAL LAW.

"Beginning to Demolish"—Interruption.]—Proof that the mob, after breaking open the door, tearing down the window-frames, and doing other serious damage to the house, was interrupted in its proceedings by a military force, is evidence from which a beginning to demolish (in an action against the hundred) was to be presumed; but if the mob, after committing such mischief, voluntarily retired without proceeding to demolition, it was a question for the jury whether there was a beginning to demolish. *King* (*Lord*) v. *Chambers*, 1 Stark. 195; 4 Camp. 377; 16 R. R. 806.

In an action against the hundred on 1 Geo. 1, st. 2, c. 5, for damage done to a house, the breaking of the inside window-shutters, a window-sill, and the wood of the fan-light, was sufficient evidence of a beginning to pull down, if the mob was interrupted and dispersed, while committing these acts of violence, by an alarm of the approach of the military. *Samson* v. *Chambers*, 4 Camp. 221.

Where the mob, after breaking the windows, and doing other damage to the house, retired without demolishing it, and without any disturbance having been given to their operations, the hundred was not liable. *Anon.*, Holt, 203. See also *Greasley* v. *Higginbottom*, and cases supra.

Burning.]—In an action on 1 Geo. 1, st. 2, c. 5, and upon 52 Geo. 3, c. 130, against the hundred:—Held, that burning, though specifically mentioned in a clause of the statute, as distinct from a demolishing or pulling down, was included in the latter terms. *Nesham* v. *Armstrong*, 1 B. & Ald. 146; Holt, 466.

3. WHO ENTITLED TO RECOVER.

Provocation Offered.]—Where provocation has been offered by the claimant or his representatives to the crowd, that will disentitle the plaintiff to recover under the Riot (Damages) Act, 1886. *Gunter* v. *Metropolitan Police Receiver*, 53 J. P. 249.

Trustee.]—An action on 1 Geo. 1, st. 2, c. 5, was maintainable by a trustee, in whom the legal estate was vested for existing purposes, and (as it seems) even by a bare trustee of a satisfied term. *Prichit* v. *Waldron*, 5 Term Rep. 14.

An action might be maintained under 1 Geo. 1, s. 2, c. 2, against hundredors, by the trustee in whom the property in a house of correction belonging to the county was vested, for the demolition of the house by rioters. *Onslow* v. *Smith*, 3 Dougl. 348.

Joint Lessee.]—A person who is a joint lessee, but a sole occupier of premises feloniously injured, may maintain an action against the hundred if he has complied with the requisites of the 7 & 8 Geo. 4, c. 31, although the co-lessee has not done so. *Lowe* v. *Braxtowe*, 5 B. & Ad. 550; 1 L. J., M. C. 57.

Termor or Freeholder.]—If an action is brought by a termor upon 7 & 8 Geo. 4, c. 31, for an injury done to his house within three calendar months from the offence committed, and that action abates by the death of the termor, after the three months have expired, his executor cannot bring a fresh action. *Till Adam* v. *Bristol*, 4 N. & M. 144; 2 A. & E. 389; 4 L. J., M. C. 35.

A termor, and also the party seised of the freehold subject to the term, might each recover damages against the hundred for the injury resulting from a felonious burning, in respect of their possessory and reversionary interests. *Pellew* v. *East Wonford*, 4 M. & Ry. 130; 9 B. & C. 134; 7 L. J. (o.s.) M. C. 84.

Insured Owner.]—An owner of sacks of corn, maliciously destroyed by fire, might maintain an action against the hundred, under 9 Geo. 1, c. 22, although he had previously received the full amount of his loss from an insurance office. *Clark* v. *Blything Hundred*, 3 D. & R. 489; 2 B. & C. 254; 2 L. J. (o.s.) K. B. 7; 26 R. R. 334.

Insurers.]—Where insurers paid the amount of the loss occasioned by the demolition of a house by rioters, they might maintain an action in the name of the insured, against the hundred, under 1 Geo. 1, st. 2, c. 5, s. 6. *Mason* v. *Sainsbury*, 3 Dougl. 61.

But an insurance office having paid the assured the amount of the loss sustained by him in consequence of a demolishing by rioters, sued the hundredors under 1 Geo. 1, st. 2, c. 5, s. 6, in their own names:—Held, by Lord Mansfield, C.J., and Buller, J., Willes and Ashurst, JJ., dissentientibus, that the office was not entitled to recover. *London Assurance Co.* v. *Sainsbury*, 3 Dougl. 245.

4. PROCEDURE.

a. Notice.

Time for.]—The two days allowed by 9 Geo. 1, c. 22, for giving notice of the offence, were exclusive of the day on which the fire happened. *Pellew* v. *East Wonford*, 4 M. & Ry. 130; 9 B. & C. 134; 7 L. J. (o.s.) M. C. 84.

The notice required by 9 Geo. 1, c. 22, s. 8, to be given to the inhabitants of a hundred, for damage sustained by the burning of the plaintiff's barn, must have been given to such inhabitants previously to the party's examination on oath before the magistrate. *Fowler* v. *Loningborough*, 3 Moore, 319; 1 Br. & B. 64.

By whom.]—Notice given by a servant of the tenant, as such servant, was sufficient in order to support an action by the landlord. *Adderley* v. *Offlow*, Peake's Add. Cas. 206.

To whom.]—A declaration, in an action on 9 Geo. 1, c. 22, s. 8, to recover damages against the hundred for the value of a sack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants of the parish (instead of the "town, village, or hamlet," which were the words of the act), near the place, &c.; yet, as the law primâ facie intends every parish to be a vill, unless the contrary is shown, this allegation was sufficient, after verdict, to sustain judgment for the plaintiff. But if it had been shown at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict. *Cook* v. *Pimhill*, 8 East, 173.

Where a declaration upon that act alleged the notice of the fire to have been given to the parish instead of to the town, village, or hamlet, as required by the statute:—Held, that the objection was cured by the verdict. *Reed* v. *Gainsbury*, 4 D. & R. 250; 2 L. J. (o.s.) K. B. 158.

b. Examination.

Parties—Owner or Servants.] —Where the owner of property destroyed by malicious fire gave in his examination on oath under 9 Geo. 1, c. 22, it was not necessary in order to enable him to recover against the hundred that any other person should do so. *Rolfe* v. *Elthorne*, M. & M. 185.

So, the provision that the servants having the care of the premises should do so only applied to cases where the owner was away, and had no personal superintendence of the premises, and not to cases where he merely happened to be absent at the instant when the fire took place. *Ib.*

Where a reversioner sued the hundred for damages resulting from a felonious burning, if no servant of his had the care of the premises, he was the proper person to give in an examination. *Pellew* v. *East Wonford*, 4 M. & Ry. 130; 9 B. & C. 134; 7 L. J. (o.s.) M. C. 84.

—— **Servants.**]—The 9 Geo. 1, c. 22, s. 8, required that all the servants having the care of property wilfully destroyed by fire should be examined before a magistrate before the owner could sue the hundred for damages:—Held, that this was not complied with by the examination of the plaintiff's steward alone, who lived at a distance from the property burnt, and had the general superintendence of it, there being several labourers employed under him, who worked on the spot, and had the actual care of it. *Somerset* (*Duke*) v. *Mere*, 6 D. & R. 247; 4 B. & C. 167.

The servant or servants who in the absence of a master have the general care and superintendence of property, and who represent him in his absence, and not all who have the special care under them of particular parts of the property contained in a dwelling-house or manufactory, are the servant or servants who by 7 & 8 Geo. 4, c. 31, s. 3, are required, before any action is brought against the hundred for damage by rioters, to go before a justice and state upon oath the names of the offenders, and submit to examination touching the circumstances of the offence. *Lowe* v. *Broxtowe*, 3 B. & Ad. 550; 1 L. J., M. C. 57.

The swearing before a justice to a deposition previously prepared is a sufficient submission to examination within the meaning of the act, if the justice requires nothing further. *Ib.*

—— **One of Three Claimants.**]—In an action on the stat. 52 Geo. 3, c. 130, against the hundred by several partners in trade, to recover the value of premises feloniously destroyed, three of the partners being present when the fact was committed but only one giving in his examination upon oath, without stating that to the best of his belief the others had no knowledge of the person who committed the fact:—Held, that that was not sufficient. *Nesham* v. *Armstrong*, 1 B. & Ald. 146; Holt, 466.

What it must state—Knowledge of Persons.] —In an action against the hundred on 9 Geo. 1, c. 22, for damage sustained by the wilful burning of the party's barn, it was a precedent condition that the party grieved should, within the time limited, give in his examination upon oath before a magistrate whether or not he knew the offender or offenders, or any of them; and an examination on oath, in which the party only swore that he suspected that the fact was done by some person or persons to him unknown, was not sufficient; still less in support of an averment in a declaration that he gave in such examination, in and by which it appeared that the plaintiff did not know the person or persons who committed the fact. For non constat by the terms of such examination that the plaintiff did not know some of the offenders if there were several. *Thurtell* v. *Mutford and Lothingland*, 3 East, 400.

An affidavit by the owner of premises wilfully set on fire, "that he did not know the person or persons who wilfully set fire to his premises," but not adding "or any of them," did not satisfy 9 Geo. 1, c. 22, s. 8, and would not support an action against the hundred for compensation. *Trimmer* v. *Mutford*, 6 D. & R. 10; 3 L. J. (o.s.) K. B. 158. See also *Lowe* v. *Broxtowe*, 3 B. & Ad. 530; 1 L. J., M. C. 57.

An examinant was not, however, bound to state mere suspicions entertained by him as to the person who committed the offence, unless interrogated thereto by the magistrate. *Pellew* v. *East Wonford*, 4 M. & Ry. 130; 8 B. & C. 134; 7 L. J. (o.s.) M. C. 84.

c. By Action.

Defendants—Borough or Hundred.]—Where a plaintiff, by mistake, proceeded against the inhabitants of the hundred instead of the borough of S., in an action for damages by rioters, under 7 & 8 Geo. 4, c. 31, the court amended the writ and subsequent proceedings by striking out the word "hundred" and substituting the word "borough," the time for bringing a fresh action having expired. *Horton* v. *Stamford*, 1 C. & M. 773; 2 D. P. C. 96; 2 L. J. Ex. 274.

In an action against a hundred to recover compensation for injury done by a riotous mob to premises within a borough which formed part of the hundred:—Held, that the action was properly brought against the hundred, and that the borough was liable as part of the hundred, although it came within the provisions of the 5 & 6 Will. 4, c. 76, s. 112. *Birley* v. *Salford Hundred*, 11 M. & W. 391; 12 L. J., M. C. 118.

—— **Inhabitants.**]—An action did not lie upon 9 Geo. 1, c. 22, s. 7, against two of the inhabitants of a hundred by name; but must have been brought against the inhabitants at large; and this was a valid objection in arrest of judgment. *Jackson* v. *Pearson*, 2 D. & R. 439; 1 B. & C. 304; 1 L. J. (o.s.) K. B. 119.

Nature of Proof.]—In an action against the hundred to recover compensation for felonious demolition, the same strictness of averment and proof is necessary as on a trial of an indictment for a felony under 7 & 8 Geo. 4, c. 30, s. 7. *Barwell* v. *Winterstoke Hundred*, 14 Q. B. 704; 19 L. J., Q. B. 206; 14 Jur. 392.

To support an action upon 9 Geo. 1, c. 22, s. 8, against the hundred, for the wilful and malicious destruction of stacks of corn by fire, it was sufficient to give such evidence as might reasonably induce the jury to believe that the fire was wilful and malicious. *Reed* v. *Gainsbury*, 4 D. & R. 250.

Knowledge of Offenders.]—A declaration, after stating the felonious demolition of premises, alleged that the person who went before a justice submitted himself to examination, and became bound to prosecute the offenders when apprehended, such offenders being then and there unknown to the plaintiff, or to the party bound:—Held, after verdict, that, assuming any allegation on this point to be necessary under 7 & 8 Geo. 4, c. 31, this was sufficient, as it could only be sustained by proof that all the offenders were unknown. *Lowe* v. *Broxtowe*, 3 B. & Ad. 550; 1 L. J., M. C. 57.

And see supra, col. 618.

Amount of Compensation.]—Semble, that, in assessing compensation for the demolition of a dwelling-house under 7 & 8 Geo. 4, c. 31, the jury ought to consider what sum will be necessary to repair the injury and replace the building in the state it was when the outrage was committed; and not whether the plaintiff was likely to make it his residence, or whether it was suitable for such residence. *Newcastle (Duke)* v. *Broxtowe*, 4 B. & Ad. 273; 1 N. & M. 598; 2 L. J., M. C. 47.

Under 9 Geo. 1, c. 22, where a barn, which was the property of the landlord, and the corn contained therein the property of the tenant, were maliciously set fire to, and burnt, the hundred was liable to the extent of 200*l.* to both parties injured. *Adderley* v. *Offlow*, Peake's Add. Cas. 206.

—— **Goods Lost or Stolen.**]—*See* ante, col. 613, 614.

Costs.]—A party aggrieved was entitled to costs in an action on 9 Geo. 1, c. 22, against the hundred, although they, together with the damages, exceeded 200*l.* *Jackson* v. *Calesworth*, 1 Term Rep. 71. But see *Wilkinson* v. *Abbott*, Cowp. 366.

d. By Summary Proceedings.

Formalities.]—To ground a proceeding at petty sessions under 7 & 8 Geo. 4, c. 31, s. 8, for compensation in respect of felonious injury by rioters, the party or his servant must go before a justice within seven days after the offence was committed, and submit to examination, according to s. 3, as well as where an action is to be brought. And the court will not grant a mandamus to summon such petty sessions, where it does not appear by affidavit that these steps have been taken, though the party swears that he duly served the notice required by s. 8. *Rex* v. *Folkestone JJ.*, 4 B. & Ad. 552; 1 N. & M. 718; 2 L. J., M. C. 41.

It is not necessary for a party who applies to the magistrates for a remedy in respect of an injury committed against 9 Geo. 1, c. 22, to prove that it was committed by a "riotous" or tumultuous assembly, notwithstanding the introduction of those words in ss. 2 and 4 of 3 Geo. 4. *Rex* v. *Wylde*, 4 L. J. (o.s.) K. B. 67.

Amount of Compensation.] — Where the damages sustained by means of the unlawfully and maliciously setting fire to any house, barn, outhouse, mow or stack of corn, was less than 30*l.*, the remedy by action, given by 9 Geo. 1, c. 22, s. 7, to the party grieved, was taken away, and a summary remedy substituted for it by 3 Geo. 4, c. 33; although the injury had not been done by a riotous and tumultuous assembly. *Rex* v. *Somerset JJ.*, 7 D. & R. 385; 4 B. & C. 913.

The 3 Geo. 4, c. 33, s. 2, gave a summary remedy to the extent of 30*l.* against the hundred, for injuries done to property by riotous assemblies, on application to the petty sessions in the manner therein prescribed; and s. 7 gave an appeal to the quarter sessions to persons aggrieved by anything done in pursuance of the act. Where the petty sessions, under a mistake of the law, and not upon the merits of the case, dismissed an application under this statute:—Held, that the quarter sessions might entertain an appeal against their determination. *Rex* v. *Tucker*, 5 D. & R. 434; 4 B. & C. 545.

Order as to Levying Money.]—An order of justices under 7 & 8 Geo. 4, c. 31, ss. 7, 14, 15, for the levying of money upon the inhabitants of the hundred under the Riot Act, directing that the money, when levied, should be paid into the hands of a banker, subject to their further order, was bad. *Rex* v. *Halfshire*, 5 Term Rep. 341; Nolan, 265. J. M.

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[By E. MANSON.]

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I. MARRIAGE.

1. VALIDITY.

a. Contractual Capacity.

Law of Domicil.]—The personal capacity of parties to enter into the contract of marriage depends upon their domicil; and where both parties had a foreign domicil, and, by the law of their domicil, their marriage was invalid by reason of consanguinity, a marriage which was contracted in England, and which would have been valid according to English law, was held invalid. *Sottomayer* (*otherwise De Barros*) v. *De Barros*, 47 L. J., P. 23; 3 P. D. 1; 37 L. T. 415; 26 W. R. 455—C. A.

Two Portuguese subjects, whose domicil was Portugal, and whose marriage in Portugal would have been invalid without a Papal dispensation, on the ground of consanguinity, they being first cousins, contracted in 1866 a marriage in England. At that time they were of the respective ages of sixteen and fourteen, and the lady alleged that her marriage was entered into under pressure, and only with the purpose of saving some of her father's property from the consequences of a bankruptcy. The marriage was never consummated. In 1874 a petition to have the marriage declared void was presented by the lady: Held, that the marriage being invalid according to the law of the country of domicil of the parties, must be declared null and void here. *Ib.*

A foreign marriage, valid according to the law of the country where it is celebrated, is good everywhere; but that applies only to the form, and not the essentials of the contract, which depend on the lex domicilii: that is, the law of the country where the parties are then domiciled, and in which they contemplate to reside. Therefore, if a marriage abroad of English subjects domiciled in this country is contrary to our notions of public policy—for example, polygamous or incestuous—this country will not recognise it, and will follow in that respect its own rules as to incest and policy. *Brook* v. *Brook*, 9 H. L. Cas. 193; 7 Jur. (N.S.) 422; 4 L. T. 93; 9 W. R. 461. Affirming 27 L. J., Ch. 401.

Christian Marriage—Nature of Contract.]—The contract of marriage is, in its essence, a consent on the part of a man and a woman to cohabit with each other, and with each other only. The religious element does not require anything more of the parties; and therefore it is not essential that all the words of the marriage service to be repeated by the man and woman should be actually said: but the ceremonies required by law, such as the publications of banns and the like, being complied with, when the hands of the parties are joined together, and the clergyman pronounces them to be man and wife, if they understand that by that act they have agreed to cohabit together and with no other person, they are married. *Harrod* v. *Harrod*, 1 Kay & J. 4; 18 Jur. 853; 2 W. R. 612.

—— Domiciled Englishman with Woman of Uncivilised Tribe, according to Native Custom.]—A union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman to the exclusion of all others." *Bethell, In re, Bethell* v. *Hildyard*, 57 L. J., Ch. 487; 38 Ch. D. 220; 58 L. T. 674; 36 W. R. 503.

C. B., whose domicil was English, in 1878 went to South Africa, and afterwards resided at Mafeking in Bechuanaland. In 1883 he went through the ceremony of marriage with T., a woman of the Baralong tribe, according to the customs of the tribe, among whom polygamy is allowed. C. B. and T. lived together as husband and wife. He was killed in the colony in 1884, and about ten days after his death T. gave birth to a female child. C. B., in a document which he wrote and

signed in 1883, made some provision for T. and for a child out of the proceeds of sale of his property in the colony. He refused to be married to T. in a church on the ground that he was a Baralong. He never mentioned the marriage to any of his friends in England, and there was no evidence that he ever introduced or spoke of T. as his wife, but that he called her "that girl of mine." He was in receipt of about 600*l*. a year, the rents of estates in England, devised to him for life with remainder to his lawful child or children:—Held, that the union of C. B. and T. was not a marriage in the Christian, but in the Baralong sense, and that it was not a valid marriage according to the law of England. *Ib.*

—— **Marriage between British Subject and Native of Japan—Monogamous Marriages.**]—In a petition to establish the validity of a marriage under 21 & 22 Vict. c. 93, it appeared that the petitioner, who was a British subject with an Irish domicil of origin, and temporarily resident in Japan, had married a Japanese woman in Japan, according to the forms required by the law of the country. Evidence having been adduced which showed that the marriage was valid according to the law of Japan, and that by such a marriage the petitioner was precluded from marrying any other woman during the subsistence of the marriage:—Held, that the marriage was valid in this country. *Brinkley* v. *Attorney-General*, 59 L. J., P. 51; 15 P. D. 76; 62 L. T. 911.

—— **Polygamy.**]—A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in christendom; and although it is a valid marriage by the lex loci, and at the time when it was contracted both the man and woman were single, and competent to contract marriage, the English matrimonial court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations. *Hyde* v. *Hyde and Woodmansee*, 35 L. J., Mat. 57; L. R. 1 P. 130; 12 Jur. (N.S.) 414; 14 L. T. 188; 14 W. R. 517. *See* col. 632.

Capacity—Presumption in favour of.]—The presumption of the court is always in favour of sanity, and of the validity of a marriage; therefore an ability in general to understand others, especially strangers, and occasional or not infrequent inability to appreciate simple arithmetical calculations, held quite insufficient to show incapacity to enter into the marriage contract; and the court refused to direct an issue to take the opinion of a jury upon the marriage. *Harrod* v. *Harrod*, 1 Kay & J. 4; 18 Jur. 853; 2 W. R. 612.

The presumption of law in favour of the validity of a marriage is less strong where there is no issue, and where the parties to the marriage admit its validity. *M'Loughlin, In re*, 1 L. R. Ir. 421.

Person of Weak Intellect.]—In deciding whether a person has sufficient mental capacity to contract a marriage, the question for the court is, whether the mind of the contracting party was diseased or not at the time of the contract: and if the evidence establishes that the mind was, at the time of entering the contract, diseased, the court will not enter into the consideration of the extent of the derangement. *Hancock* (f. c. *Peaty*) v. *Peaty*, 36 L. J., Mat. 57; L. R. 1 P. 335; 16 L. T. 182; 15 W. R. 719.

Deaf and Dumb Persons.]—Deaf and dumb persons may enter into the contract of marriage, and the presumption is in favour of the validity of such a marriage and of the capacity of the parties to contract, and the onus of proof is upon those who would impeach the marriage. *Harrod* v. *Harrod*, supra.

If there is no question of mental capacity, the objection that a deaf and dumb person did not understand the nature of the contract of marriage which she had been induced to enter into, is an objection on the ground of fraud. *Harrod* v. *Harrod*, supra.

Insanity—Onus of Proof.]—The burden of showing that the respondent was insane at the time of the marriage lies upon the party asserting it, and the court has to determine whether the respondent was capable of understanding the nature of the contract, and the duties and responsibilities which it creates, and was free from the influence of morbid delusions upon the subject. *Durham* v. *Durham*, 10 P. D. 80.

Want of Consent and Free Agency.]—Although public policy requires that a marriage should not be lightly set aside, the validity of a contract of marriage must be tested in the same manner as that of an ordinary contract, and therefore a marriage will be annulled if the consent of either party thereto was obtained by means of fraud or duress. *Scott* v. *Sebright*, infra.

It is not necessary in order to avoid a contract entered into through fear that the fear should be such that a person of ordinary courage and resolution would yield to it; but if either party is mentally incompetent to resist pressure improperly brought to bear, there is no consent. *Ib.*

A young lady, eighteen years of age, entitled to considerable property, her parents being dead, having been passing her vacation at the house of one of the executors named in her father's will, whom she considered as her guardian, was induced by his brother, who was residing in the same house, and was fifty two years of age, to promise to marry him; she withdrew that promise a few days afterwards, but was importuned again, and prevailed upon to renew it, and the marriage was celebrated without the knowledge of any of her friends, upon a false statement made by him of her age and residence in the publication of the banns, and in the register of the marriage. There was no cohabitation, or consummation of the marriage, as she alleged. She, after a few days, went to a friend's house, and by his advice applied for an act of parliament to annul the marriage, the same being considered valid in law:—Held, that it did not appear that the marriage was not solemnised with the free consent of the lady, and that the case made was not such as to justify legislative interference. *Field's Bill*, 2 H. L. Cas. 48. See *Wortham's Case*, 2 H. L. Cas. 73.

Duress—Supposed Betrothal—Conspiracy of Respondent and Petitioner's Mother.]—Petitioner was induced by her own mother, acting in concert with the respondent, to go through the ceremony of marriage with the respondent. At the time of the marriage the mother, who was

shown to have exercised an abnormal amount of control over her daughter, persuaded her that the ceremony she had gone through was merely a ceremony of betrothal:—Held, that the petitioner acted under the duress of her mother, and was not a consenting party to the marriage, and was therefore entitled to a decree of nullity. *Clarke* (otherwise *Ford*, otherwise *Stier*) v. *Clarke*, 65 L. J., P. 13; [1896] P. 1; 11 R. 668; 73 L. T. 632.

—— **Threat to Shoot.**]—A man, after paying to a girl of sixteen attentions which she rejected, threatened to blow her brains out if she would not consent to marry him, and produced from his pocket a pistol, which he held at her head. She then promised to marry him on condition that he put away the pistol, which he did. A few days later she went home, and shortly afterwards he intercepted her while on a railway journey, and took her to the office of a registrar of marriages, stating that they were going to see her mother. During the marriage ceremony she fainted, and, as soon as it was over, she left him. The marriage was never consummated, and the man never insisted upon his marital rights. The court pronounced the marriage to be null and void. *Bartlett* (otherwise *Rice*) v. *Rice*, 72 L. T. 122.

—— **Incapacity to resist Coercion—Mental Prostration.**]—The petitioner, a young woman of twenty-two years of age, entitled to a sum of 26,000*l.* in actual possession and a considerable sum in reversion, had become engaged to the respondent, and shortly after coming of age was induced by him to accept bills to the amount to 3,325*l.* The person who had discounted these bills subsequently issued writs against her, and threatened to make her a bankrupt. The distress caused by these threats seriously affected her health, and reduced her to a state of bodily and mental prostration, in which she was incapable of resisting coercion and threats, and being assured by the respondent that the only method of evading bankruptcy proceedings and exposure was to marry him, she reluctantly went through a ceremony of marriage with him at a registrar's office. In addition to other threats of ruining her, the respondent immediately before the ceremony threatened to shoot her, if she showed that she was not acting of her free will. The marriage was never consummated, and the petitioner and the respondent separated immediately after the ceremony:—Held, that there was not such a consent on the part of the petitioner as the law requires for a making of a contract of marriage, and that the ceremony before the registrar must be declared null and void. *Scott* v. *Sebright*, 56 L. J., P. 11; 12 P. D. 21; 57 L. T. 421; 35 W. R. 258.

—— **Coercion — Intimidation — Fraud.**] — In a suit by a woman for a declaration of nullity of marriage, it appeared that the petitioner and respondent were Americans and cousins—the petitioner at the time of the ceremony hereinafter referred to being twenty-four, and the respondent under twenty-one years of age. The respondent had made an offer of marriage to the petitioner, which she had refused, and on a Sunday in July 1888, under the pretence of going to the afternoon service at St. Paul's Cathedral, he took her to St. Bride's Church, Fleet Street, and outside the church said to her suddenly, "You must come into the church and marry me, or I will blow my brains out, and you will be responsible." According to her own statement she was so alarmed that she did not know what she was doing, and went into the church, where the ceremony of marriage was performed and she signed the register. The respondent had previously obtained a licence, on a false declaration as to his own age and as to the petitioner's residence, and had made arrangements at the church for the marriage to be performed that day. The vicar of St. Bride's, who performed the ceremony, stated that the petitioner went through it without showing any signs of unwillingness, repeated the responses in an audible tone, and signed the register in a clear, firm hand. After the ceremony the respondent took the petitioner home, and left her at the door of the house. The marriage was never consummated, and the parties never saw each other afterwards, though they corresponded, but always on the footing of cousins and not as husband and wife. The petitioner never told her parents or friends of the marriage, because, as she said, she did not regard it as binding. The respondent, who did not appear in the suit, admitted he had only married the petitioner for her money, and that he did not care for her. There was evidence that the petitioner was of a weak, impressionable character, with not much power of resistance to a stronger will, but that she was not particularly disposed to fall into a hysterical state in the medical sense of the term:—Held, that the facts were insufficient to rebut the presumption of consent: that the marriage was valid, and that the suit must be dismissed. *Cooper* (f. c. *Crane*) v. *Crane*, [1891] P. 369; 40 W. R. 127.

Consanguinity and Affinity.]—The issuing of a citation in a cause of nullity of marriage, seven days previously to the 5 & 6 Will. 4, c. 54, receiving the royal assent, was within the meaning of the act, so as to constitute such suit depending. *Sherwood* v. *Ray*, 1 Moore, P. C. 353.

The 5 & 6 Will. 4, c. 54, s. 2 (passed 31st August, 1835) enacts, that all marriages which shall thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be null and void. The prohibited degrees are those declared by 28 Hen. 8, c. 7, s. 11, to be prohibited by God's law. Consequently, the marriage of a man with the sister of the deceased wife is prohibited and void by 5 & 6 Will. 4, c. 54. *Reg.* v. *St. Giles-in-the-Fields*, 11 Q. B. 173. S. P., *Reg.* v. *Chadwick*, 17 L. J., M. C. 33; 12 Jur. 174.

A marriage within the prohibited degrees of consanguinity, or of affinity, is null and void, although one of the parties is illegitimate. *Reg.* v. *Brighton*, 1 B. & S. 447; 30 L. J., M. C. 197; 5 L. T. 56; 9 W. R. 831.

—— **With Deceased Wife's Sister.**] — The marriage of a man with a sister of his deceased wife is declared by 28 Hen. 8, c. 7, to be contrary to God's law; and though that statute itself is repealed, its declarations are renewed in 28 Hen. 8, c. 16, and 32 Hen. 8, c. 38, which are in force. *Brook* v. *Brook*, 9 H. L. Cas. 193; 7 Jur. (N.S.) 422; 4 L. T. 93; 9 W. R. 461. Affirming 3 Sm. & G. 481; 27 L. J., Ch. 401.

Being forbidden by the law of England, such a marriage contracted by British subjects temporarily resident abroad, but really domiciled in this country, though valid in the foreign country,

and duly celebrated according to the forms required by the law of that country, is absolutely void here. *Ib.*

A. and B., British subjects, intermarried; B. died; A. and C. (the lawful sister of B.) being both at the time lawfully domiciled British subjects, went abroad to Denmark, where by the law, the marriage of a man with the sister of his deceased wife is valid, and were there duly, according to the laws of Denmark, married:—Held, that under 5 & 6 Will. 4, c. 54, the marriage in Denmark was void. *Ib.*

A person born of an English marriage with a deceased wife's sister is not legitimate in Scotland as to the succession to real estate. *Fenton* v. *Livingstone*, 3 Macq. H. L. 497; 5 Jur. (N.S.) 1183; 7 W. R. 671.

Although prior to 5 & 6 Will. 4, c. 54, a marriage with a deceased wife's sister could not be questioned after the death of both or either of the parties, it was illegal nevertheless, and if questioned while both parties were alive it must have been declared void ab initio. *Ib.*

A., a native of Marburg, in the electorate of Hesse Cassel, domiciled in England, married in 1835, and in 1836 was naturalised by act of parliament. In 1841 he made his will. His wife having died, he went to Frankfort in 1846, and there married a sister, by the half-blood, of his deceased wife, with a view to subsequent residence in England, such marriage being valid by the law of Frankfort, and by that of Hesse Cassel; soon after his second marriage he returned to England, where he died in 1856, never having since its acquisition abandoned his English domicil. Letters of administration of the estate and effects of A. having been granted by the Prerogative Court of Canterbury:—Held, in a suit instituted for the purpose of recalling those letters of administration, and obtaining probate of the will, that A.'s second marriage was rendered void by 5 & 6 Will. 4, c. 54, s. 2, and consequently did not revoke his will. *Mette* v. *Mette*, 1 Sw. & Tr. 416; 28 L. J., P. 117; 7 W. R. 543.

—— **With Daughter of Deceased Wife's Half-Sister.**]—The marriage of a man with a daughter of the half-sister of his deceased wife is null and void by 5 & 6 Will. 4, c. 54. *Reg.* v. *Brighton*, 1 B. & S. 447; 30 L. J., M. C. 197; 5 L. T. 56; 9 W. R. 831.

—— **Wife's Mother.**]—A man petitioned for a decree of nullity of marriage, on the ground that he had had intercourse with his wife's mother before the fact of marriage with his alleged wife, which intercourse, he averred brought him within the prohibited degrees of affinity in respect of marriage established by the law of England:—Held, that affinity could not be so constituted by the law of England, and that 28 Hen. 8, c. 7, had been repealed and not revived by any subsequent statute. *Wing* v. *Taylor* (f. c. *Wing*), 2 Sw. & Tr. 278; 30 L. J., Mat. 258; 7 Jur. (N.S.) 737; 4 L. T. 583.

—— **Both Parties cognisant of Impediment.**]—A decree will be made declaring a marriage with a deceased wife's sister null and void, although it is shown that both parties at the time of the celebration of the marriage were aware of the impediment. *Andrews* (f. c. *Ross*) v. *Ross*, 58 L. J., P. 14; 14 P. D. 15; 59 L. T. 900; 37 W. R. 239.

Indian Divorce—Marriage of Parties in England within Six Months of Final Decree.]—The prohibition contained in s. 57 of the Indian Divorce Act of 1869, No. 4, against the remarriage of either party within six months of the date of the final decree, is an integral part of the proceedings, and a condition which must be fulfilled before the parties can contract a fresh marriage, and they cannot evade it by obtaining a domicil in another country. A respondent and a co-respondent in a divorce suit in India, in which a decree absolute was pronounced on 27th November, 1879, came to this country and were married on 3rd February, 1880. On 6th February, the co-respondent duly executed a will by which he bequeathed all his property to his "reputed wife." On 2nd April, 1880, the parties went through a second form of marriage:—Held, that the first marriage having been celebrated within six months from the date of the final decree of divorce, was invalid, and that the will was revoked by the subsequent marriage. *Scott* v. *Att.-Gen.* (11 P. D. 128) distinguished. *Warter* v. *Warter*, 59 L. J., P. 87; 15 P. D. 152; 63 L. T. 250; 54 J. P. 631.

Quakers.]—There is no doubt of the legality of Quaker marriages. They were meant to be included in the remedy of the stat. 21 & 22 Geo. 3, c. 25, though the words of that act may seem not to apply to them. *Haughton* v. *Haughton*, 1 Moll. 611.

Jews.]—Marriage presumed between a Jew and a Christian woman, upon the weight of evidence, in the absence of direct proof of a ceremonial marriage. *Goodman* v. *Goodman*, 28 L. J., Ch. 745; 5 Jur. (N.S.) 902.

Royal Marriages.]—The Royal Marriage Act, 12 Geo. 3, c. 11, extends to prohibit the contracting of marriages, or to annul any already contracted in violation of its provisions, wherever the same may be contracted or solemnised, either within the realm of England or without. *Sussex Peerage*, 11 Cl. & F. 85; 8 Jur. 793.

Officer Abroad.]—The marriage of an officer, celebrated by the chaplain of the British army, within the lines of the army when serving abroad, is valid under the 9 Geo. 4, c. 91, though the country in which such army is serving is not in a state of hostility, and though no authority for the marriage has been obtained from the officer's superior in command. *Waldegrave Peerage*, 4 Cl. & F. 649.

Lunatic.]—Information directed to be filed for contriving marriage of a woman to an idiot. *Smart* v. *Taylor*, 9 Mod. 98.

If one marries a lunatic who is under the care of the committee of the court, this is a contempt for which the person marrying may be committed, and marriage is no supersedeas of the commitment, so as to take him or her out of the custody of the committee. *Ash's Case*, Pre. Ch. 203.

b. Solemnisation.

i. *General Formalities.*

Lex loci contractus.]—The forms of entering into contract of marriage are regulated by the lex loci contractûs, the essentials of the contract depend upon the lex domicilii. If the latter are contrary to the law of domicil, the marriage

(though duly solemnised elsewhere) is there void. *Brook* v. *Brook*, 9 H. L. Cas. 193 ; 7 Jur. (N.S.) 422 : 4 L. T. 93 ; 9 W. R. 461. Affirming 3 Sm. & G. 481 ; 27 L. J., Ch. 401.

The 26 Geo. 2, c. 33, only applies to the forms of certain marriages celebrated in this country ; it does not touch the essentials of the contract. It is, therefore, only territorial. *Ib.*

Marriage Act.]—A marriage contrary to the Marriage Act is absolutely void. *Rex* v. *Preston*, Burr. S. C. 486 ; 1 Wm. Bl. 192.

Presence of Priest.]—A man and woman cannot be lawfully married by a priest except such priest is a third party and witness. *Beamish* v. *Beamish*, 9 H. L. Cas. 274 ; 11 Ir. C. L. R. 511 ; 8 Jur. (N.S.) 770 ; 5 L. T. 97.

Since *Reg.* v. *Millis* (10 Cl. & F. 534), it must be taken that there never could have been a valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards without the presence of a priest or of a deacon. *Ib.*

When a bridegroom was himself a priest, there being no other priest present, a valid marriage was not contracted by him. *Ib.*

The law requires that equally in the case of the clergy, as of the laity, marriage in this country must, in the absence of express statute, take place in the presence and with the assent of a clerk in holy orders, who must be a third person, and whose duty it is to prevent or put off the marriage if there is opposed a just impediment, and who, in case he allows of its proceeding, is then, in the primary sense of the word, to marry the parties by receiving their mutual consent to become man and wife. *Ib.*

Consent Essence of the Contract.]—No set form of words is, or was previous to the last Marriage Act, necessary to be followed for the legality of a marriage in England. Nothing more is required to be done by the parties than that they shall agree to cohabit with each other, and with no other person, during their joint lives. The religious form is added by the church, but all the parties have to do is to give their consent as above ; therefore the omission of some of the words of the service is not necessarily material. *Harrod* v. *Harrod*, 1 Kay & J. 4 ; 18 Jur. 853 ; 2 W. R. 612. And see *Beamish* v. *Beamish*, supra.

Form of Words—Rubric.]—The forms of words prescribed by the rubric for the publication of banns need not be precisely followed, this part of the act of parliament being merely directory. *Standen* v. *Standen*, Peake, 34 ; 6 Term Rep. 331, n.

Ceremonies Enjoined by Rubric.]—The ceremonies enjoined by the rubric, such as addressing the congregation, putting the ring on the finger, pronouncing the benediction, &c., are not absolutely essential to the validity of a marriage in facie ecclesiæ, the essential part being the reciprocal taking of each other for wedded wife and wedded husband, and being declared married persons. *Ib.*

Quære, whether the decision in *Reg.* v. *Millis* (10 Cl. & F. 534) would apply to a marriage bonâ fide contracted in the colonies, or on board a ship, where it was impossible to procure the attendance of a minister of religion. *Ib.*

Presbyterian Minister.]—A., a member of the established church in Ireland went, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract of marriage with B. ; the minister performing a religious ceremony between them according to the rites of the Presbyterian church. A. and B. lived together for some time as man and wife ; A. afterwards, B. being still alive, married another person, in a parish church in England :—Quære, whether the first contract thus entered into was sufficiently a marriage to support an indictment against A. for bigamy. The lords being divided, the rule Semper præsumitur pro negante applied, and judgment was given for the defendant in error. *Reg.* v. *Millis*, 10 Cl. & F. 534 ; 8 Jur. 717.

Popish Priest and Protestant.]—A party to a marriage celebrated in Ireland by a Roman Catholic priest, who was born and bred a Protestant, and of a Protestant family, unless he has done some act to denote a change in his religious persuasion, must be deemed to be a Protestant within the 19 Geo. 2, c. 13, s. 1, which provides that every marriage celebrated by a popish priest, between a papist and any person that hath been, or hath professed himself to be, a Protestant, at any time within twelve months before such celebration, shall be null and void. *Yelverton* v. *Longworth*, 10 Jur. (N.S.) 1209 ; 11 L. T. 118 ; 13 W. R. 235.

Abjuration of Faith—Fraud.]—A marriage celebrated at Rome between two persons, Protestants, but who had, in accordance with the law of Rome, abjured the Protestant faith, and been admitted into the Roman Catholic Church, declared null and void on the ground that such abjuration was fraudulent and colourable, and that the parties never were or intended to become Roman Catholics. *Swift* v. *Swift*, 3 Knapp, 303.

Ceremony according to Rites of Church of England on Board Ship—Presence of Ordained Clergyman—No Banns, Licence, or Previous Public Notification.]—The court, in the absence of any argument contra, held, on the authority of *Catherwood* v. *Caslon* (13 M. & W. 261 ; 13 L. J., Ex. 334) and *Reg.* v. *Millis* (10 Cl. & F. 534), that a marriage solemnised in 1884 according to the rites and ceremonies and by a duly ordained clergyman of the Church of England, on board a Queen's ship, and in the presence of the captain, whilst the ship was lying at or off a port within her Majesty's dominions, was a valid marriage at common law, although there had been no publication of banns, nor any licence for or previous public notification of such marriage. *Culling* v. *Culling*, 65 L. J., P. 59; [1896] P. 116 ; 74 L. T. 252.

See now the Foreign Marriages Act, 1892, *and* col. 650.

Foreign and Mixed Marriages.]—A marriage solemnised at Antwerp between two English persons in the British church, by a Protestant clergyman appointed by the English government, but without performance of the Belgian ceremonies, is void, as being contrary to the lex loci, and not coming within the 9 Geo. 4, c. 91, which permits marriages abroad at an ambassador's or at a factory chapel. *Kent* v. *Burgess*, 11 Sim. 361 ; 5 Jur. 166.

The validity of a marriage, celebrated in a

foreign country must be determined in an English court by the lex loci where the marriage is solemnised. *Lacon* v. *Higgins*, 3 Stark. 178; D. & R., N. P. 38; 25 R. R. 779.

The articles of the law of France, which prescribe the forms essential to marriage, but which do not annul a marriage in fact for non-observance of such forms, are to be considered as merely directory. But parol evidence is admissible to show that, by the law of that country, a marriage in fact, without the observance of the requisites prescribed by such laws, is void. *Ib.*

A marriage between two Protestant British subjects, solemnised by a Portuguese Catholic priest at Madras according to the rites of the Catholic church, followed by cohabitation, but without the licence of the governor, which it had been uniformly the custom to obtain, is a valid marriage. *Latour* v. *Teesdale*, 8 Taunt. 830; 2 Marsh. 243; 17 R. R. 518.

The 5 & 6 Will. 4. c. 54, would not affect the law of marriage in any conquered colony in which a different law of marriage has prevailed. The act is limited in its operation to the inhabitants of Great Britain and Ireland. *Brook* v. *Brook*, supra.

The rule that a marriage, if good in the country where it was contracted, is good everywhere, is subject to the qualification that the marriage must not be one prohibited by the country to which the parties contracting belong. *Ib.*

The general rule is to determine the validity of a marriage by the law of the country where the parties were domiciled, and in most cases the legitimacy of a party is to be determined by the law of his birthplace, and of his parent's domicil. *Fenton* v. *Livingstone*, 3 Macq. H. L. 497; 5 Jur. (N.S.) 1183; 7 W. R. 671.

The comity of nations does not demand that a nation should recognise as valid every marriage which is valid lege loci contractûs, and not prohibited by the common consent of Christianity. Each nation has a right to define and prohibit incest. *Ib.*

Mixed Marriage without Statutory Formalities.]—Where a ceremony of marriage between a Protestant and a Roman Catholic was performed by a Roman Catholic clergyman, according to the rules of his church, in the sacristy of a Roman Catholic chapel at about four o'clock in the afternoon in the presence of two witnesses, but with closed doors; and no notice was given to the registrar, nor certificate issued by him, as required by s. 38 of the Matrimonial Clauses and Marriage Law (Ireland) Amendment Act, 1870 (33 & 34 Vict. c. 110), and one of the contracting parties subsequently endeavoured, in order to avoid forfeiture of certain rights under a will, to question the validity of the marriage, but no evidence was given of an intention on the part of either, at the time of the ceremony, to contract a sham marriage:—Held, that notwithstanding the absence of the statutory formalities the marriage was valid, as the parties had not, "knowingly and wilfully," disregarded them within the meaning of s. 39 of the same act, and that it was contrary to public policy, under the circumstances, to allow a contracting party to dispute the validity of the marriage. *Knox, In re*, 23 L. R. Ir. 542—C.A.

—— **Marriage in England between Foreigners.**]—A marriage duly solemnised in England, in the manner prescribed by the law of England, between parties of full age, and capable of contracting according to that law, cannot be held null and void because the parties to that marriage, being foreigners, contracted it in England in order to evade the laws of the country to which they belonged, and in which they were domiciled at the time. *Simonin* (f. c. *Mallac*) v. *Mallac*, 2 Sw. & Tr. 67; 29 L. J., Mat. 97; 6 Jur. (N.S.) 561; 2 L. T. 327.

—— **Cousins, one domiciled in Portugal, the other in England.**]—Two natives of Portugal, one of whom was domiciled in England, the other in Portugal, contracted a marriage in England in 1866. They were first cousins, and were incapable, according to the law of Portugal, of intermarrying, on account of consanguinity, without a papal dispensation. The petitioner (the wife) filed a petition praying that her marriage with the respondent might be declared null and void:—Held, that the lex loci contractûs should prevail in the matter; and the marriage being valid according to the law of England, the court dismissed the petition. *Sottomayer* (otherwise *De Barros*) v. *De Barros* (the queen's proctor intervening), 49 L. J., P. 1; 5 P. D. 94; 41 L. T. 281; 27 W. R. 917.

The queen's proctor, although intervening before decree nisi, is not precluded from setting up other defences in addition to that of collusion. *Ib.*

Presumption as to.]—Evidence that British subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and interpreted into English by the officiating clerk; which service the parties understood to be the marriage-service of the Church of England, and they received a certificate of the marriage, which was afterwards lost, is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years' cohabitation as man and wife till the period of the husband's death. *Rex* v. *Brampton*, 10 East, 282; 10 R. R. 289.

After Divorce by Foreign Tribunals.] — A woman, whose original domicil was English, and who married in England, resided for two and a half years in one of the states of America, and then petitioned the competent court in that state for a dissolution of her marriage, on grounds for which, if proved, the English court of divorce would also have dissolved an English marriage. No personal notice of the proceedings was given to the husband, who had never been within the state, and whose domicil continued to be English. The marriage having been dissolved, she remarried in America in the lifetime of her first husband:—Held, that a divorce so obtained could have no legal effect upon an English marriage, and therefore the second marriage was invalid. *Shaw* v. *Att.-Gen.*, 39 L. J., P. 81; L. R. 2 P. 156; 23 L. T. 322; 18 W. R. 1145.

But if she had been legally domiciled in the state at the time when the divorce was granted, the English courts would have recognised and acted on the decree. *Ib.*

Englishman Married in Armenia.] — An English Protestant went through a form of marriage with an Armenian Protestant christian

at Teheran, she being pregnant at the time. By the Persian law, christian marriages are recognised if valid according to the religious denomination of the parties. By the Armenian Church law, a woman cannot marry while in a state of pregnancy. The Armenian priests having refused to marry the parties, a Roman Catholic priest performed the ceremony according to the rites of the Romish Church, he having obtained a special licence to do so on the ground that the man was a Roman Catholic and the woman a Protestant: —Held, that as by the law of the country where the solemnisation took place the marriage was invalid, and as the forms prescribed by 12 & 13 Vict. c. 68, had not been complied with, there was no marriage. *Alison's Trusts, In re*, 31 L. T. 638; 23 W. R. 226.

Cohabitation in Virginia.]—In a suit for dissolution of marriage, it appeared that the petitioner and respondent lived together for five years in Virginia, and were received in society as man and wife; that by the law in force in Virginia, when the cohabitation began, no religious ceremony was necessary to the validity of a marriage, nor was any registry of marriages required to be kept, and that, in consequence of war in Virginia, the record of any religious ceremony which might have taken place could not be obtained:—Held, that there was sufficient proof of the marriage. *Rooker* v. *Rooker and Newton*, 3 Sw. & Tr. 526; 33 L. J., Mat. 42; 9 Jur. (N.S.) 1329; 12 W. R. 807.

The identity of the parties may be proved by circumstantial evidence. *Ib.* *See* col. 652.

Compare cases under INTERNATIONAL LAW.

ii. *Banns.*

Clandestine Marriages.]—By the stat. of 1 Eliz. and 13 & 14 Car. 2, the laity are bound by the rubric against marrying without publication of banns, and by the first act are expressly punished by the censures of the church; and by the second act, the power of the ordinary is directed to be continued and applied for punishing the like offence against the rubric of the present book of Common Prayer. *Middleton* v. *Crofts*, 2 Atk. 674.

Marriage by banns legal, though only one of the parties resided in the parish. *Robinson* v. *Grant*, 18 Ves. 289. Or though neither. *Nicholson* v. *Squire*, 16 Ves. 259.

—— **Wrong Name—Mistake.**]—A person whose baptismal and surname were A. L., was married by banns by the name of G. S., having been known in the parish where he resided and was married by that name only, from his first coming into the parish till his marriage, which was about three years:—Held, that the marriage was valid, and therefore the wife and children were entitled to the husband's settlement. *Rex* v. *Billingshurst*, 3 M. & S. 250; 15 R. R. 474.

Where a married woman, on the death of her husband, assumed her maiden name, and after several years had elapsed, married, by banns, to a second husband in that name, and described herself as a "widow":—Held, that, in the absence of fraud, such marriage was legal, and that her settlement followed that of her second husband. *Rex* v. *St. Faith's, Newton*, 3 D. & R. 348.

In the publication of banns, in 1817, a woman named Mary Hodgkinson was called White, a surname entered by mistake in the register of her baptism, but which she had never gone by or been entitled to. The false name was given to the officiating clergyman without any intention to mislead, nor did any individual having an interest in the marriage appear to have been deceived:—Held, that the marriage was void. *Rex* v. *Tibshelf*, 1 B. & Ad. 190; 8 L. J. (O.S.) M. C. 120.

A marriage by banns, published in false names, is not void under 4 Geo. 4, c. 76, s. 22, unless both parties were privy to such mispublication. *Rex* v. *Wroxton*, 1 N. & M. 712; 4 B. & Ad. 641; 2 L. J., M. C. 64.

A man caused the banns to be published without the knowledge of the intended wife, a minor, to whom he proposed marriage only the day before it took place. For the purpose of concealment, the christian name of the wife was wrongly stated, and the age and residence of the husband and wife were also falsely described:—Held, that the marriage was valid, the wife having been unconscious of the irregularity in the publication of the banns. *Templeton* v. *Tyree*, 41 L. J., Mat. 86; L. R. 2 P. 420; 27 L. T. 429; 21 W. R. 81.

A marriage solemnised after an undue publication of banns will not be held null and void, under 4 Geo. 4, c. 76, unless it is shown that both parties "knowingly and wilfully" concurred in such undue publication. *Gompertz* v. *Kensit*, 41 L. J., Ch. 382; L. R. 13 Eq. 369; 26 L. T. 95; 20 W. R. 313.

When an intending husband, then a minor, desiring to have a secret marriage, gave instructions for the publication of banns, and in such instructions omitted two of his own christian names and one of the christian names of his intended wife (also a minor), and the names were entered with such omissions in the register of banns—there being no evidence of how the banns were actually published—and the names were, after the ceremony, signed by the respective parties, with the same omissions in the register, there being no further evidence besides that of the husband, who deposed that he omitted the names, not thinking or believing he was acting contrary to law, and for brevity's sake only, and the marriage having been reputed good for more than thirty years:—Held, that the husband was not proved to have committed any offence against the statute. *Ib.*

The husband deposed that, prior to the marriage, the intended wife neither directly nor indirectly took any step towards the publication of the banns, but left the matter entirely to him. There was no evidence of knowledge on her part beyond her signature of the marriage register with the omission above mentioned, that not being her usual form of signature. She being dead, and the marriage having been reputed good throughout her life—that is to say, for upwards of twenty-four years:—Held, that the court could not impute to the wife knowledge of the omission of the name in the instructions for publication of banns. *Ib.*

—— **Designedly Changing Name for Clandestinity.**]—Banns having been published between two persons (who afterwards clandestinely intermarried) under the names John Miles and Maria Courtenay, upon evidence (of one alone of the parties, corroborated, however, by other persons and by documents) that the intending wife has been baptised Beatrice Mary Victoria Emma Guy, and that instead of the

name "Beatrice" (by which she was familiarly known) the name "Maria" (by which she was not known) had been, in the publication of the banns, used and adopted with cognisance of both parties for the purpose of clandestinity:—Held, that the parties had knowingly and wilfully intermarried without due publication of banns; and that under the Irish Marriage Act of 1847 (7 & 8 Vict. c. 81), s. 49, the marriage was null and void. *Courtenay* v. *Miles*, Ir. R. 11 Eq. 284.

And a nullity of marriage by reason of undue publication of banns, pronounced for, both parties being cognisant of the undue publication. *Brealy* v. *Reed*, 2 Curt. 833.

A marriage by banns, where the publication of banns was in the name of John, instead of Bower, the christian name of the man, both parties being at the time of the solemnisation of the marriage aware of such misdescription, was pronounced null. *Midgley* (f. c. *Wood*) v. *Wood*, 30 L. J., Mat. 57.

A marriage by banns, in the publication of which one of the christian names of the man, a minor, was designedly concealed, and which was solemnised in such imperfect name, is void under 4 Geo. 4, c. 76, ss. 7, 22, the judicial committee being of opinion that the circumstances of the man omitting to sign his full christian names in the register indicated his participation in the previous false publication. *Tongue* v. *Tongue*, 1 Moore, P. C. 90.

In the publication of banns the woman's name was published as Morumild instead of Wormald. When in the vestry of the church, before the solemnisation of the marriage, the clergyman called out the names from the banns-book in the presence of both parties, the woman thereupon stated that her name was Wormald, and it was so entered by the clergyman in the marriage register:—Held, an undue publication of banns, under 4 Geo. 4, c. 76, s. 22, and the marriage pronounced null. *Wormald* v. *Neale*, 19 L. T. 93. *And see* col. 640.

—— **Minor.**]—It is doubtful whether the marriage of a minor can be declared null and void by reason of undue publication of banns if there is no parent or guardian whose consent or dissent can be given to such marriage. *Holmes* v. *Simmons*, 37 L. J., Mat. 58; L. R. 1 P. 523; 18 L. T. 770; 16 W. R. 1024.

—— **Mistake as to Time.**]—The due publication of banns of marriage was completed on the 1st July, and the marriage took place on the 1st October following. The 4 Geo. 4, c. 76, s. 9, requires marriages by banns to be solemnised within three months after the complete publication of banns:—Held, that the marriage was valid, it not being found that the parties knowingly and wilfully intermarried without due publication of banns. *Reg.* v. *Clarke*, 16 L. T. 429; 15 W. R. 796; 10 Cox, C. C. 474.

Re-marriage after Divorce.]—A wife having obtained a decree dissolving her marriage with her husband, subsequently re-married him. The second marriage was celebrated after publication of banns, in which she was described by her name of marriage, she having in the interval between the decree dissolving her first marriage and the celebration of the second usually passed by her maiden name. On an application to annul such marriage by reason of an undue publication of banns:—Held, that a name acquired by marriage can only be superseded by a reputed name in case where the name had been so far acquired by repute as to obliterate the name acquired by marriage. *Fendall* (otherwise *Goldsmid*) v. *Goldsmid*, 46 L. J., P. 70; 2 P. D. 263. And see *Chichester* v. *Mure* (f. c. *Chichester*), col. 659.

Prohibition for Marrying Without Banns.]—A prohibition was granted to a suit in the spiritual court, for marrying without banns or licence, because it was a matter of temporal jurisdiction. *Campbell* v. *Aldrich*, 2 Wils. 79.

District Parish—Incumbent Exclusive Right to Celebrate Marriage by Banns.]—An incumbent of a district parish validly constituted under 58 Geo. 3, c. 45 and 59 Geo. 3, c. 134 has an exclusive right to celebrate marriages by banns, between persons both of whom are resident within the district parish. *Tuckniss* v. *Alexander*, 32 L. J., Ch. 794; 9 Jur. (N.S.) 1026; 8 L. T. 821; 11 W. R. 938.

iii. *Licence.*

Presumption.]—The factum of marriage, celebrated by a clergyman of the Church of England in 1815, being proved, the maxims semper presumitur pro matrimonio, and omnia presumuntur rite et solemniter acta, which raise the presumption of law that a special licence existed authorising the marriage, can only be repelled by strong, distinct, satisfactory, and conclusive evidence to the contrary, and every reasonable possibility of a fact in favour of the presumption must be rebutted. *Piers* v. *Piers*, 2 H. L. Cas. 331; 13 Jur. 569.

The presumptio juris in favour of the existence of a special licence is not sufficiently repelled by the evidence of the bishop of the diocese, thirty years after the factum, that he never granted a licence for the marriage of the parties in question, stating his reasons why he was certain that he never granted such licence. *Ib.*

The reasonable possibility (not disproved) that the special licence might have been granted by the late bishop, who died a year and a half before the marriage, is sufficient to support the presumptio juris. *Ib.*

Marriage of Minor without Consent.]—The marriage of a minor by licence without the consent required by 4 Geo. 4, c. 76, s. 16, is valid, the statute being directory only. *Rex* v. *Birmingham*, 2 M. & Ry. 230; 8 B. & C. 29; 6 L. J. (O.S.) M. C. 67. So under 6 & 7 Will. 4, c. 85, s. 25.

Where, in ejectment, the plaintiff relies on the invalidity of a second marriage, by reason of a former marriage by licence, one of the parties being a minor, and the defendant has notice that the question intended to be raised is whether the first marriage was with the consent of the minor's parent, it lies upon the defendant to disprove consent. *Doe* d. *James* v. *Price*, 1 M. & Ry. 683; 6 L. J. (O.S.) K. B. 157.

—— **In Scotland.**]—A marriage in Scotland by an infant who was an English subject, without consent, was held good by the court of delegates. *Compton* v. *Bearcroft*, Bull. N. P. 113.

—— **Wrong Name.**]—A marriage by licence, not in the man's real name, but in the name which he had assumed because he had deserted, he being known by that name only in the place

where he lodged and was married, and where he had resided sixteen weeks, is a valid marriage. *Rex* v. *Burton-upon-Trent*, 3 M. & S. 537; 16 R. R. 350.

A marriage by licence under a false name is valid. *Lane* v. *Goodwin*, 3 G. & D. 610; 4 Q. B. 361; 12 L. J., Q. B. 157; 7 Jur. 372.

A partial departure from the true name of one of the parties to a marriage in a licence obtained in the altered name by the other party for the purpose of concealing the intended marriage is no cause of nullity if the altered name may represent the person, and if such licence was obtained for and by the direction of that person. *Bevan* f. c. *M'Mahon* v. *M'Mahon*, 2 Sw. & Tr. 230; 30 L. J., Mat. 61; 7 Jur. (N.S.) 218; 3 L. T. 820.

A marriage was solemnised by a licence in which the name of the woman was stated to be "Margaret Bevan," her baptismal name, and that by which she was commonly called being "Margaret Lea Bevan." The licence was obtained in the altered name by the man, who knowingly and by the direction of the woman suppressed the name "Lea" in order that the surrogate might not know who the woman was, and that the intended marriage might be kept secret from her friends:—Held, in a suit of nullity of marriage instituted by the woman on the ground of misnomer in the licence, that as the name "Margaret Bevan" might represent her, and the licence was obtained for her and by her direction, the marriage was not void as having been solemnised without licence. *Ib.*

A marriage by licence is not invalidated through the husband having been, by mistake, described in the licence as having two additional christian names. *Haswell* v. *Haswell and Gilbert*, 51 L. J., P. 15; 30 W. R. 231.

Marriage before Licence Issued.]—A. and B. intermarried at the parish church of Bradford, Yorkshire, on the 18th of June, 1857. The licence for their marriage did not issue until the 19th of June, and the husband knew at the time of the marriage that the licence was not in existence, but the wife was ignorant of the fact and believed that all necessary formalities had been observed:—Held, that the parties had not knowingly and wilfully intermarried without licence within 4 Geo. 4, c. 76, s. 22, and the validity of the marriage was pronounced for. *Greaves* v. *Greaves*, 41 L. J., Mat. 66; L. R. 2 P. 423; 26 L. T. 745; 20 W. R. 802.

Jurisdiction of Arches Court.]—The Arches Court has no jurisdiction to entertain a suit by letters of request against a layman for falsely swearing before a surrogate to an affidavit to lead to the issue of a marriage licence. *Phillimore* v. *Machon*, 1 P. D. 481.

Granting Licence—Duty of Incumbent.]—Where a licence is granted, in due form, for a marriage at a particular church, the incumbent is under no obligation to inquire whether there has been a sufficient residence to justify the granting of the licence. His proper course is to assume the regularity of the licence and to perform the marriage ceremony. *Tuckness* v. *Alexander*, 4 Drew. & Sm. 614; 2 N. R. 480; 32 L. J., Ch. 794; 9 Jur. (N.S.) 1026; 8 L. T. 821; 11 W. R. 938.

Without Banns or Licence.]—A marriage is valid although celebrated without banns or licence first had and obtained, unless both parties were aware at the time of the ceremony of the absence of banns and licence. *Greaves* v. *Greaves*, 41 L. J., Mat. 66; L. R. 2 P. 423; 26 L. T. 745; 20 W. R. 802.

—— **In Scotland.**]—A marriage celebrated in Scotland without banns or licence is good. *Hall, Ex parte*, 1 Rose, 30.

iv. *Consent of Parent.*

How far Necessary.]—The provision in 4 Geo. 4, c. 76, s. 17, does not apply to a father who is beyond the seas, or who unreasonably withholds his consent; but only in a case in which he is non compos mentis. *I. C., Ex parte*, 3 Mylne & Craig, 471; 2 Jur. 463.

The patria potestas of the civil law, as respects the marriage of children, was abolished by the canon law, which is the law by which marriages are governed in this country, except so far as it has been restricted by 4 Geo. 4, c. 76. *Sherwood* v. *Ray*, 1 Moore, P. C. 353.

Although a father may withdraw his consent to his daughter's marriage at any time previously to the actual solemnisation, yet his consent when duly obtained will be upheld, though he died before any preliminary arrangements for the marriage could be settled. *Yonge* v. *Purse*, 26 L. J., Ch. 117; 2 Jur. (N.S.) 864. See *S. C.*, 26 L. J., Ch. 352; 3 Jur. (N.S.) 603; 5 W. R. 394.

Condition of Marriage with Consent.]—Held, subsequent and not precedent, and its performance having become impossible, by the act of God, was dispensed with. *Collett* v. *Collett*, 35 Beav. 312.

Bastard.]—Bastards were within 26 Geo. 2, c. 33, which required the consent of the father, guardian, or mother, to the marriage of persons under age, who were not married by banns. *Rex* v. *Hodnett*, 1 Term Rep. 96.

All marriages, whether of legitimate or illegitimate children, were within 26 Geo. 2, c. 33, and a marriage of an illegitimate minor, had by licence with the consent of her mother, was void by s. 11. *Priestly* v. *Hughes*, 11 East, 1; 10 R. R. 406.

Presumption of Validity of Marriage.]—On a question of legitimacy there were in evidence a sentence of nullity of the marriage of a minor for want of her father's consent, and a statement in the parish register that the marriage took place by licence with the consent of the mother of the bride, but nothing as to the father's consent. There was, however, evidence leading to the conclusion that the sentence had been obtained by collusion between the husband and wife, and that the father had been aware, and did not disapprove, of the match:—Held, fifty years after the date of the sentence of nullity, that the marriage ought to be presumed valid. *Harrison* v. *Southampton Corporation*, 4 De G. M. & G. 137; 22 L. J., Ch. 722; 18 Jur. 1; 1 W. R. 422. S. P., *Birch, In re*, 17 Beav. 358.

See also *Poole* v. *Poole*, Younge, 331, and *Adams* v. *Adams*, 8 Ir. Ch., R. 41; *Rex* v. *Brampton*, 10 East, 282; 10 R. R. 289; *Adrian Birch, In re*, and col. 655.

v. *In what Places and before Whom.*

In England—Clergyman not Officiating.]—A marriage between English subjects, celebrated

according to the rites of the Church of England, but not in the presence of a priest in holy orders, is invalid at common law. *Catherwood* v. *Caslon*, 13 M. & W. 261; 13 L. J., Ex. 334; 8 Jur. 1076.

A clergyman of the Church of England performed the ceremony of marriage between himself and A. in a private house. At the performance of the ceremony there were no witnesses present in the room, but a woman in a yard adjoining witnessed the proceedings without hearing what was said. The marriage was consummated:—Held, invalid. *Beamish* v. *Beamish*, 9 H. L. Cas. 274; 11 Ir. C. L. R. 514; 8 Jur. (N.S.) 770; 5 L. T. 97.

It must be taken as established, since *Reg.* v. *Millis* (10 Cl. & F. 534), that there never could have been a valid marriage in England before the Reformation, without the presence of a priest episcopally ordained; or afterwards, without the presence of a priest, or of a deacon; and as the presence of a priest is declared to be necessary, it is clear that he must be a third party present at the time of making the contract. *Ib.*

The presence of a priest was not merely for the purpose of securing a religious sanction to the contract of marriage, but one of the objects was to prevent an unlawful contract, which could not be secured unless the priest was a person other than either of the two engaged in the act. The directions contained in the rubric respecting the opening address to the congregation, the adjuration to the persons about to be married as to confessing any lawful impediment to their union, the putting on the ring, &c., are not absolutely essential to the validity of the marriage; the essential part of the service is the reciprocal taking each other for wedded wife and wedded husband. *Ib.*

Quære, whether the decision in *Reg.* v. *Millis* (10 Cl. & F. 534), would apply to a marriage bonâ fide contracted in the colonies, or on board a ship, where it was impossible to procure the attendance of a minister of religion. *Ib.*

See *Culling* v. *Culling*, 65 L. J., P. 59; [1896] P. 116; 74 L. T. 252; col. 634.

A marriage between British subjects, at the celebration of which no ordained clergyman of the Established Church of England and Ireland intervened, is not valid at common law so as to avoid a marriage subsequently solemnised in due form, between one of the parties to the first marriage and a third party, and bastardise the issue. *De Moulin* v. *Druitt*, 13 Ir. C. L. R. 212. *See* col. 633.

—— **Number of Witnesses.**]—The 4 Geo. 4, c. 76, s. 28, which requires that two witnesses should be present at a marriage, and should sign the register, is merely directory; and a non-compliance with its directions is no ground for annulling a marriage. *Wing* v. *Taylor*, f. c. *Wing*, 2 Sw. & Tr. 278; 30 L. J., Mat. 258; 7 Jur. (N.S.) 737; 4 L. T. 583.

A marriage solemnised in the presence of one witness only is therefore a good marriage. *Ib.*

—— **Before Registrar.**]—The superintendent registrar has no power to grant his certificate, pursuant to 6 & 7 Will. 4, c. 85, s. 7, in cases where it is proposed that the marriage shall take place out of his district, and without licence. *Brady, Ex parte*, 8 D. P. C. 332; 4 Jur. 269.

Where, on an indictment for bigamy, it was alleged that the first marriage took place in a dissenting chapel duly licensed for marriages, and a witness was called who proved that he was present at the marriage, that it took place in the dissenting chapel in the presence of the registrar, that the entry of the marriage in the registrar's book was signed by the witness as a witness to the marriage, and that the parties afterwards lived together as husband and wife for some years:—Held, first, that the parol testimony of the witness sufficiently proved the fact of marriage. *Reg.* v. *Mainwaring*, Dears. & B. 132; 26 L. J., M. C. 10; 2 Jur. (N.S.) 1236; 5 W. R. 119; 7 Cox, C. C. 192.

Held, secondly, that there was primâ facie evidence that the chapel was duly registered, and was a place in which marriages might legally be solemnised. *Ib.*

To render a marriage invalid within the 6 & 7 Will. 4, c. 85, s. 42—which enacts "that if any persons shall knowingly and wilfully intermarry under the provisions of this act without due notice to the superintendent registrar, the marriage of such persons shall be null and void"—it must be contracted with a knowledge by both parties that no due notice had been given. *Reg.* v. *Rea*, 41 L. J., M. C. 92; L. R. 1 C. C. 365; 26 L. T. 484; 20 W. R. 632.

Therefore, where one of the parties under s. 4, which requires that the notice shall state the name and surname of each of the parties intending marriage, gave a notice stating therein a false christian name for such party, but the other party did not know that fact at the time of the marriage, the marriage was held valid. *Ib.*

In a suit for nullity of marriage celebrated before a superintendent registrar, it appeared that the notice required by 19 & 20 Vict. c. 119, s. 2, was signed by the husband with a wrong name (his first christian name being omitted), and that it was falsely asserted that both parties were twenty-one years of age. The court held that the validity of the marriage could not be questioned, and dismissed the petition. *Prowse* v. *Spurway*, 46 L. J., P. 49; 26 W. R. 116.

A man may change his surname by use and reputation, and if by use and reputation he has acquired a new name, he is not indictable under 19 & 20 Vict. c. 19, s. 2, for using a new name in signing a notice for the purpose of procuring his marriage under 6 & 7 Will. 4, c. 85. *Reg.* v. *Smith*, 4 F. & F. 1099.

—— **Presumption.**]—When a marriage has been solemnised in a registrar's office in the presence of the registrar and deputy registrar, the presumption of law is that the requisites of the statute 6 & 7 Wm. 4, c. 85, s. 21, have been complied with. If it appeared from the evidence that such a marriage took place with closed doors, it would not on that account be held to be invalid, so as to disentitle the husband after the wife's death to have administration granted to him of her effects, a marriage so celebrated not being specified in the 42nd section of the statute as one that is null and void. *Campbell* v. *Corley*, 4 W. R. 675. *And see* col. 655.

—— **Due Notice.**]—The "due notice" required by the registration acts for the validity of a marriage before a registrar, is a notice conforming to the formalities provided by 6 & 7 Will. 4, c. 85, and the words "due notice" will be satis-

fied, though the contents of the notice in respect of christian names and residences of the parties, or other details, are not accurate. *Holmes* v. *Simmons* f. c. *Holmes*, 37 L. J., Mat. 58; L. R. 1 P. 523; 18 L. T. 770; 16 W. R. 1024.

Since 19 & 20 Vict. c. 119, there is no analogy between a marriage by banns and a marriage by notice before the registrar. The decisions as to what constitutes undue publication of banns, under 4 Geo. 4, c. 76, are not therefore applicable to a question of what constitutes undue notice under the registration acts. *Ib.*

—— **In what Churches and Chapels.**]—Marriages, since 26 Geo. 2, c. 33, in chapels, not having chapelries or districts annexed to them, and in which banns have not been usually, although often published, were upon the construction of that statute void. *Rex* v. *Northfield*, Cald. 115; 2 Dougl. 659.

In an action for crim. con., if the plaintiff's marriage was solemnised in a chapel, he must give some evidence that banns were usually published there before the passing of the Marriage Act. *Taunton* v. *Wyborn*, 2 Camp. 297.

An incumbent of a district parish validly constituted under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, has an exclusive right to celebrate marriages by banns, between persons both of whom are resident within the district parish. *Tuckniss* v. *Alexander*, 2 Drew. & Sm. 614; 2 N. R. 480; 32 L. J., Ch. 794; 9 Jur. (N.S.) 1026; 8 L. T. 821; 11 W. R. 938.

—— **In Vestry.**]—A marriage solemnised in a vestry belonging to and in the church is a good marriage. *Wing* v. *Taylor*, f. c. *Wing*, 2 Sw. & Tr. 278; 30 L. J., P. 258; 7 Jur. (N.S.) 737; 4 L. T. 583.

Primâ facie the vestry is part of the church, and a petition for sentence of nullity, on the ground that a marriage was solemnised in a vestry, which does not aver that the vestry formed no part of the church, is insufficient. *Ib.*

—— **In Building near Church.**]—When a marriage was solemnised in a building in a parish situate a few yards from the church, at a time when the church was disused in consequence of undergoing repairs, and divine service had been several times performed in the building, in the absence of any proof that it was licensed by the bishop, it was presumed in favour of the marriage to have been duly licensed. *Reg.* v. *Cresswell*, 45 L. J., M. C. 77; 1 Q. B. D. 446; 33 L. T. 760; 24 W. R. 281; 13 Cox, C. C. 126.

—— **On Board British Ship.**]—A marriage solemnised by an ordained clergyman of the church of England on board a queen's ship, while lying at or off a port within her majesty's dominions, is a valid marriage at common law. *Culling* v. *Culling*, 65 L. J., P. 59; [1896] P. 116; 74 L. T. 252. *See* col. 634.

In Ireland.]—A marriage solemnised in Ireland in 1835 by a non-placed Presbyterian clergyman who had previously had a congregation, but had been suspended and had ceased to have one, is valid. *Harris* v. *Harris*, Ir. R. 3 C. L. 294.

—— **At House of Clergyman.**]—A., a member of the established church in Ireland, went, accompanied by B., a Presbyterian, to the house of C., a regularly-placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract of marriage with B.; the minister performing a religious ceremony between them, according to the rites of the Presbyterian church. A. and B. lived together for some time as man and wife; A. afterwards, B. being still alive, married another person, in a parish church in England:—Quære, whether the first contract thus entered into was sufficiently a marriage to support an indictment against A. for bigamy. Lords Brougham, Denman and Campbell were of opinion that it was, Lords Lyndhurst, Cottenham, and Abinger were of opinion that it was not. The lords being thus divided, the rule semper præsumitur pro negante applied, and judgment was given for the defendant in error. *Reg.* v. *Millis*, 10 Cl. & F. 534; 8 Jur. 717; and see *Beamish* v. *Beamish*, col. 633.

—— **In Private House.**]—A marriage in Ireland, performed by a clergyman of the established church of England, is valid, though it was celebrated in a room of a private house and without any special licence being granted to the parties. *Smith* v. *Maxwell*, 1 Car. & P. 271; R. & M. 80. And see *Stockbridge* v. *Quicke*, 3 Car. & K. 305.

—— **Of Protestant by Roman Catholic.**]—A party to a marriage celebrated in Ireland by a Roman Catholic priest, who was born and bred a Protestant, and of a Protestant family, unless he has done some act to denote a change of his religious persuasion, must be deemed to be a Protestant within the 19 Geo. 2, c. 13, s. 1, which provides that every marriage celebrated by a popish priest, between a papist and any person that hath been or hath professed himself to be, a Protestant, at any time within twelve months before such celebration, shall be null and void. *Yelverton* v. *Longworth*, 4 Macq. H. L. 746; 10 Jur. (N.S.) 1209; 11 L. T. 118; 13 W. R. 235.

In Scotland—When Valid.]—A domiciled Englishman and Englishwoman residing in England, after an illicit connection of some years standing, went to Gretna in Scotland, and on their arrival there (before the passing of 19 & 20 Vict. c. 99) contracted a marriage, per verba de præsenti, by making a mutual declaration of marriage before witnesses. At the instance of the man, the certificate of marriage given by the person who officiated at the ceremony was antedated four years. In a suit for nullity of marriage by the man, he repudiated the marriage, on the ground that he had never consented to a marriage, but went through the form of marriage with a simulated object in view, namely, for the purpose of obtaining a certificate to blind inquiries. There was no deception on the part of the woman, who believed it to be a marriage:—Held, that the marriage was valid by the lex loci contractûs, there being reasonable evidence of the intention of the parties to contract, ipsum matrimonium; and that as there was a mutual declaration of present marriage, it was immaterial whether the man had some other motive beside marriage. *Bell* v. *Graham*, 13 Moore, P. C. 242; 1 L. T. 221; 8 W. R. 98.

To constitute a marriage in accordance with Scotch law, the agreement to marry must be

deliberate and serious, and given mutually with the view and for the purpose of creating thenceforth the relation of husband and wife, and it is not necessary that a contract so made should be followed by cohabitation, nor is it necessary to allege the particular place, or the exact day where and when such consent was exchanged. *Yelverton* v. *Longworth*, 4 Macq. H. L. 746; 10 Jur. (N.S.) 1209; 11 L. T. 118; 13 W. R. 235.

An unmarried woman, while living with her mother, had two children by H., a single man, who gave bond to the parish to indemnify it against their maintenance. He afterwards changed his residence, and she went with her children to reside in his house, and so resided till his death. Shortly after this change of residence, he obtained from his law agent a form of words necessary by the Scotch law to constitute a marriage; he then wrote this note:—"My dearest Mary, I hereby solemnly declare that you are my lawful wife, though, for particular reasons, I wish our marriage to be kept private for the present. I am your affectionate husband.—A. H." This note was addressed inside to her, but outside to Mrs. A. H. He deposited the note with the law agent, saying it would please and satisfy her, but directed the agent to keep it a secret till his death. He always represented himself to his relations as a single man:—Held, that a valid marriage had been constituted between these parties; that the words of the paper were sufficient for that purpose, so far as the man was concerned; and that his conduct and expressions to the law agent, together with the subsequent residence of the woman with him, must be taken as evidence of her knowledge of the paper, and her assent to it. *Hamilton* v. *Hamilton*, 9 Cl. & F. 327.

—— **Cohabitation—How far Sufficient.**]—Cohabitation, with the required repute, as husband and wife, is proof that the parties between themselves have mutually contracted the matrimonial relation. It demonstrates that interchange of consent which alone constitutes marriage in Scotland. The law of habit and repute, however, is not peculiar to Scotland; although in countries where the facilities of matrimony are less than in Scotland, the evidence to establish the marriage must be stronger. *Campbell* v. *Campbell*, L. R. 1 H. L. Sc. 182.

A connection commencing in adultery may, on ceasing to be adulterous, become matrimonial by consent, and may be evidenced by habit and repute, the parties being at liberty to intermarry. The alteration in the character of the connection from adultery to matrimony need not be indicated by any public act, or by any observable changes in outward demonstration. *Ib.*

A., a widow, entitled to a pension durante viduitate, cohabited with B. in Scotland. In regard to society, they held themselves out as man and wife; but with respect to the pension, they acted as if they were unmarried; and A., half-yearly, made solemn declarations of widowhood for the purpose of obtaining the pension:—Held, that, on the whole, the finding that no valid marriage had taken place was right. *Robertson* v. *Crawford*, 3 Beav. 103.

M. and C. cohabited. There was no direct evidence of the time at which their intercourse began, but M. wrote to C. a letter, which was dated in March, 1826, and was in the following terms:—"Christy,—You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born in consequence of the present connection between us." This letter was not delivered till 1828:—Held, that it did not in any way constitute a marriage by the law of Scotland. *Stewart* v. *Menzies*, 8 Cl. & F. 309.

A., a Scotchman, married in Scotland and went abroad; his wife cohabited with C., and had children by him. To make such children legitimate, it was held necessary, for those who asserted their legitimacy, to prove either a legal origin of the cohabitation, or a change in the nature of it after the death of A. had become known to all the parties. The mere fact that C. and the woman continued to live together was not sufficient for that purpose. Under such circumstances the children were held illegitimate, though born after the date of A.'s death. *Lapsley* v. *Grierson*, 1 H. L. Cas. 498.

The law of Scotland accepts the continued cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of Scotland. Cohabitation outside Scotland will not constitute marriage, although it may be competently founded on, either as corroborative evidence of a ceremony in Scotland, or as evidence that a ceremony proved to have taken place in Scotland was truly intended by the parties as a present interchange of matrimonial consent. A. alleged that she was lawfully married to B. by interchange of mutual consent de præsenti before witnesses in 1844 in Scotland, and that having remained in Scotland for about a month, B. and she cohabited at divers places in England as husband and wife, and that a son now living was born of the marriage in 1863. Between 1844 and 1849, when B. deserted A., three daughters were born, one of whom B. registered as legitimate. In 1851 B. married C. at a parish church in England and had children. A. was informed of this marriage shortly after its celebration, but took no steps to have the validity of the averred irregular Scotch marriage of 1844, or the nullity of the marriage of 1851, judicially declared, until 1880. The alleged witnesses to A.'s marriage were admitted now to be dead, but they were alive in 1853, when they might have been judicially examined in an action brought against B. for the board and lodging of A.:—Held, that the evidence completely disproved the allegation of a marriage between A. and B. *Dysart Peerage Case*, 6 App. Cas. 489—H. L.

—— **Invalid—Status of Children.**]—By the law of Scotland, where a marriage between two persons is invalid by reason of the existence of a prior marriage entered into by one of those persons, and either of such persons is, at the time of the solemnisation of such second marriage, justifiably ignorant that any impediment to such second marriage exists, the issue of the invalid marriage has, nevertheless, the personal status of legitimate children. *Wilson, In re, Shaw, In re*, 35 L. J., Ch. 243; L. R. 1 Eq. 247; 12 Jur. (N.S.) 132; 13 L. T. 576; 14 W. R. 161.

In Colonies.]—The 5 & 6 Will. 4, c. 54, does not bind all English subjects in all parts of the world, and it would not affect the law of mar-

riage in any conquered colony in which a different law of marriage prevailed, whatever effect it might have in any other colony. *Brook* v. *Brook*, 9 H. L. Cas. 193; 7 Jur. (N.S.) 422; 4 L. T. 93; 9 W. R. 461.

Marriages of British subjects in British plantations are governed by the common law of England, unless otherwise enacted by the imperial legislature or that of the colony, and evidence of the solemnisation by a clergyman of the Church of England according to the rites of that church and of cohabitation is sufficient proof of a marriage between British subjects in Norfolk Island, a British colony. *Limerick* v. *Limerick*, 32 L. J., Mat. 92; 11 W. R. 503.

—— **New South Wales.**]—A marriage in New South Wales (before a Presbyterian minister), where there was a fact of consent between the parties to become husband and wife, is a valid marriage, notwithstanding a noncompliance with the provisions of a local act, in which there were no words constituting a nullity. *Catterall* v. *Catterall*, 1 Rob. Ec. Rep. 580; 11 Jur. 914.

—— **Cape—Second Marriage—Wife Living.**]—A., born in Ireland, resided at the Cape of Good Hope, first, in her majesty's 45th regiment of foot, and afterwards in the Cape mounted rifles, from 1842 till 1862. In 1850 he married B., resident in the colony. In 1852 the colonial court decreed a dissolution of that marriage; in 1856 A. married C., B. still living. A. died in 1863 intestate; and on a question as to the right to letters of administration raised between C. and the brother and next of kin of A.:—Held, that C. was entitled to administration as the widow of A. *Argent* v. *Argent*, 4 Sw. & Tr. 52; 34 L. J., P. 133; 11 Jur. (N.S.) 864; 12 L. T. 768.

In India—Of British Subjects.]—The duplicate registers of marriage kept in the East Indies, and transmitted to this country by the direction of the governing authority there, are admissible. *Ratcliffe* v. *Ratcliffe and Anderson*, 1 Sw. & Tr. 467; 5 Jur. (N.S.) 714; 7 W. R. 726.

A marriage took place in Bombay in 1844, previously to 14 & 15 Vict. c. 40. To prove the marriage, a book was produced from the archives of the East India Company, which purported to contain the quarterly returns of marriages for 1844, from the presidency of Bombay, such returns being authenticated copies of the original registers remaining in India, and made and transmitted by authority:—Held, that as at that time the East India Company, under the sovereignty of the crown, possessed supreme authority over the territories of the company in India, and a registry of marriages was kept in each presidency by its order, and an authentic copy thereof was made and transmitted by the servants of the company to the secretary at the East India House, and that the book produced came from the proper custody, the entries therein were admissible to prove the celebration of a marriage in India. *Ib.*

—— **Of Indians.**]—Suit on the ecclesiastical side of the supreme court at Bombay, by wife against husband, for restitution of conjugal rights, and for maintenance. Protest by the husband, that the parties were Parsees, professing the religion of that sect, and that the court had no jurisdiction to administer towards them the ecclesiastical law as at the date of the charter was used and exercised in the diocese of London:—Held, that the supreme court of Bombay, on its ecclesiastical side, had no jurisdiction to entertain such a suit, as there existed such a difference between the duties and obligations of a matrimonial union among Parsees from that of Christians, that the court, if it made a decree, had no means of enforcing it, except according to the principles governing the matrimonial law in Doctors' Commons, which were, in such a case, incompatible with the laws and customs of Parsees. *Ardaseer Cursetjee* v. *Peroæeboye*, 6 Moore, Ind. App. 348.

In British Territory — Roman Catholic Church.]—A marriage celebrated between British subjects according to the rites of the Roman Catholic Church in a country subject to British dominion, but where there is no established church, is valid. *James* v. *James and Smyth*, 51 L. J., P. 24; 30 W. R. 232.

Elsewhere.]—The 4 Geo. 3, c. 91, gives validity to the marriage of a British subject in the chapel of the British ambassador abroad, whether the other party to the marriage is a British subject or not. *Wright, In re*, 2 Kay & J. 595; 25 L. J., Ch. 621; 2 Jur. (N.S.) 465; 4 W. R. 541.

A marriage between an Englishman and a domiciled French lady, at the house of the British ambassador at Paris, by the chaplain to the embassy, is valid under 4 Geo. 4, c. 91. *Lloyd* v. *Petitjean*, 2 Curteis, 251.

The marriage of an officer celebrated by a chaplain of the British army within the lines of the army when serving abroad, is valid under 9 Geo. 4, c. 91, though such army is not serving in a country in a state of actual hostility, and though no authority for the marriage was previously obtained from the officer's superior in command. *Waldegrave Peerage*, 4 Cl. & F. 649.

A marriage contract was entered into in Paris between two English subjects, according to the formalities required by the French law, in anticipation of a marriage to be solemnised "suivant la loi." A valid English marriage took place at the embassy, but no marriage ceremony took place according to the French forms and solemnities:—Held, that the marriage "suivant la loi," was fulfilled by the English marriage, and that the settlement being to regulate an English marriage, was valid here, notwithstanding that, according to the French law, the marriage and the settlement might be inoperative. *Este* v. *Smyth*, 18 Beav. 112; 23 L. J., Ch. 705; 18 Jur. 300; 2 W. R. 148.

English subjects on their marriage may stipulate that their marriage rights shall be regulated by the law of a foreign country, and a court of equity will enforce such a contract. *Ib.*

Foreign Marriages.]—55 & 56 Vict. c. 23, *consolidates enactments relating to the marriage of British subjects outside the United Kingdom.*

52 & 53 Vict. c. 38, *removes doubts as to the validity of certain marriages solemnised in Basutoland and in British Bechuanaland.*

vi. *Proceedings against Clergyman in respect of.*

Non-Performance.]—A declaration in an action against a clergyman for not solemnising a mar-

riage, stated that the plaintiff and Mary were desirous to intermarry; that a licence was obtained authorising the solemnisation of the marriage at any time within three months from the date, between 8 and 12 a.m., and reciting that Mary had resided at B. for fifteen days next before the date; that the defendant was minister of the church; that, by reason of the premises, and by force of the licence, it became his duty to solemnise the marriage in the manner and time specified in the licence, when thereunto requested; that he had notice of the licence, and was requested by the plaintiff to solemnise the marriage in the manner and at the time specified in the licence, yet he wrongfully and illegally refused:—Held, after verdict for the plaintiff, that the declaration was bad, as the request by the plaintiff alone did not show notice to the defendant that Mary was willing to be then married. *Davis* v. *Black*, 1 G. & D. 432; 1 Q. B. 900; 10 L. J., Q. B. 338; 6 Jur. 55.

Where a licence from the bishop, duly framed, is produced to the minister, he has no option but to perform the marriage according to the licence, and the responsibility of ascertaining that one of the persons to be married has lived for fifteen days in the district for which the licence has been granted, rests on the ordinary granting it, and not on the officiating minister. *Tuckness* v. *Alexander*, 4 Drew. & Sm. 614; 2 N. R. 480; 32 L. J., Ch. 794; 9 Jur. (N.S.) 1026; 8 L. T. 821; 11 W. R. 938.

Where a man and a woman, notice of whose intended marriage had been published at the board of guardians, called at the private house of the clergyman of a chapel in the district, at nine o'clock in the evening, and, showing him the superintendent registrar's certificate requested him to appoint a time for their marriage, when the clergyman declared he would marry them when they had expressed a desire to be confirmed, and not till then:—Held, that this was no proper tender of the parties for marriage, nor a legal demand of marriage, and that the clergyman was not liable to an indictment for his refusal at such time and place. *Reg.* v. *James*, T. & M. 300; 2 Den. C. C. 1; 19 L. J., M. C. 179; 14 Jur. 940. *See now* 19 & 20 Vict. c. 119, ss. 11, 12.

Celebration by, without Inquiry.]—A clergyman celebrating a marriage by banns, without making the inquiry directed by the marriage act, is liable to ecclesiastical censure at least; perhaps to other consequences. *Nicholson* v. *Squire*, 16 Ves. 259.

A prohibition was granted to a suit in the spiritual court, for marrying without banns or licence, because it was a matter of temporal jurisdiction. *Campbell* v. *Aldrich*, 2 Wils. 79.

Celebration—Pretence of Holy Orders.]—Where a person is indicted for falsely pretending to be in holy orders and solemnising matrimony according to the rites of the Church of England, the mere licence by the bishop to a curacy, or the institution by him to a benefice, which renders a clergyman compellable to perform the marriage ceremony between competent parties, is no defence if the person charged knows of the invalidity of the letters of orders on which he has been so licensed or initiated. *Reg.* v. *Ellis*, 16 Cox, C. C. 469.

Where a person is so indicted it is enough for the prosecution to show the letters of orders which the person charged has held out to be genuine, and has put forward as a justification for presenting himself as a person in holy orders, are spurious; and it is not incumbent on the prosecution to show that he had no other valid orders. *Ib.*

c. Evidence.

English—Cohabitation for Length of Time.]—Cohabitation for thirty years as man and wife is sufficient evidence of a marriage. *Rex* v. *Stockland*, Burr. S. C. 508; 1 W. Bl. 367. And see *Poole* v. *Poole*, Younge, 331.

Strong acknowledgments of marriage for eighteen years together are sufficient to establish it inter vivos, though no actual proof can be had; the supposed marriage being previous to 26 Geo. 2, c. 33. *Hervey* v. *Hervey*, 2 W. Bl. 877.

—— **Proof of.**]—Where a marriage is proved to have been solemnised de facto 110 years ago by people who intended that it should be a good marriage, and it is done bonâ fide and openly, the maxim omnia præsumuntur rite esse acta applies. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.)

A., then ill of the malady of which he died, and two days before his death, was married in 1772 in New York to B. by C., an ordained clergyman of the Church of England, then assistant minister of Trinity Church, New York. There was produced, inter alia, in support of the marriage, from the custody of the family a certificate signed by C. that he had married A. and B. according to the rites of the Church of England as by law established, and an affidavit signed by the mayor of New York, to the effect that C. had made oath of the truth of the statements in the certificate; a will of date anterior to the marriage, by which A. left all his property to B. and the children then born; copies of letters showing that one of the executors wrote to his co-executor in England, a brother of A., stating that he was a witness to the ceremony of marriage; that B. signed herself in A.'s surname; that the children were recognised and taken care of by members of the family as A.'s children; and also War Office records showing that B. received a pension as A.'s widow:—Held, that there was ample proof of a legal marriage. *Ib.*

—— **Onus on Party Impeaching.**]—In a suit by the children of a marriage to enforce payment of their portions, the legitimacy of the plaintiffs having been called in question by the next tenant for life, who was a defendant in the cause:—Held, that a marriage de facto having once been established, it lay on the party impeaching the marriage to show that the same was illegal or void; that sufficient evidence of a marriage de facto having been submitted to the court, the court itself was competent to decide the question of marriage for the purposes of the suit, without directing an issue. *Piers* v. *Tuite*, 1 Dr. & Wal. 279.

—— **Subsequent Conduct.**]—Assuming the marriage to be regular, previous and subsequent conduct of the parties is admissible evidence upon the question of consent. *Macneill* v. *Macgregor*, 2 Bli. (N.S.) 393.

—— **By Repute.**]—A marriage may be esta-

blished by preponderating repute and by conduct, even though the repute is divided. *Lyle* v. *Ellwood*, 44 L. J., Ch. 164; L. R. 19 Eq. 98; 23 W. R. 157.

A. and B. cohabited together as man and wife for thirty years, and until B.'s death in 1835. There was no evidence of any marriage having been solemnised, nor was there any affidavit in support of the marriage made by any member of the family; but there was general reputation that they were married, and proof of the registry of the baptism of several of their children as of A. and B. his wife. C., the brother of B., by his will made in 1871, gave a legacy to one of these children, describing her as "his niece":—Held, that these children were entitled, as legitimate children of A. and B., to share, as next of kin, in a fund as to which C. had died intestate. *Collins* v. *Bishop*, 48 L. J., Ch. 31.

Semble, a marriage may be established by repute, even though there may be no positive evidence in support of the marriage, from any member of the family. *Ib.*

Evidence of marriage had been given by proof of cohabitation and reputation. In addition, an affidavit of the 19th July, 1784, made by the alleged husband for the purpose of obtaining a special licence, and the fiat of the Archbishop of Canterbury, directing the licence to pass as prayed, which was at the foot of the affidavit, were put in, produced from the proper custody. No search had been made for the licence, but it appeared that such licences are not kept in any regular custody. An extract of the parish register was also put in, which stated that a marriage between the parties in question had been celebrated by special licence from the archbishop on the 21st July, 1784. It was objected, that the documentary evidence was inadmissible without production of the licence:—Held, that it was admissible as confirming the evidence by cohabitation and reputation. *Doe* d. *Egremont* (*Earl*) v. *Grazebrook*, 3 G. & D. 334; 4 Q. B. 406; 12 L. J., Q. B. 221.

General reputation is sufficient evidence of a marriage to entitle a son to inherit property, though the father is still living. *Doe* d. *Fleming* v. *Fleming*, 4 Bing. 266; 12 Moore, 500; 5 L. J. (O.S.) C. P. 169; 29 R. R. 562.

—— **By Registry.**]—The registry of a marriage is evidence between strangers of the time of the marriage. *Doe* d. *Wollaston* v. *Barnes*, 1 M. & Rob. 386.

—— **Examined Copy of Registry.**]—In order to prove that the defendant was wife of J. G., an examined copy of a register of a marriage between the defendant and one J. G. was put in evidence. A witness was then called, who stated that he knew one J. G., and was acquainted with his handwriting, and that the handwriting of J. G. in the original register was in the handwriting of the J. G. with whom he was acquainted:—Held, that this evidence was receivable without producing the original register. *Sayer* v. *Glossop*, 2 Car. & K. 694; 2 Ex. 409; 17 L. J., Ex. 300; 12 Jur. 465.

—— **Entries in Church Books.**]—The entry of names and titles of persons in a church book, either for marriages or births, cannot be positive evidence of the marriage or birth of any person, unless the identity of person named in such entries is fully proved and strengthened also by circumstances of cohabitation, and the allowance of parties. *Draycott* v. *Talbot*, 3 Bro. P. C. 564.

—— **Entries in Roman Catholic Chapel Books.**]—Entries made in the chapel books by Roman Catholic clergymen, whose death and handwriting have been proved, are evidence of a marriage or baptism recorded thereby. *Malone* v. *L'Estrange*, 2 Ir. Eq. R. 16. See *Malone* v. *O'Connor*, Macl. & R. 469.

—— **Certificates—How far Evidence.**]—Certificates of births, baptisms, marriages or deaths are admissible as evidence, without proof of the identity of the persons mentioned in them with the persons as to whom the fact recorded by them is sought to be established. *Hubbard* v. *Lees*, 4 H. & C. 418; 35 L. J., Ex. 169; L. R. 1 Ex. 255; 12 Jur. (N.S.) 435; 14 L. T. 442; 14 W. R. 694.

—— **Entries in Books at Ambassador's.**]—The book kept at the British ambassador's hotel in Paris, in which the ambassador's chaplain makes and subscribes entries of all marriages of British subjects celebrated by him, has not the authenticity of an English parish register. An attested copy of an entry in it is not admissible to prove a marriage. *Athlone's* (*Earl*) *Claim*, 8 Cl. & F. 262.

—— **Description in Will.**]—It was necessary to prove that W. S. married M. D. There was no certificate of marriage found, but the will of her uncle, S. D., was produced. It was in these words: "All this I give to my nephew, W. S." (who was identified as the W. S. in question), and the act book from Doctors' Commons was produced, granting administration to "W. S., S. D.'s nephew, minor, and universal legatee." Received as proof that a marriage had taken place between W. S. and M. D. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

—— **Irish Marriage — Certificate — Copy of Church Register.**]—The court accepted as evidence in proof of a marriage solemnised in 1866 in Dublin, according to the rites of the Established Church of England and Ireland, a copy of an entry in the register of marriages, purporting to be signed, and certified as a correct copy of the entry, by the clergyman of the parish where the marriage was celebrated. *Wallace* v. *Wallace*, 74 L. T. 253.

—— **Entry in Archives of East India Company.**]—A marriage took place in Bombay in 1844, previously to the 14 & 15 Vict., c. 40. To prove the marriage, a book was produced from the archives of the East India Company, which purported to contain the quarterly returns of marriages for 1844, from the presidency of Bombay, such returns being authenticated copies of the original registers remaining in India, and made and transmitted by authority:—Held, that as at that time the East India Company, under the sovereignty of the crown, possessed supreme authority over the territories of the company in India, and a register of marriages was kept in each presidency by its order, and an authentic copy thereof was made and transmitted by the servants of the company to the secretary at the East India House, and that the book produced came from the proper custody, the entries therein were admissible to prove the celebration of mar-

riage in India. *Ratcliffe* v. *Ratcliffe and Anderson*, Sw. & Tr. 467 ; 5 Jur. (N.S.) 714.

Presumption in Favour of.]—A marriage may be presumed. *Wilkinson* v. *Payne*, 4 Term Rep. 468.

Everything is presumed in favour of marriage. *Harrod* v. *Harrod*, 1 K. & J. 4 ; 18 Jur. 853 ; 2 W. R. 612.

The factum of marriage, celebrated by a clergyman of the Church of England in the year 1815, being proved, the maxims, Semper præsumitur pro matrimonio, and Omnia præsumuntur rite et solemniter acta, which raised the presumption of law that a special licence existed, authorising the marriage, can only be repelled by strong, distinct, satisfactory, and conclusive evidence to the contrary ; and every reasonable possibility of a fact in favour of the presumption must be rebutted :—Held, that the presumptio juris in favour of the existence of a special licence was not sufficiently repelled by the evidence of the bishop of the diocese, thirty years after the factum, that he never granted a licence for the marriage of the parties in question, stating his reasons why he was certain that he never granted such licence :—Held, also, that the reasonable possibility (not disproved) that the special licence might have been granted by the late bishop, who died a year and a half before the marriage, is sufficient to support the præsumptio juris. *Piers* v. *Piers*, 2 H. L. Cas. 331 ; 13 Jur. 569.

The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage. *Ib.*

Evidence in support of a plea of coverture that the defendant was married in a Catholic chapel according to the rites of the Roman Catholic Church, to a person with whom she afterwards lived as wife, is primâ facie sufficient to show a valid marriage under 6 & 7 Will. 4, c. 85, as the law will presume that the chapel was registered, and the registrar present as required by that act. *Sichel* v. *Lambert*, 15 C. B. (N.S.) 781 ; 33 L. J., C. P. 137 ; 10 Jur. (N.S.) 617 ; 9 L. T. 687 ; 12 W. R. 312.

Where the question is whether a certain marriage has or has not taken place, and the fact of cohabitation is established, together with reputation of marriage, a presumption is created in favour of the marriage having taken place, which can only be rebutted by strong and weighty evidence to the contrary. Marriage held to have taken place under such circumstances, notwithstanding some evidence leading to the contrary conclusion, and absence of any positive evidence in corroboration. *Fox* v. *Bearblock*, 44 L. T. 508 ; 29 W. R. 661 ; 45 J. P. 648.

In an action against husband and wife for a debt due from the wife before coverture, it is not necessary to give actual proof of the marriage, presumptive evidence of it is sufficient. *Tracey* v. *M'Carlton*, 7 D. P. C. 532 ; 1 W. W. & H 550 ; 3 Jur. 124.

In an action against husband and wife, on the note of the wife dum sola, a witness stated that he knew A. B. (the wife) formerly, and had heard that she afterwards married E. F. (the husband). The witness was not cross-examined : — Held, sufficient primâ facie evidence of marriage. *Evans* v. *Morgan*, 2 C. & J. 453 ; 2 Tyr. 396.

Second Marriage — Proof of Death of First Spouse.]—The law always presumes against the commission of crime ; and therefore, where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him :—Held, that the sessions did right in presuming primâ facie that the first husband was dead at the time of the second marriage, and that it was incumbent on the party objecting to the second marriage to give some proof that the first husband was then alive. *Rex* v. *Twyning*, 2 B. & Ald. 386 ; 20 R. R. 480.

Where, upon a question as to the validity of a marriage between A. and C., it appears that A.'s first wife, B., was alive in a distant colony twenty-six days before the second marriage, the sessions or a jury are justified in finding the second marriage to be void. *Rex* v. *Harborne*, 4 N. & M. 341 ; 2 A. & E. 540 ; 1 H. & W. 36 ; 4 L. J., M. C. 49.

Presumption less Strong where no Issue.]—The presumption of law in favour of the validity of a marriage is less strong where there is no issue, and where the parties to the marriage admit its invalidity. *M'Loughlin's Estate, In re*, 1 L. R., Ir. 421.

Where Insufficient to Establish.]—To support a defence to an action that the plaintiff was under coverture when the cause of action accrued, although she lived as a single woman, it is not enough to prove a bare declaration by her that she had been married to S., who was still alive, without actual proof of the marriage, or of cohabitation with her supposed husband, particularly if there appears to be any reason to doubt that the marriage was valid. *Wilson* v. *Mitchell*, 3 Camp. 393.

Property was bequeathed to the children of A., provided he should marry an English lady. He, in 1859, married a woman named Hannah Tuhi Tuhi, one of the offspring of an alleged marriage between a British subject and a native woman of New Zealand named Tuhi Tuhi. The only evidence of the marriage was that of the alleged husband himself, who said that he was a British subject, born abroad, in 1801, of British parents. He further said that he came to reside in New Zealand in or about 1828, and had resided there ever since ; that in 1829 he inter-married with Tuhi Tuhi, and that such marriage was solemnised at a place in New Zealand, according to the laws, customs, and usages then in force in New Zealand ; that New Zealand was not then a British colony, and there was not then a minister of any Christian church, nor any registry of marriages in the island, and that from and after the marriage Tuhi Tuhi had lived and still lived with him as his wife. The deponent did not state the names of his parents. He said that Hannah, before her marriage, was called Tuhi Tuhi, and not by her father's name, in conformity with the customs of the natives of New Zealand ; but there was no evidence as to what the laws and customs of the natives of New Zealand were :—Held, that the evidence was insufficient to enable the court to presume a marriage. *Armitage* v. *Armitage*, L. R. 3 Eq. 343.

—— That Banns had been Forbidden.]—A declaration by a clergyman, that a friend of the wife's had forbidden the banns the second time they were published, is not admissible as a fact but as evidence that the clergyman had confessed that he had married without banns. *Standen* v. *Standen*, Peake, 30, 32 ; 6 Term Rep. 331, n.

—— **Clandestine Marriage.**]—In cases relating to clandestine marriage hearsay evidence and declaration are no defective proof, but have weight with the court, especially when uncontradicted by anything on the other side. *Beard* v. *Travers*, 1 Ves. 313.

—— **Commission to India Refused.**]—A marriage was set up between C., an Englishman in India, and a native woman. C., after the time alleged, married another person in the English form, and had children reputed legitimate, and no claim of such prior marriage was set up till seventeen years after C.'s death in this country: —Held, the evidence being suspicious and weak, no commission ought to be sent to India to procure further evidence, as such a proposal would only tend to encourage perjury. *Moorhouse* v. *Lord*, 32 L. J., Ch. 295; 9 Jur. (N.S.) 677; 8 L. T. 212; 11 W. R. 637.

Heir in Tail entitled to Discovery.]—Heir in tail may have discovery of settlement for purpose respecting marriage. *Lempter* v. *Pomfret*, Dick. 238.

Scotch—Evidence of Repute and Written Declaration.]—The evidence of neighbours and mere acquaintances of habit and repute must extend through a long series of years to raise the presumption of an agreement on both sides to live together as husband and wife, but if the consensus is once proved lapse of time is unimportant; and where there is evidence of express acknowledgment, a very short cohabitation in accordance therewith will be sufficient for this purpose. *Hill* v. *Hibbit*, 25 L. T. 183; 19 W. R. 250. *And see* cols. 646—8.

H. formed an illicit connection with P. in London. He subsequently moved with her to Glasgow, where they lived together for a year and a half. H. introduced her to his family and acknowledged her as his wife. They afterwards went separately to America, and lived separately for more than thirty years, she resuming her maiden name:—Held, that there was sufficient evidence of the change in the nature of the connection, and that the consensus being proved the marriage was valid, and not affected by the short duration of the cohabitation or the subsequent separation. *Ib.*

A written declaration of marriage de præsenti signed by both and delivered by the man to the woman, conclusively establishes the contract. *Forster* v. *Forster*, L. R. 2 H. L. (Sc.) 244.

Circumstances under which it was held that direct proof of the wife's signature to the declaration was unnecessary, she possessing the document, and suing upon the faith of it for a declarator of marriage. *Ib.*

The declaration might be regarded as a promise which when followed but not preceded by copula constitutes marriage. *Ib.*

—— **Twenty-one Days' Residence in Scotland.**]—Two persons domiciled in England arrived in Scotland about 4 a.m. of the 1st of July, 1870, remained there until the 21st following, and between 11 and 12 a.m. of that day contracted a marriage by declaration before a registrar:—Held, that they had not lived in Scotland for twenty-one days next preceding the marriage, and that therefore it was invalid. *Lawford* v. *Davies*, 47 L. J., P. 38; 4 P. D. 61; 39 L. T. 111; 26 W. R. 424.

J. D. and A. L., who were both domiciled in England, left London for Scotland on the evening of the 30th of June, 1870. They arrived at Edinburgh between five and six o'clock on the following morning, the 1st of July, and they lived in Scotland until the 21st of July, on which day, about 11.30 a.m., they contracted an irregular marriage by declaration before the registrar at Edinburgh. By 19 & 20 Vict. c. 96, s. 1, it is enacted that "no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage":—Held, that the parties had not lived the prescribed time in Scotland, and that the marriage was invalid. *Ib.*

—— **Gretna Green Marriage—Validity.**]—On the 5th March, 1846, the mother and father of the petitioner went through a ceremony of marriage at Gretna Green, the lady at that time being fifteen years of age. The certificate was signed by the contracting parties, and by two friends as witnesses to the marriage. The lady having signed her maiden name and made some erasure on the first certificate, a second was signed by the parties and witnesses, and was duly dated. This document was not forthcoming, and the first-mentioned certificate was tendered at the hearing, having been produced by one of the witnesses who attested it, and who had preserved it as a curiosity. After the ceremony at Gretna Green the parties returned home, and were recognised as married by their respective parents and friends. The petitioner was born in Jan. 1847. This petition became necessary to enable him to establish his title to a reversionary interest under the will of a relative, which reversion he had mortgaged. The petitioner's father died in 1878, and the two witnesses were also dead. The petitioner's mother gave the only direct evidence in proof of her marriage:—Held, that the marriage was valid by the law of Scotland, and accordingly a declaration was made of the petitioner's legitimacy in terms of the prayer of the petition. *Gardner* v. *Att.-Gen.* 60 L. T. 839.

In a suit by a husband for dissolution of marriage, the only evidence of the marriage being that he and the wife had, in May, 1850, left England together for the purpose of being married at Gretna Green, that they shortly returned and stated that they had been married, and lived together for many years as man and wife, it is sufficient evidence of the marriage. *Putrickson* v. *Patrickson*, 35 L. J., Mat. 48; L. R. 1 P. 86; 12 Jur. (N.S.) 30; 13 L. T. 567; 14 W. R. 212.

Marriage in Private House — Witness.]—Where a woman present at a marriage ceremony in Scotland, performed in a private house by a minister of a congregation (but whether or not of the kirk she did not know), stated that she herself had been married in the same way, that parties always married in Scotland in private houses, and that the parties after the ceremony had lived together as man and wife:—Held, that her evidence was insufficient to prove the law of marriage in Scotland, or to establish a marriage in fact. Some person conversant with the law of Scotland as to marriage should have been called. *Reg.* v. *Povey*, Dears. C. C. 32; 22 L. J., M. C. 19; 17 Jur. 120; 1 W. R. 40; 6 Cox, C. C. 83.

Jewish.]—Semble, that to prove a Jewish marriage it is not enough to produce witnesses who were present at the ceremony in the synagogue; but the written contract between the parties should be produced, and the execution of it proved. *Horn* v. *Noel*, 1 Camp. 61.

A Jewish divorce cannot be proved without producing the document of divorce delivered by the husband to the wife. *Moss* v. *Smith*, 1 Man. & G. 228.

Foreign—Register.]—A copy of the register of a foreign marriage is not evidence to prove a marriage. *Leader* v. *Barry*, 1 Esp. 353.

In proof of a marriage in Chili, a document was tendered purporting to be an extract from a register of marriages, and signed by the curate rector of the church where it was solemnised; his signature was verified by a public notary, whose signature was verified by other notaries, and their sigatures were verified by the foreign minister of the Chilian republic, and a certificate under the hand and seal of the British consul at Chili was added. On the evidence of a witness that a registry was kept by the curate rector of every church in Chili of marriages solemnised in it, and that a certificate of marriage such as that tendered was in the Chilian courts received in evidence, that he knew the name of the curate rector, and was also well acquainted with several of the persons whose signatures were appended to the certificate as witnesses, the document was admitted as evidence of the marriage. *Abbott* v. *Abbott and Godoy*, 29 L. J., Mat. 57.

A certificate of a marriage in a foreign country, not purporting to be a copy of an entry in a registry of marriages kept by the law of that country, but only containing a reference to the registry, cannot be received as evidence of the marriage, although it would be evidence of the marriage in the foreign courts. *Finlay* v. *Finlay and Rudall*, 31 L. J., Mat. 149. See also *Ratcliffe* v. *Ratcliffe and Anderson*, 1 Sw. & Tr. 467; 5 Jur. (N.S.) 714: col. 654; and the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23).

And see EVIDENCE ON PETITION FOR DECLARATION OF LEGITIMACY, col. 669.

d. Remarriage after Dissolution.

Before Decree Absolute.] — Where, after a decree of dissolution of marriage, one of the parties to such marriage was married in fact within the time limited by 20 & 21 Vict. c. 85, and during the lifetime of the other party to the marriage:—Held, that the latter de facto marriage was null and void in law. *Chichester* v. *Mure* f. c. *Chichester*, 3 Sw. & Tr. 223; 32 L. J., Mat. 146; 9 Jur. (N.S.) 779; 8 L. T. 676; 11 W. R. 990.

On the 1st June, 1860, a final decree of dissolution of marriage was pronounced: parliament was prorogued on the 28th of August, 1860, and on the 20th of November, 1860, when parliament was not sitting, the respondent married again:—Held, that the marriage was void. *Rogers*, otherwise *Briscoe*, f. c. *Halmshaw* v. *Halmshaw*, 3 Sw. & Tr. 509; 33 L. J., Mat. 141; 11 L. T. 21.

2. FEES.

From 1808 until 1854, fees of 10*s.* to the rector and 3*s.* to the clerk of a parish church were with some immaterial variations paid on every marriage celebrated in the parish church. There was no evidence extending beyond 1808:—Held, that as fees of this amount could not have been payable in the time of Richard I., considering the difference between the value of money at that time and the present time, the objection of rankness applied to the claim, and rebutted the presumption arising from modern enjoyment, of an origin dating from before the time of legal memory. *Bryant* v. *Foot*, 9 B. & S. 444; 37 L. J., Q. B. 217; L. R. 3 Q. B. 497; 18 L. T. 587; 16 W. R. 808—Ex. Ch.

New Parish.]—The publication of the banns of marriage and the solemnisation of marriage are "ecclesiastical purposes" within the meaning of 19 & 20 Vict. c. 104, s. 14, and, where a district becomes within this section a separate and distinct parish for ecclesiastical purposes, the incumbent of such parish has the exclusive right of performing the office of marriage in the case of persons resident in his parish, and of receiving the fees for such marriages, and consequently the incumbent of the mother parish has no right to solemnise such marriages in the church of the mother parish or to receive the fees for the same. *Fuller* v. *Alford*, 52 L. J., Q. B. 265; 10 Q. B. D. 418; 48 L. T. 431; 31 W. R. 522; 47 J. P. 423.

District Church—Rights of Rector and Incumbent.]—Under 59 Geo. 3, c. 134, and by an order in council, a district, with a district church, was parted off from the parish of St. Matthew, Bethnal Green; but the order in council directed that, during the incumbency of the rector of St. Matthew, two-thirds of the fees to be received for marriages, baptisms, churchings, and burials at the district church should belong and be paid to the rector, and one-third to the district minister:—Held, that where the minister had actually received the entire fees for marriages, &c., the rector might recover from him the two-thirds in an action for money had and received. *King* v. *Alston*, 12 Q. B. 971; 18 L. J., Q. B. 59; 13 Jur. 297.

Held, also, that the act and order in council did not oblige the minister to receive the fees, or any part of them, and that the rector could not maintain assumpsit against him on a supposed duty to take the fees and pay the rector his two-thirds. *Ib.*

3. CONDITIONS IN RESTRAINT OF MARRIAGE.

See WILL.

4. LEGITIMACY OF CHILDREN.

a. Generally.

Jurisdiction of Divorce Court to make Declaration of.]—21 & 22 Vict. c. 93, *enables persons to establish their legitimacy and the validity of marriages, and the right to be deemed natural-born subjects by application to the Court for Divorce and Matrimonial Causes.*

By 22 & 23 Vict. c. 61, s. 7, *the right of appeal to the House of Lords given by* 20 & 21 Vict. c. 85, s. 56, *is extended to all sentences and final judgments on petitions under the act.*

The 10th section does not prevent the court from inquiring, in any case, into the merits of a petition, but only that its decree shall not have any effect upon the final judgment already pronounced of another competent court. *Shedden*

v. *Patrick*, 2 Sw. & Tr. 170; 30 L. J., Mat. 217; 6 Jur. (N.S.) 1163; 3 L. T. 592; 9 W. R. 285.

—— **As to Title of Honour.**]—The Legitimacy Declaration Act (21 & 22 Vict. c. 93) gives the court no jurisdiction to investigate or decide upon a claim to a title of honour, and allegations in a petition, to the effect that by reason of the facts therein set out the petitioner was entitled to a baronetcy, were ordered to be struck out as irrelevant. *Frederick* v. *Att.-Gen.*, 43 L. J., Mat. 32; L. R. 3 P. 196; 30 L. T. 767; 22 W. R. 416.

—— **As to Petitioner's Grandfather.**]—The Probate Division has no power under the Legitimacy Declaration Act (21 & 22 Vict. c. 93) to make a decree establishing the legitimacy of a petitioner's grandfather. Insufficiency of this act in this respect commented on. *Dodds* v. *Att.-Gen.*, 42 L. T. 402.

—— **As to Property—Lex loci rei sitæ.**]—The question of legitimacy having relation to real estate is a question which each country will answer for itself. *Fenton* v. *Livingstone*, 3 Macq. H. L. 497, 556; 5 Jur. (N.S.) 1183; 7 W. R. 671.

In deciding the title to real estate, the lex loci rei sitæ must always prevail, so that a person legitimate by the law of his birthplace, and of the place where his parents were married, may not be regarded as legitimate to take a real estate by inheritance elswhere. *Ib.*

In respect to immovable property, the rule is, that the law of the country in which it is situated governs the tenure, the title, and the descent. *Ib.*

Presumption of Legitimacy.]—On the birth of a child shortly after marriage the presumption of legitimacy clearly exists until rebutted by satisfactory evidence to the contrary. *Parsons, In re*, 18 L. T. 704.

—— **Husband within Four Seas.**]—It is a presumption of law that a child born of a married woman whose husband is within the four seas is legitimate, unless there is irresistible evidence against the possibility of sexual intercourse having taken place. *Head* v. *Head*, 1 Sim. & S. 150; Turn. & R. 138; 1 L. J. (O.S.) Ch. 105.

—— **Hurrying on Marriage.**]—When, after open courtship and constant intercourse, a man and woman (she being ultimately in an advanced state of pregnancy), hurry on their marriage to prevent, or to mitigate, scandal; and where in less than seven weeks after the marriage she gives birth to a child; the presumption of the husband's paternity to that child is next to insuperable. *Gardner* v. *Gardner*, 2 App. Cas. 723—H. L. (Sc.)

The presumption is not a presumptio juris et de jure, but a presumption of fact. *Ib.*

—— **Possibility of Access.**]—Where the evidence as to the probability of access between husband and wife is such as to leave any reasonable doubt on the mind of the court, the presumption is in favour of the legitimacy of the child. The onus of proof that the child was not the child of the husband lies on the party contesting the legitimacy. *Plowes* v. *Bossey*, 2 Dr. & Sm. 145; 31 L. J., Ch. 681; 8 Jur. (N.S.) 352; 7 L. T. 306; 10 W. R. 332.

When husband and wife have been in such a situation that access may have taken place, the presumption of law is in favour of the issue, but may be rebutted on strong evidence. If access is proved, no inquiry can be made whether the husband or any other person be the parent. Lord Coke's doctrine of "inter quatuor maria" is exploded. *Ib.* *See* col. 673.

—— **Presumption of Father's consent to Marriage.**]—Where a marriage of a minor was celebrated by a licence, to which the consent of the father was requisite, his consent (the presumption of law being in favour of marriage and legitimacy, and against the commission of any crime or offence) must be presumed until proved to the contrary, and the mere fact that the mother's name appeared in the register as the consenting party was not sufficient to contravene the presumption. *Harrison* v. *Southampton Corporation*, 4 De G. M. & G. 137; 22 L. J., Ch. 722; 18 Jur. 1; 1 W. R. 422.

—— **Sleeping together — Capacity.**] — The presumption of law arising from the fact of husband and wife sleeping together is irresistible as to the legitimacy of a child of the wife, unless there is clear and satisfactory evidence that some physical incapacity existed. *Legge* v. *Edmonds*, 25 L. J., Ch. 125: 4 W. R. 71.

Where such physical incapacity is satisfactorily made out according to the opinions of the medical witnesses, evidence of the adultery of the wife is still an important ingredient in determining the legitimacy of the child; because, if the wife were of irreproachable character, it would go far to modify the opinion as to the husband's incapacity. *Ib.*

The declaration of a mother is not admissible to prove non-access on the part of her husband; but where non-access has been established aliunde, the declaration of the wife is admissible to prove the paternity of the child. *Ib.* *And see* col. 674.

—— **Evidence to Rebut.**]—A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by showing that the husband was, first, incompetent; secondly, entirely absent, so as to have no intercourse or communication of any kind with the mother; thirdly, entirely absent at the period during which the child must, in the course of nature, have been begotten; fourthly, only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman. *Hargrave* v. *Hargrave*, 9 Beav. 552; 10 Jur. 957.

It is, however, very difficult to conclude against the legitimacy, in cases where there is no disability and where some society or communication is continued between husband and wife during the time in question, so as to have afforded opportunities of sexual intercourse; and in cases where such opportunities have occurred, and in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to show that any man, other than the husband, may have been, or probably was, the father of the wife's child. Throughout the investigation the presumption in

favour of the legitimacy is to have its weight and influence, and the evidence against it ought to be strong, distinct, satisfactory, and conclusive. *Ib.*

—— **Voluntary Separation.**]—In the case of a divorce à mensâ et thoro, baron and feme live separately, and the wife has a child; this is a bastard; for the court will intend obedience has been paid to the sentence during this time. But if in the case of a voluntary separation a child is born, this is legitimate. Secus, where the jury find the husband has had no access to the wife. If the party charges his adversary with anything criminal, it ought to be shown with great plainness and certainty. *Sidney* v. *Sidney*, 3 P. W. 275.

On a trial as to the legitimacy of children begotten when the husband and wife were living separate, the fact that they had opportunities of access is not conclusive of the legitimacy; but the presumption of intercourse may be rebutted by circumstances. *Reg.* v. *Mansfield*, 1 Q. B. 444; 1 G. & D. 7; 10 L. J., M. C. 97; 5 Jur. 505.

—— **Conduct of Wife.**]—Husband and wife, after living together for ten years, and having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent:—Held, that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation may be rebutted, not only by evidence to show that the husband had not sexual intercourse with her, but also by evidence of their conduct; such as that the wife was living in adultery, that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence; and also that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will. *Morris* v. *Davies*, 5 Cl. & F. 163; 1 Jur. 911.

The illegitimacy of a child born of a married woman is established beyond all dispute, by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as to make access impossible. *Saye and Sele* (*Barony*), 1 H. L. Cas. 507.

Allegation that Petitioner is Heir-at-Law.]—Under the Legitimacy Declaration Act (21 & 22 Vict. c. 93), the court cannot determine whether or not the petitioner is heir-at-law to another person, and allegations to that effect in the body of the petition or in the prayer thereto are inadmissible. *Mansel* v. *Att.-Gen.*, 46 L. J., P. 64; 2 P. D. 265; 25 W. R. 879.

Status of Child depends on Status of Father.]—The status of the child, with respect to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the status of the putative father, not on that of the mother. *Udny* v. *Udny*, L. R. 1 H. L. (Sc.) 441.

According to English law—where at the time of a bastard's birth the father has his domicil in England—no subsequent change of domicil can render practicable the bastard's legitimation. *Ib.*

Scotch Marriage.]—By Scotch law marriage of a domiciled Scotchman legitimates his children born previous to the marriage, and the same effect is produced even if the marriage takes place on death bed. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.)

A Scotch marriage can legitimate the previously-born children of the married persons, so as to enable them to succeed as heirs to real estate in Scotland. The child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland, by the subsequent marriage of the parents in England, if the domicil of the father was and continued throughout to be Scotch. Neither the place of the marriage nor the place of the birth of the child will, under such circumstances, affect the status of the child. *Dalhousie* v. *M'Donall*, 7 Cl. & F. 817. See *Munro* v. *Munro*, 7 Cl. & F. 842.

In order to entitle the children of a putative marriage, which has been declared void, to the status of legitimacy, under the Scotch law, the parents must be justifiably ignorant of the subsistence of the impediment which led to the nullity, and the impediment must be a matter of fact and not of law only. *Shaw* v. *Gould*, 37 L. J., Ch. 433; L. R. 3 H. L. 55; 18 L. T. 833.

Bigamy.]—A man and woman were married in 1874, but the woman having previously gone through a ceremony of marriage with a man whose wife was living at the time, they prayed the court to declare their marriage had in 1874 valid:—Held, that this was included within 21 & 22 Vict. c. 93, s. 1. *Shilson* v. *Att.-Gen.*, 22 W. R. 831.

Divorce from Lunatic—Suit to perpetuate Testimony.]—A lunatic's wife was divorced for adultery, and it was alleged that the last child born before the divorce was illegitimate. The committee presented a petition for leave to prosecute a suit to perpetuate testimony as to the child's illegitimacy:—Held, that the proper course was for the court to direct a settlement of part of the lunatic's property on his children, so as to give the legitimate children an interest in the property which would entitle them to raise the question of the legitimacy of the child last born and bring a suit to perpetuate the testimony on the subject. *Stoer, In re*, 9 P. D. 120; 51 L. T. 141; 32 W. R. 1005—C. A.

Domicil of Petitioner not English—No Property in England.]—A petition was filed by a son, a minor, by his guardian, under 21 & 22 Vict. c. 93, for a declaration of his legitimacy. The marriage of his parents took place in 1864. In 1856 his mother went through a ceremony of marriage with one Hawkins, who was previously married, and whose wife was then living. The petition contained a prayer that this marriage of 1856 might be declared null and void, in which event the legitimacy of the petitioner would follow as a matter of course. Hawkins was cited to see proceedings. The mother was not cited, but was examined as a witness at the hearing, when it was admitted that the petition could not be sustained under the Legitimacy Declaration Act, the domicil of the petitioner being Austra-

lian and not English, and there being no property in England which could be affected by the decree. The court declined to treat the proceedings as if instituted for a declaration of the nullity of the marriage of 1856, and dismissed the petition. *Johnstone* v. *Att.-Gen.*, 43 L. J., Mat. 3 ; 29 L. T. 547 ; 22 W. R. 208.

Jews.]—A father, who was a Jew, by his will gave his daughters benefits contingent upon their marrying according to the tenets of the Jewish religion, and determinable upon their marrying otherwise. By a codicil he gave his residuary estate to the children of his sons and daughters. The father at his death left a son who had eight children, of whom three were born before marriage, and were the children of his wife. He knew of the facts attending the births of the eight children, all of whom were living at the date of his codicil. By the Jewish law, the subsequent marriage of parents legitimises children born before marriage :—Held, that the children born before marriage did not take under the gift. *Levy* v. *Solomon*, 37 L. T. 263 ; 25 W. R. 842.

Disannulling Sentence obtained by Fraud.]—Sentence of the Ecclesiastical Court declaring a marriage null and void, is not conclusive as to the fact of the nullity of the marriage if obtained by collusion or fraud. *Harrison* v. *Southampton Corporation*, 4 De G. M. & G. 137 ; 22 L. J., Ch. 722 ; 18 Jur. 1 ; 1 W. R. 422.

On a question of legitimacy there were in evidence a sentence of nullity of the marriage of a minor for want of her father's consent, and a statement in the parish register that the marriage took place by licence with the consent of the mother of the bride, but nothing as to the father's consent. There was, however, evidence, leading to the conclusion that the sentence had been obtained by collusion between the husband and wife, and that the father had been aware and did not disapprove of the match :—Held, fifty years after the date of the sentence of nullity, that the marriage ought to be presumed valid. *Ib.* S. P., *Birch*, *In re*, 17 Beav. 358.

Bastard taking by Purchase—Reputation.]—Bastard may take by purchase, if sufficiently described, and having acquired the reputation of child. *Wilkinson* v. *Adam*, 1 Ves. & B. 466.

Child en ventre sa mère—Party to Proceedings.]—A marriage was solemnised between A. and B., but it was declared void by the Ecclesiastical Court. Some years afterwards, a child of A. and B. en ventre sa mère at the time of the sentence, and who necessarily was no party to the proceedings, claimed property in this court as descendant of A. Quære, whether, in such a case, the child, who was bastardised by the effect of the sentence, had any means of showing that the sentence was erroneous. Semble, not. *Perry* v. *Meddowcroft*, 10 Beav. 122.

b. Practice to obtain Declaration.

The Divorce Rules are to apply. *See* D. R. 1865, R. 174.

Petition.]—A form of petition is set out in *Shedden* v. *Att.-Gen.*, 2 Sw. & Tr. 170 ; 30 L. J., Mat. 217.

When the proceedings are instituted by one who claims real estate in England, circumstances may be stated in the petition to support such claim. *Mansel* v. *Att-Gen.*, 46 L. J., P. 64 ; 2 P. D. 265 ; 25 W. R. 879.

—— **Of Infant.**]—A petition, presented on behalf of an infant to establish his legitimacy, can only be so by a guardian assigned to him by the court. *Upton*, *In re*, 6 Jur. (N.S.) 404.

But the court refused to appoint a guardian to an infant, for the purpose of presenting a petition on his behalf until the matter had been referred to the registrar, to ascertain whether the institution of the suit was likely to be of benefit to the infant. *Chaplin*, *In re*, 36 L. J., Mat. 49 ; L. R. 1 P. 328 ; 16 L. T. 154.

And the court afterwards, being satisfied from the report that the object of the suit was to prove that the infant was illegitimate, refused to appoint a guardian. *S. C.*, 36 L. J., Mat. 90 ; 16 L. T. 612 ; 15 W. R. 1048.

Who Respondent.]—The attorney-general is the necessary respondent ; petitioners have a right to have their case heard as between themselves and him, and the parties cited, pro interesse suo, cannot sustain a plea of res judicata, as between themselves and the petitioners, in bar of the whole proceedings. *Shedden* v. *Patrick*, 2 Sw. & Tr. 170 ; 30 L. J., Mat. 217 ; 6 Jur. (N.S.) 1163 ; 3 L. T. 592 ; 9 W. R. 285.

The answer of the attorney-general to a petition should be a formal traverse of the allegations in the petition. *Ryves* v. *Att.-Gen.*, 35 L. J., Mat. 6 ; L. R. 1 P. 23 ; 11 Jur. (N.S.) 878 ; 13 L. T. 305 ; 14 W. R. 17.

Joinder in Writ with Claim for Probate.]—A claim for a declaration of legitimacy cannot be joined with a claim for probate in a probate action. It must be made on petition under the Legitimacy Declaration Act, 1858. *Warter* v. *Warter*, 59 L. J., P. 45 ; 15 P. D. 35 ; 62 L. T. 328.

Parties to be Cited.]—When a party applying to the court to declare the validity of a marriage has filed a petition, he should ask permission to cite individuals to see proceedings, and show sufficient reason why they should be selected. *Shedden*, *In re*, 5 Jur. (N.S.) 151 ; 7 W. R. 463.

The court will not take upon itself to decide who shall be cited to see proceedings. The petitioner should ask leave to cite some person specified, and show that he is a person fit to be cited. *Upton* v. *Att.-Gen.*, 32 L. J., Mat. 177.

A person not cited, who has no real interest in opposing a petition for a declaration of legitimacy, will not be allowed to intervene. *Ib.*

—— **Citation of Elder Brother.**]—In a petition under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), the court refused to order the citation, under s. 7, of the elder brother of the petitioner, who was alleged by the petitioner to be illegitimate, as having been born before the date of the marriage of his parents. *Mansell* v. *Att.-Gen.*, 26 W. R. 316.

—— **Practice as to Citing Parties other than the Attorney-General.**]—The practice in future under the Legitimacy Declaration Act and the Greek Marriages Act, 1884, will be that, after citing the attorney-general, the parties on applying to have the case set down for trial must lay the state of the case, by affidavit or otherwise, before the registrar, who will direct whether any, and

if so which parties shall be cited to see proceedings. The registrar's direction to be subject to the judge in the same manner as all other orders of the registrar. *Brinkley* v. *Att.-Gen.*, 58 L. J., P. 53; 14 P. D. 83; 60 L. T. 935; 37 W. R. 687; 53 J. P. 425.

Striking out Petition.]—In a petition under the Legitimacy Declaration Act, the court struck out so much of the petition as prayed for a declaration that the petitioner's father was the legitimate child of the petitioner's grandfather, the probate division having no power under the Legitimacy Declaration Act to make a decree establishing the legitimacy of a petitioner's grandfather. *Dodds* v. *Att.-Gen.*, 28 W. R. 278.

Commission to Examine Witnesses.]—When a motion is made for an order for a commission to examine witnesses abroad, the affidavit on which the motion is founded should set out the names of the witnesses whom it is proposed to examine. *Ryves* v. *Att.-Gen.*, L. R. 1 P. 23.

Motion for Directions.]—The court dismissed, with costs, an application, made upon a motion, by the petitioner in a legitimacy declaration suit, asking for leave to cite a certain person, other than the attorney-general, and for directions; such motion being contrary to the practice in such cases, as settled in *Brinckley* v. *Att.-Gen.*, supra. *Bain* v. *Att.-Gen.*, 64 L. T. 837.

Pleadings — Pedigree to be Set Out.]—The pedigree of parties claiming to be related to a deceased intestate as against the Queen's proctor's allegation of bastardy, must be set out, but it is sufficient to aver that B. was the legitimate child of A., and his lawful wife, without stating the time or place of the marriage, or the name of the wife, or the date of the birth of B. *Dyke* v. *Wallis*, 2 Sw. & Tr. 466; 31 L. J., P. 97; 8 Jur. (N.S.) 417; 6 L. T. 227; 10 W. R. 631.

In answer to the Queen's proctor's declaration of bastardy, the steps of the pedigree must be set out, but it is not necessary to plead that a marriage was solemnised at a particular time and place, and that certain issue was born after the date of the marriage. *Dyke* v. *Williams*, 2 Sw. & Tr. 465; 31 L. J., P. 90; 6 L. T. 227; 10 W. R. 586.

—— **Contents—Amendment of.**]—In a petition under the Legitimacy Declaration Act, the petitioner may allege that he claims real estate, and may also state how he claims it; but he cannot allege or pray for a declaration that he is entitled to such estate to the exclusion of some other person—e.g. by reason of the illegitimacy of the person. A petitioner alleged that he claimed real estate as heir-at-law of his father, and that E. B. M. also claimed to be such heir-at-law. Leave to cite E. B. M. was refused, on the ground that E. B. M. was not interested in disputing the only facts which the court was competent to determine—i.e. the legitimacy of the petitioner or the marriage of his parents. The court has power to amend the pleadings at any time, and, if necessary, to order allegations to be re-inserted which it had previously directed to be struck out. *Mansel* v. *Att.-Gen.*, 48 L. J., P. 42; 4 P. D. 232; 40 L. T. 367; 26 W. R. 316.

Trial of Issues by Jury.]—In an interest suit, in which a question of legitimacy was raised between a person claiming to be the lawful nephew and next-of-kin of a deceased intestate and the queen's proctor, the court directed the issues joined to be tried by a jury, on the application of the next-of-kin, although the application was opposed by the Queen's proctor. *Queen's Proctor* v. *Williams*, 4 Sw. & Tr. 221; 31 L. J., P. 86.

The court will generally, at the request of either party to the petition, direct issues raised to be tried by a jury. *Bouverie* v. *Att.-Gen.*, 2 Sw. & Tr. 548; 31 L. J., Mat. 79; 6 L. T. 692; 10 W. R. 811.

The case cannot be tried by a jury unless an issue has been raised. *Ryves* v. *Att.-Gen.*, 35 L. J., Mat. 6; L. R. 1 P. 23; 11 Jur. (N.S.) 878; 13 L. T. 305; 14 W. R. 17.

—— **Postponement of.**]—Where, on an application for the postponement of a trial by the attorney-general, his affidavit stated that certain documents already in his possession were likely to lead, on inquiry, to further information, the court granted the application on this ground. *Ryves* v. *Att.-Gen.*, 14 W. R. 409.

Costs in Suits.]—Semble, that the court has no power under the Legitimacy Declaration Act to condemn in costs a party who is cited, and who is unsuccessful in his opposition to the declaration prayed for in the petition. *Frederick* v. *Att.-Gen.*, 43 L. J., Mat. 32; L. R. 3 P. 196; 30 L. T. 767; 22 W. R. 416.

A petitioner, who is resident out of the jurisdiction of the court, cannot be compelled to give security for costs. *Shedden* v. *Att.-Gen.*, 36 L. J., Mat. 132; 16 L. T. 746; 15 W. R. 1093.

In proceedings under the Legitimacy Declaration Act, 1858, the court has jurisdiction to order a person who has been cited, and has appeared and opposed the petition, to pay the costs of the petitioner. *Bain* v. *Att.-Gen.*, 61 L. J., P. 135; [1892] P. 261; 67 L. T. 447; 40 W. R. 505—C. A. Affirming 61 L. J., P. 107; [1892] P. 217; 67 L. T. 387.

Settlement Made to raise Question of Legitimacy.]—The court will entertain a suit to declare the rights of children of a marriage to a fund settled by one of their parents, though the fund be settled with the object of determining, by having the individuals comprising the class ascertained, whether a reputed child is legitimate. *Gurney* v. *Gurney*, 1 Hem. & M. 413; 32 L. J., Ch. 456; 9 Jur. (N.S.) 514; 8 L. T. 380; 11 W. R. 659.

In December, 1859, a wife eloped from her husband, there being at that time two children of the marriage. Proceedings for obtaining a divorce were immediately commenced by the husband; a decree nisi was pronounced on the 13th of February, 1861, and made absolute on the 22nd of May, 1861. On the 4th of May, 1861, the wife was delivered of a full-grown male child. In order to determine the status of this child, the husband, in January, 1862, vested 2,000*l.* reduced annuities in trustees, for all and every the children then living of his marriage with his wife; and a suit was instituted, seeking that the rights of the parties interested under this settlement might be declared, and the trusts of the settlement might be carried out under the direction of the court: —Held, that although the real object of the settlor might be, and probably was, to obtain

a decision from the court that this child was illegitimate, and although the decision might affect property of far greater value, those circumstances were not sufficient to warrant the court in withholding the exercise of its ordinary jurisdiction. *Ib.*

Family estates stood limited to an eldest son for life, with remainder to his male issue in tail, with remainder to the second son for life, with remainder to his male issue in tail, with remainder to the eldest son's female issue in tail, with remainder to the second son's female issue in tail, with remainders over. The eldest son and wife were divorced, at the husband's suit, by a decree of the divorce court; but no child of the marriage having been born during a cohabitation of six years, a female child was born of the wife after an interval of nearly eighteen months after cesser of cohabitation with her husband, a few weeks only after the decree nisi in the divorce court was pronounced, but before the decree absolute was pronounced. The child must have been begotten before the proceedings in the divorce court were instituted. The eldest son taking no steps to raise the question of legitimacy of the child, and neither he nor the second son having any male issue, a smal personal settlement was, after the decree absolute, made by the mother of the eldest son, with the privity of the second, for the express purpose of raising the question, the settlement giving successive interests to the children living at the date of the marriage between the eldest son and his then divorced wife, and to the second son. The latter then filed a bill to have the trusts of the settlement carried into execution, upon an allegation that the trustee declined to act except under the direction of the court, charging the illegitimacy of the child, and claiming an immediate interest in the trust fund. The settlement was admittedly made with a view to settling the succession to the family estates:—Held, that a suit so circumstanced, being merely manufactured for the purpose of compelling the present trial in an indirect way of an important question affecting the title to large estates, namely, the status of legitimacy or illegitimacy of the infant, was not maintainable. *Cooke* v. *Cooke*, 4 De G. J. & S. 704; 34 L. J., Ch. 459; 11 Jur. (N.S.) 533; 12 L. T. 468; 13 W. R. 697.

—— **Father and Mother Living.**]—Where a settlement was made to raise a question of a child's legitimacy the court declined to entertain a suit for its execution when the father and mother are living, and had not concurred in the settlement or the suit, and where the guardian of the child (an infant) disclaimed at the bar. *Anon.*, 2 Hem. & M. 124.

c. Evidence on Petition for Declaration.

General Principle—Presumption in Favour of Legitimacy.]—A child of a married woman must be presumed to be the child of the husband, unless it is proved beyond all reasonable or serious doubt that no sexual intercourse could have taken place at the time within which the husband could be the father. The onus probandi lies entirely on the part of those who wish to show the illegitimacy. *Plowes* v. *Bossey*, 3 Dr. & Sm. 145; 31 L. J., Ch. 681; 8 Jur. (N.S.) 352; 7 L. T. 306; 10 W. R. 332; *Morris* v. *Davies*, 5 Cl. & F. 163; 1 Jur. 911.

Plowes v. *Bossey* (supra), is not an exception to the rule that on a question of legitimacy the evidence of the mother is inadmissible. *Atchley* v. *Sprigg*, 3 N. R. 360.

Declarations.]—Declarations of members of a family in questions of legitimacy are not admissible post litem motam, whether the lis is known or not known to the person making the declarations. *Shedden* v. *Att-Gen. and Patrick*, 2 Sw. & Tr. 170; 30 L. J., Mat. 217; 6 Jur. (N.S.) 1163; 3 L. T. 592; 9 W. R. 285.

To constitute lis mota, for this purpose, there must be more than the existence of the state of facts on which the claim is founded, or even of litigation on kindred matters; but there must have been a controversy in respect of the very point in dispute as to which the evidence is tendered. *Ib.*

On an issue whether the plaintiff was the natural son of H. C., declarations of J. C., brother of H. C., were tendered as evidence of the relationship between the plaintiff and H. C.:—Held, that such declarations did not fall within the exception which admits declarations of members of the family in cases of pedigree. *Crispin* v. *Doglioni*, 3 Sw. & Tr. 44; 32 L. J., P. 109; 8 L. T. 91; 11 W. R. 500.

In an administration suit, the only question before the jury was, whether D., through whom the defendant claimed, was legitimate. The defendant, after producing primâ facie evidence of the legitimacy of D., tendered his declarations. The plaintiff objected to the admissibility of these declarations, and tendered evidence on the voir dire for the purpose of showing that the declarant was not a member of the family. The court being of opinion that the defendant had made out a primâ facie case of the declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on the voir dire tendered by the plaintiff. *Hitchens* v. *Eardley*, 40 L. J., Mat. 70; L. R. 2 P. 241; 25 L. T. 163.

Asserted marriage between A. and B. in 1773. In 1800, C., their eldest son, claimed certain property, to which, if legitimate, he was entitled, but which was then in the possession of D., his maternal uncle. D. answered, saying that he should be ready to defend any action which C. might bring, and communicated the fact that the claim had been made to the paternal uncle of C. C. replied that his object was to establish his legitimacy, and did not follow up the claim to the property by any suit or action. In a proceeding under the Legitimacy Declaration Act to establish the fact of marriage between A. and B.:—Held, that a controversy had arisen in 1800 between C. and D. upon the very question involved in the litigation, and that declarations by members of his family subsequent to 1800 were inadmissible as made post litem motam. *Frederick* v. *Att.-Gen.*, 44 L. J., Mat. 1; L. R. 3 P. 270; 32 L. T. 39.

A deed, dated 1803, to which members of the family were parties, was tendered for the purpose of proving by means of the recitals in the deed declarations by them, but was rejected on the ground that the declarations were made post litem motam. It was then tendered as evidence of conduct or a solemn act done by the parties:—Held, that it was inadmissible for the purpose for which it was tendered. *Ib.*

Evidence of declarations by members of the family subsequent to 1800 as to statements made by other members of the family concerning the

marriage prior to lis mota was also tendered and rejected as falling within the principle of declarations made post litem motam. *Ib.*

A deed, of date 1826, made between D. and other parties, was tendered and received for the purpose of showing that the property claimed by C. had been dealt with adversely to his family from the death of B., his mother, down to the present time. *Ib.*

Of Mother.]—A mother's evidence is inadmissible to prove the legitimacy or illegitimacy of her child born during wedlock. *Atchley* v. *Sprigg*, 3 N. R. 360; 33 L. J., Ch. 345; 10 Jur. (N.S.) 144; 10 L. T. 16; 12 W. R. 364.

Where the legitimacy of a party was the question in dispute, and a witness deposed to expressions of the mother tending to bastardise the child:—Held, that the evidence was admissible. *Hargrave* v. *Hargrave*, 2 Car. & K. 701.

On a summons for maintenance of children against P., the father, P., denied the paternity, his wife having been living apart from him. P. was allowed to deny an alleged admission by him as to the paternity:—Held, that P.'s evidence was not admissible to contradict evidence of other witnesses as to his admission of paternity. *Ulverstone Union* v. *Park*, 53 J. P. 629.

Letter from Mother.]—The mother of a child wrote a letter to the alleged father, declaring that he was the father of her child, which was born three months after the death of her husband. It did not appear that this letter was ever received by the person to whom it was addressed, nor even that she had ever voluntarily parted with the possession of it:—Held, that the letter was not admissible as evidence of the conduct of the mother. *Legge* v. *Edmonds*, 25 L. J., Ch. 125; 4 W. R. 71.

Of Father.]—A father coming to bastardise his own issue is, though legal, a very suspicious witness. *Standen* v. *Edwards*, 1 Ves. 134.

Of Deceased Person.]—In such a case evidence of declarations made by a deceased person, other than the deceased in the cause, is inadmissible, unless the relationship is proved aliunde; but evidence of declarations made by the deceased in the cause is admissible. *Dyke* v. *Williams*, 31 L. J., P. 157; 6 L. T. 726.

Of Interested Person.] — The legitimacy of the defendants in an ejectment being in issue, they tendered the declarations of their natural father, made after their birth, that a prior marriage, contracted by him with a woman who was alive at the time of his de facto marriage with the defendant's mother, was invalid:—Held, inadmissible, the relationship not being established except by the evidence itself, and, semble, as being made by an interested party. *Plant* v. *Taylor*, 7 H. & N. 211; 31 L. J., Ex. 289; 8 Jur. (N.S.) 140; 5 L. T. 318.

Examination de bene esse.]—Upon a question of legitimacy depending upon a chain of distinct circumstances in the knowledge of different individuals, and the defendant an infant kept out of the way, an examination de bene esse would have been granted, though not within any of the three cases, viz. witnesses of the age of seventy, or quitting the kingdom, or a fact depending on a single witness. *Shelly* v. ——, 13 Ves. 56.

Personal Resemblance.]—On a question of disputed paternity, evidence of personal resemblance between the child and his alleged father is admissible. *Bagot* v. *Bagot*, 1 L. R., Ir. 308.

Entry in Family Bible.]—An entry in a family bible of the births of children, made by their mother shortly after their birth, is good evidence, in the absence of other and better testimony, such children having been neither baptised nor registered. *Ashcroft* v. *Powell*, 12 W. R. 301.

Sufficiency—Reputation of Marriage.]—Upon a question of legitimacy, A. produced witnesses, who swore to a marriage in fact between his parents, and he obtained a verdict. On a second trial he declined to produce those witnesses, and rested solely upon a reputation of the marriage. Although he again obtained a verdict, yet this is not sufficient to satisfy the conscience of a court of equity. *Sherborne* v. *Napier*, 2 Ridgw. P. C. 224.

On questions of legitimacy, declarations of parents after the birth of the child can have but little weight. *Id.* 234.

Observation as to the nature and extent of proof necessary to establish a case of adulterine bastardy, and as to what kind of evidence is admissible in such cases. *Hargrave* v. *Hargrave*, 9 Beav. 552; 10 Jur. 957.

When a man has been reputed all his life to be the legitimate child of his parents, persons who dispute his legitimacy after his death must produce very strong and unequivocal evidence in support of their contention. *Olivant, In re*, *Haslam* v. *Cron*, 19 W. R. 968.

Disproving—Onus.]—In a suit by the children of a marriage to enforce payment of their portions, the legitimacy of the plaintiffs having been called in question by the next tenant for life, who was a defendant in the cause:—Held, that a marriage de facto having been once established, it lay on the party impeaching the marriage to show that the same was illegal or void; that sufficient evidence of a marriage de facto having been submitted to the court, the court itself was competent to decide the question of the marriage for the purposes of the suit, without directing an issue. *Piers* v. *Tuite*, 1 Dr. & Wal. 279.

Reputation—Jew and Christian Woman.]—Marriage presumed between a Jew and a Christian woman, upon the weight of evidence, in the absence of direct proof of a ceremonial marriage. *Goodman* v. *Goodman*, 28 L. J., Ch. 745; 5 Jur. (N.S.) 902.

A., a Jew, and B., a Christian woman, cohabited as man and wife for twenty-eight years, and until B.'s death. They had several children, who were brought up as Christians; they cohabited partly in England and partly in foreign parts. There was no evidence of any marriage having been solemnised, but there was general reputation that the parties were married, and proof of the registry of the baptism in England of several of the children, as of A., and B. his wife, and that on a judicial proceeding, the parties gave evidence on oath as "A., and B. his wife." The relatives of A. never recognised the fact of a marriage, and some of them swore that they did not know even of the reputation of marriage.

A., in his will, referred to such of the children as were living as "my legatees":—Held, that the children were entitled, as legitimate children of A. and B., to a fund belonging to A.'s next-of-kin, and that the onus of proof lay upon those who sought to disturb the general reputation and presumption of marriage under the foregoing circumstances. *Ib.* *See* col. 655.

Sentence of Court—After-born Child—Right to Impeach Sentence for Collusion.]—A marriage was solemnised between A. and B., but it was declared void by the ecclesiastical court. Some years afterwards, a child of A. and B. en ventre sa mère at the time of the sentence, and who necessarily was no party to the proceedings, claimed property in this court as descendant of A.:—Held, first, that he was bound by the sentence, though he might avoid its effect by showing fraud and collusion in obtaining it; secondly, that such fraud and collusion must be shown to have taken place between the parties to the proceedings; and thirdly, that proof that the costs of the unsuccessful party had been agreed to be paid, that witnesses were not examined and others not cross-examined, and that the difficulties were not interposed which might have been, did not altogether amount to proof of fraud and collusion. Quære, whether in such a case, the child, who was bastardised by the effect of the sentence, had any means of showing that the sentence was erroneous. Semble, not. *Perry* v. *Meddowcroft*, 10 Beav. 122.

On appeal, the Lord Chancellor, upon the claimant's undertaking to file a bill to establish his claim as male lineal descendant of the father, allowed the exceptions to stand over, &c. *Ib.*

In 1798 a marriage was solemnised by licence between a man and a female minor. Three years afterwards, in pursuance of a previous agreement, the woman instituted a suit for nullity of marriage, and a decree of nullity was pronounced, on the ground of non-consent of the minor's father. Early in the following year a daughter was born:—Held, overruling the decision of the court below, that evidence showing that the sentence of the ecclesiastical court had been obtained by fraud and collusion was admissible; and upon its being satisfactorily proved to the court, the legitimacy of the daughter was established. *Harrison* v. *Southampton Corporation*, 4 De G. M. & G. 137; 22 L. J., Ch. 722; 18 Jur. 1; 1 W. R. 422.

Claim to Property—Onus probandi.]—Where an issue is raised between the crown alleging the bastardy of, and parties claiming to be related to, a deceased intestate, the burden of proof is on the parties setting up the relationship. *Emsley, In goods of*, 2 Sw. & Tr. 491.

Effect of Proof of Legitimacy.]—Proof of the legitimacy of the offspring is proof of the validity of the marriage. *Campbell* v. *Campbell*, L. R. 1 H. L. (Sc.) 182.

See also BASTARDY.

d. Access.

Access, what is.]—Access is such access as affords an opportunity of sexual intercourse, and where there is evidence of such access between a husband and wife, within a period capable of raising the legal presumption as to the legitimacy of an after-born child, the court will not direct an issue upon evidence showing the continued adulterous intercourse of the wife with another man, and the improbability of the husband being the father; but will declare the legitimacy of the child. *Bury* v. *Philpot*, 2 Myl. & K. 349.

Husband within Four Seas.]—It is a presumption of law that a child born of a married woman is legitimate, the husband being within the four seas, unless there is irresistible evidence against possibility of sexual intercourse having taken place. *Head* v. *Head*, 1 Sim. & S. 150; Turn. & R. 138; 1 L. J. (O.S.) Ch. 105. See also *Banbury Peerage Case*, 1 Sim. & S. 153.

Access not Presumed.]—Access is not to be presumed between man and wife on account of the mere possibility of its occurrence. *Clark* v. *Maynard*, 6 Madd. 364.

The old rule to presume access conclusively, if the parties were within the four seas, is done away. Access or non-access must be proved like any other fact. *Shelly* v. ——, 13 Ves. 58; *Pendrel* v. *Pendrel*, 2 Stra. 925. *Morris* v. *Davies*, 5 Cl. & F. 163; 1 Jur. 911.

Wife Living in Adultery—Husband in another part of Kingdom.]—The illegitimacy of a child born of a married woman is established beyond all dispute by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as to make access impossible. *Saye and Sele (Barony of), In re*, 1 H. L. Cas. 507.

Child born Six Months after Reunion.]—Where a husband, after a long absence, did not rejoin his wife till the 24th November, 1849, and where she, nevertheless, produced a full-grown child on the 18th May, 1850:—Held, that he could not have been the father, and that she was guilty of adultery. *Heathcote's Divorce Bill*, 1 Macq. H. L. 535.

Strict proof of non-access is required in such cases. *Ib.*

Evidence — Admissibility of — Wife's Paramour.]—Evidence of verbal statements made by a wife's paramour previously to the birth of the child is admissible as evidence of conduct tending to show that he was the father of the child. *Burnaby* v. *Baillie*, 58 L. J., Ch. 842; 42 Ch. D. 282; 61 L. T. 634; 38 W. R. 125; *Ginclay, In re*, 17 Beav. 573.

—— **Of Parents as to Access.**] — Neither husband nor wife can be examined for the purpose of proving non-access during marriage. Nor can either be examined as to any collateral fact, for the purpose of proving non-access; as that the husband, at a particular time, lived at a distance from his wife and cohabited with another woman. *Rex* v. *Sourton*, 5 A. & E. 180; 6 N. & M. 575; 2 H. & W. 209; 5 L. J., M. C. 100.

A mother's evidence is inadmissible to prove the legitimacy or illegitimacy of her child born during wedlock. *Atchley* v. *Sprigg*, 33 L. J., Ch. 345; 10 Jur. (N.S.) 144; 10 L. T. 16; 12 W. R. 364.

W., by will, bequeathed 1,500*l.* to trustees in trusts for C., the wife of J., for life, and after her death to divide the same equally among the children of the marriage. J. deserted C., who subsequently cohabited with M., and during such cohabitation A. was born. On the death of C.,

A., an infant, by her next friend, applied for maintenance, out of the fund, whereupon J. filed an affidavit denying the legitimacy of A. upon the ground, among others, of non-access to his wife:—Held, that this was not a "proceeding instituted in consequence of adultery" within the meaning of s. 3 of the Evidence Further Amendment Act, 1869, and therefore, the evidence of the husband as to non-access was not admissible. *Nottingham Union* v. *Tomkinson* (4 C. P. D. 343) followed. *Walker, In re, Jackson, In re*, 53 L. T. 660; 34 W. R. 95. See *The Aylesford Peerage*, infra.

A defendant in a testamentary suit claimed to be lawful nephew and one of the next-of-kin of the deceased:—Held, that the declarations by the defendant's mother as to her marriage with his father were inadmissible without previous proof of such marriage. *Dyke* v. *Williams*, 31 L. J., P. 157; 6 L. T. 726.

In an action to try the legitimacy of the child of a married woman, no question tending directly or indirectly to prove or disprove access on the part of her husband can be asked of the husband or of the wife. *Hamp* v. *Robinson*, 16 L. T. 29.

Evidence of what occurred during a conversation between the husband and wife, if given by a third person, is receivable as evidence of a fact. *Ib.*

An agreement executed by husband and wife who have been living apart, to live together again, is receivable to raise a presumption of previous non-access, as being an act done by the parties. *Ib.*

Evidence of a husband on the question of non-access, and consequent legitimacy of some of the children born during the marriage, is admissible, but not to be acted upon unless corroborated by other evidence. *Yearwood's Trusts, In re*, 46 L. J., Ch. 478; 5 Ch. D. 545; 25 W. R. 461.

A. married B. on the 6th of July, 1865. In September, 1865, they voluntarily separated, but the marriage was never dissolved by sentence of divorce, nor was there any judicial separation. A child was born on the 13th of May, 1866. B. went to live with another man, R., in November, 1866, and lived with him as his wife until shortly before her death in April, 1876. She had three children, born in 1868, 1870, and 1873 respectively, who were described in their baptismal certificates with the surname of R., and were supported by him and reputed his children. On a petition by the child born in May, 1866, to have a fund in court carried over to his separate account as being solely entitled under a gift in a will "in trust for all the children or any the child of B.," an affidavit of A., the husband, admitted to prove non-access to B. since Christmas, 1865, and that he had not seen her since that date, and that consequently the other three children, though born during the continuance of the marriage, were illegitimate. *Ib.*

Held, also, that though all the children above mentioned were alive at the date of the will, yet, it being possible for B. to have future legitimate children, only legitimate children could take, so that the petitioner, being the only legitimate child, was entitled to the whole of the trust fund. *Ib. Gibbs* v. *Hooper*, 2 Myl. & K. 353.

—— **Competency of Spouses to give Evidence under 32 & 33 Vict. c. 68, s. 3.**]—A petition which sought to establish a claim on the ground that a certain person was illegitimate by reason of the adultery of his mother, who had since been divorced:—Held, not to be "a proceeding instituted in consequence of adultery," within the 32 & 33 Vict. c. 68, s. 3, so as to make the husband competent to give evidence tending to prove the fact of non-access. *R.'s Trusts, In re*, 39 L. J., Ch. 192; L. R. 10 Eq. 41.

Held, also, that independent evidence showing that on the only occasion when the husband visited the place where his wife was residing, he was engaged in collecting evidence with a view to a divorce, would be sufficient to raise a presumption of non-access. *Ib.*

Notwithstanding the provisions of s. 3 of 32 & 33 Vict. c. 68, that the evidence of a husband or wife is admissible in a "proceeding instituted in consequence of adultery," the evidence of a husband is not admissible, after the dissolution of the marriage on the ground of the wife's adultery, to prove the illegitimacy of a child born in wedlock. *Burnaby* v. *Baillie*, 58 L. J., Ch. 842; 42 Ch. D. 282; 61 L. T. 634; 38 W. R. 125.

—— **Questions—Admissibility.**]—On a question of legitimacy it appeared that the child had been born three months after the marriage. It was suggested that the wife had not seen the husband until immediately before the marriage, and that at the period of conception he was married to another person. In cross-examination of the mother it was proposed to ask her, "How long she had known her husband before her marriage." This question was objected to, but the court allowed her to be asked, "When did you first become acquainted with your husband?" and she answered, twelve months before her marriage; the court would not allow this subject to be further pursued. *Anon.* v. *Anon.*, 22 Beav. 481; 23 Beav. 273; 4 W. R. 307.

—— **Conduct of Wife.**]—Where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make statements in the witness-box. *The Aylesford Peerage*, 11 App. Cas. 1—H. L. (E.)

A husband and wife lived separate. Eight years afterwards the wife had a child. The husband swore in an affidavit that he had had intercourse with his wife since the separation, but the court refused to admit this as evidence. *Patchett* v. *Holgate*, 15 Jur. 308.

The child of a married woman held to be illegitimate on a proof of non-access of the husband, and of conduct and admissions of the wife and her paramour. *Sinclay, In re*, 17 Beav. 523.

—— **In Proceedings before Justices for Maintenance.**]—Proceedings by guardians of the poor before justices against a husband, to compel him to maintain a child which, although born of his wife in wedlock, he refuses to maintain on the ground that he is not its father, are not "proceedings instituted in consequence of adultery," within the meaning of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, so as to make his evidence admissible to prove non-access to his wife, and thereby bastardise the child. *Nottingham Union* v. *Tomkinson*, 48 L. J., M. C. 171; 4 C. P. D. 343; 28 W. R. 151.

On a summons for maintenance of children against P., the father, P. denied the paternity, his wife having been living apart some time before their birth. Evidence of non-access was given, and P. was allowed to disprove an alleged admission by him of paternity to which another witness testified:—Held, that P.'s evidence was not admissible to contradict evidence given by other witnesses as to his admission of paternity. *Ulverstone Union* v. *Park*, 53 J. P. 629.

Presumption—Duration of Pregnancy.]—The presumption in favour of the legitimacy of a child born in wedlock is not a presumptio juris et de jure, but may be rebutted by evidenee, which must be clear and conclusive and not resting merely on a balance of probabilities. Thus, in a suit for declaration of legitimacy, where a child had been born 276 days after the last opportunity of intercourse between the husband and wife, and where there was evidence in the wife's conduct tending to show that she regarded the child as the offspring of her paramour, the president directed the jury that it was for them to say whether, on the whole of the evidence given on behalf of those who asserted illegitimacy, the conviction had been brought home to their minds that the husband was not the father of the child; and read to them the opinion of Lord Lyndhurst in *Morris* v. *Davies* (5 Cl. & F. 163). The jury found that the child was illegitimate:—Held, that the direction was right, and that the verdict was not against evidence. *Bosville* v. *Att.-Gen.*, 56 L. J., P. 97; 12 P. D. 177; 57 L. T. 88; 36 W. R. 79.

—— **Birth of Child between Decrees.**]—On a petition for variation of settlements after a decree of dissolution of marriage, the court refused to order an inquiry into the legitimacy of a child born between the date of the decree nisi and decree absolute. *Pryor* v. *Pryor*, 56 L. J., P. 77; 12 P. D. 165; 57 L. T. 533; 35 W. R. 349.

—— **Husband and Wife Separated.**]—Doctrine of law as to the presumption of sexual intercourse between husband and wife, who are living apart under a deed of separation, but who occasionally meet; and as to the evidence by which that presumption may be rebutted. *Morris* v. *Davies*, 5 L. J. (o.s.) Ch. 177.

—— **Husband in Lunatic Asylum—Visits of Wife.**]—A married woman in 1837 gave birth to a daughter at a period when her husband was, and had been for more than a year previously, an inmate of a lunatic asylum. The wife, who resided twenty-five miles from the asylum, stated that her husband was the father of the child, they having had sexual intercourse together when she was visiting him. There was, however, no evidence except her own to prove that she had been with her husband at a time when he could have been the father, and it was shown that the officers of the asylum were instructed not to leave the husband and wife alone together. The daughter was christened, and brought up as the husband's child, who always treated it as such. Upon the husband's next-of-kin disputing its legitimacy:—Held, that the daughter was legitimate. That the law will not allow the presumed status of the child of a married woman to be taken away merely on the balance of probability. That the onus probandi rests with the party seeking to make out the illegitimacy, to do which he must show beyond all reasonable doubt that sexual intercourse could not have taken place at a time within which the husband could have been the father. *Plowes* v. *Bossey*, 3 Dr. & Sm. 145: 31 L. J., Ch. 681; 8 Jur. (N.S.) 352; 7 L. T. 306; 10 W. R. 332.

Husband and wife, after living together for ten years, and having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent:—Held, that the presumption of law in favour of legitimacy of a child begotten and born of the wife during the separation, may be rebutted, not only by evidence to show that the husband had not sexual intercourse with her, but also evidence of their conduct, such as that the wife was living in adultery; that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted up to his death as if no such child was in existence; and also, that at the wife's death, her paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will. *Morris* v. *Davies*, 5 Cl. & F. 163; 1 Jur. 911. Affirming 3 Russ. 318; 8 L. J., Ch. 120. And see *S. C.*, at law, 3 Car. & P. 215, 427; and on motion for a new trial, 5 L. J., Ch. 177.

—— **Rebutting Presumption.**]—To rebut the presumption that a child born in wedlock is legitimate, it is not necessary to prove that generative access between the husband and wife was physically impossible, but it is enough to show circumstances in the conduct of the parties, and otherwise, which render the moral presumption against such access irresistible. *Gurney* v. *Gurney*, 1 Hem. & M. 413; 32 L. J., Ch. 456; 9 Jur. (N.S.) 514; 8 L. T. 380; 11 W. R. 659.

To rebut the presumption of legitimacy, though it is not necessary to prove impossibility of access on the part of a husband, the evidence must preponderate, so as to convince the mind of the judge that access did not take place at a time and under circumstances which would enable the husband to be the father of the child. *Atchley* v. *Sprigg*, 33 L. J., Ch. 345; 10 Jur. (N.S.) 144; 10 L. T. 16; 12 W. R. 364.

Where, however, husband and wife lived together for nine years without having a child, and then separated and never lived together again, and a child was born ten years after the separation, while the wife was in the habit of committing adultery with another man, which child was treated by the paramour as his own, and was called by his surname, and brought up by him, the child, notwithstanding possibility of access on the part of the husband, was held to be illegitimate. *Ib.*

—— **Adultery.**] — A husband and wife were married on the 30th of April, 1878, and there were three children born before the marriage was dissolved by reason of the wife's adultery with W. The decree nisi was made on the 3rd of November, 1886, and it was made absolute on the 17th of May, 1887. The three children were born respectively on the 2nd of July, 1881, the 26th of April, 1885, and the 25th of June, 1886. The legitimacy of the eldest child was admitted. That of the other two

children was disputed:—Held, on the evidence, that the legal presumption of the legitimacy of the second child was rebutted, and that it was proved not to be the child of the husband. Held, also, on evidence which satisfied the court that the husband could have had no access to the wife between the birth of the second child and the birth of the third child, that the third child was also illegitimate. *Burnaby* v. *Baillie*, 58 L. J., Ch. 842; 42 Ch. D. 282; 61 L. T. 634; 38 W. R. 125.

Testator bequeathed government annuities upon trust for his daughter C. for life, and after her decease for her children equally. C. married H. G., and by him had two children at the time when H. G. deserted her and his family. C. went to live with a man named J. H., and while living with him had five children, the eldest of whom was M., who was, according to the evidence, born during the lifetime of H. G. M. claimed a share of the fund in court:—Held, that, considering all the circumstances from which non-access between the husband and wife might be inferred, the presumption of the legitimacy of M. was rebutted, and that she was not entitled to any share of the fund. *Hawes* v. *Draeger*, 52 L. J., Ch. 449; 23 Ch. D. 173; 48 L. T. 518; 31 W. R. 576.

—— **Strong Evidence Required.**]—When, after open courtship and constant intercourse, a man and woman (she being ultimately in an advanced state of pregnancy), hurry on their marriage to prevent, or to mitigate, scandal; and where in less than seven weeks after the marriage she gives birth to a child; the presumption of the husband's paternity to that child is next to insuperable. *Gardner* v. *Gardner*, 2 App. Cas. 723.

The presumption is not a presumptio juris et de jure, but a presumption of fact. *Ib.*

When a man has been reputed all his life to be the legitimate child of his parents, persons who dispute his legitimacy after his death must produce very strong and unequivocal evidence in support of their contention. *Haslam* v. *Cron, Olivant, In re*, 19 W. R. 968.

5. Suit for Nullity.

a. Parties.

Who may Petition.]—Under 43 Eliz. c. 2, s. 7, a father has sufficient interest to institute a suit to establish the nullity of his daughter's marriage; but where a father died after such suit was instituted, and the pleadings in it were finished, but before trial:—Held, that the court had no authority to allow the widow and executrix of the father to take up the suit at the point at which it was left at the father's death. *Beavan* v. *M'Mahon and Beavan*, 2 Sw. & Tr. 58; 28 L. J., Mat. 127; 5 Jur. (N.S.) 686; 2 L. T. 255; 8 W. R. 453.

In a suit for nullity of marriage, instituted by the father of a minor, it must appear upon the face of the petition whether the father has instituted the suit in his own right, or as guardian of the minor. *Wells* v. *Cottam*, f. c. *Wells*, 3 Sw. & Tr. 364; 33 L. J., Mat. 41; 10 Jur. (N.S.) 444; 10 L. T. 138; 12 W. R. 672.

If the father of a minor petitions for a decree of nullity of his child's marriage, he must make the other party to the de facto marriage a party to the suit. *Ib.*

Interest of Parties.]—A petition for obtaining a declaration of the nullity of a marriage between two minors on the ground of the absence of parental consent and the misdescription of the husband was presented by the husband's mother, who had married a second time, and her present husband, but the registrar had declined to accept the petition on the ground that she had no interest in the suit. The court ordered the citation to issue, without prejudice to any question which might arise. *Prowse* v. *Spurway and Bowley*, f. c. *Spurway*, 24 W. R. 850.

Death of one of the Parties before Suit commenced.]—The validity of a marriage cannot be impeached on the ground of impotency, after the death of one of the parties. *A.* v. *B.*, L. R. 1 P. 559; 17 W. R. 14.

The impotence of one of the parties to a marriage does not render the marriage void, but only voidable. The validity of such a marriage can only be questioned in the lifetime of both of the parties and by the party; therefore, the next-of-kin of a deceased married woman cannot oppose the grant of administration to her husband on the ground of his impotence. *P.* v. *S.*, 37 L. J., P. 80; 19 L. T. 22; 17 W. R. 14.

Ecclesiastical court cannot annul marriage after the death of one party, as it bastardises the issue, but may punish the other for incest or fornication. *Brownsword* v. *Edwards*, 2 Ves. 245.

Locus standi of Father to Institute Suit—Liability to Support Children.]—The liability of a father, under the poor laws, to support the children of his daughters, supposing them to be legitimate, was held sufficient to entitle the father to institute a suit in the ecclesiastical court for the avoidance of his daughter's marriage. *Sherwood* v. *Ray*, 1 Moore, P. C. 353.

Sentence of Court necessary.]—Sentence of the ecclesiastical court necessary, though the marriage void, as in the case of lunacy. *Turing, Ex parte*, 1 Ves. & B. 140.

Practice—Summons by Petitioner for Directions—Notice to Queen's Proctor before setting down.]—The president, upon a summons for directions in a nullity suit by a husband, the case being undefended, directed the solicitors for the petitioner to give information of the facts of the case to the queen's proctor, before setting the case down for hearing, under 23 & 24 Vict. c. 144, s. 7, as amended by 36 Vict. c. 31. Upon receipt by the petitioner's solicitors of an intimation from the queen's proctor that he did not intend to intervene at this stage of the proceedings, the president allowed the case to be set down forthwith, and to be added to the supplemental list of undefended causes just published. *M.* v. *M.* otherwise *A.*, 76 L. T. 172.

b. Grounds for.

i. Pregnancy.

Wife Pregnant by a Third Person at Time of Marriage—Husband Ignorant of her Condition.]—The facts that a woman has been unchaste before marriage with a person or persons other than her husband, that she is in consequence pregnant at the time of her marriage, and that she has deliberately deceived her husband as to her previous conduct and present condition, do not constitute a ground on which the court can

pronounce a decree of nullity of marriage. *Moss* v. *Moss*, 66 L. J., P. 154 ; [1897] P. 263 ; 77 L. T. 220 ; 45 W. R. 635.

ii. Incapacity.

Incurable Malformation and Impotency.]—Incapacity to consummate a marriage is no ground for a decree of nullity, unless the incapacity is permanent. If there is a possibility that its cause may be cured, the court will not pronounce a sentence of nullity, although such cure may be highly improbable. *Stagg* v. *Edgecombe*, 3 Sw. & Tr. 240 ; 32 L. J., Mat. 153 ; 9 Jur. (N.S.) 698 ; 8 L. T. 643 ; 12 W. R. 19.

Impotency, not congenital, but temporarily occasioned by excessive self-abuse, and therefore capable of being cured, is not a ground for a decree of nullity of marriage. *Ib.*

A woman petitioned for nullity by reason of the man's alleged impotency. The petition was opposed, and at the hearing the court, under the circumstances proved, suspended its decree ; but on affidavits subsequently being produced to the effect that the woman had returned to cohabitation, and that the marriage remained unconsummated, made a decree of nullity, the respondent not appearing on the motion. *M.*, f. c. *H.* v. *H.*, 3 Sw. & Tr. 592 ; 11 L. T. 317 ; 13 W. R. 108.

Any evidence is admissible in a suit for nullity which tends to throw light on the case set up by the petitioner or the respondent ; evidence is therefore admissible as to disputes between the petitioner and the respondent during their cohabitation, although the only issues raised by the pleadings are the respondent's impotency, and the consummation of the marriage. *X.*, f. c. *Y.* v. *Y.*, 34 L. J., Mat. 81.

In a suit of nullity it appeared, from the husband's evidence, that whenever he had attempted to have intercourse with his wife the act had produced hysteria on her part, and that, although he had cohabited with her for more than three years, the marriage had never been consummated. The wife refused to submit to inspection. On the evidence of the husband the court made a decree nisi to annul the marriage under the provisions of the 36 Vict. c. 31. *H.* v. *P.*, f. c. *H.*, L. R. 3 P. 126.

Sentence of nullity of marriage, causâ impotentiæ, pronounced on confession of non-consummation, and refusal to undergo inspection. *Harrison* v. *Harrison*, 4 Moore, P. C. 96.

Impracticability of Consummation.]—A marriage is void if consummation is practically impossible, although there is no malformation or structural defect rendering consummation physically impossible. *G.* v. *G.*, 40 L. J., Mat. 83 ; L. R. 2 P. 287 ; 25 L. T. 510 ; 20 W. R. 103.

Wilful Non-Consummation.]—Wilful wrongful refusal of marital intercourse is not in itself sufficient to justify the court in declaring a marriage null by reason of impotence. *S.* v. *A.*, otherwise *S.*, 47 L. J., P. 75 ; 3 P. D. 72 ; 39 L. T. 127.

When, after a reasonable time, it is shown that there has been no sexual intercourse, and that the wife has resisted all attempts, the court, if satisfied of the bona fides of the suit, will infer that the refusal arises from incapacity, and will pronounce a decree of nullity of marriage. *Ib.*

Medical Evidence Necessary.]—As a general rule, a decree of nullity of marriage on the ground of malformation will not be granted, unless the existence of incurable malformation is proved by a medical man who has examined the person of the respondent. *T.* v. *M.*, f. c. *T.*, 35 L. J., Mat. 10 ; L. R. 1 P. 31 ; 13 L. T. 614.

Where the man did not appear, and did not submit to the order of inspection, the medical evidence was not conclusive as to the woman's virginity ; but the court, on her evidence on affidavit, took it to be proved—first, that the marriage was never consummated ; secondly, that this was owing to the impotence of the man ; thirdly, that the physical appearance of the woman was to be accounted for otherwise than by consummation, and pronounced its decree of nullity of marriage. *F.*, f. c. *D.* v. *D.*, 4 Sw. & Tr. 86 ; 34 L. J., Mat. 66 ; 11 Jur. (N.S.) 307 ; 12 L. T. 84 ; 13 W. R. 546.

Evidence of Petitioner Unsupported.]—In a suit of nullity by reason of the husband's impotency, the surgical report stated that the physical appearances of the wife were such that she might have had regular connection with her husband during cohabitation. The wife during two years' cohabitation, had not complained to her family on this matter, and had separated from her husband by reason of his alleged violence. The husband affirmed on oath that the marriage had been consummated. The court declined to pronounce the marriage invalid on the unsupported oath of the party seeking to be relieved from its obligation. *U.*, f. c. *J.* v. *J.*, 37 L. J., Mat. 7 ; L. R. 1 P. 450 ; 16 W. R. 518.

In a suit by a woman for nullity of marriage on the ground of the man's impotency, her evidence being wholly unsupported, the physical appearances being consistent with consummation, and the parties having lived together for eight years without complaint by the woman, the court held that the charge was not made out, and dismissed the petition. *Tarernor*, f. c. *Ditchfield* v. *Ditchfield*, 35 L. J., Mat. 51 ; L. R. 1 P. 127 ; 12 Jur. (N.S.) 673 ; 14 L. T. 227.

Refusal of Woman to allow Consummation—Inference of Latent Incapacity.]—From the fact of non-consummation of a de-facto marriage after a period of cohabitation, during which one party made repeated attempts and was always willing and anxious to bring about the consummation of the marriage, the court, notwithstanding the apparent competence of both parties, may draw the inference that something more than seemingly mere wilful refusal must have animated the party who has, in fact, persistently refused to allow consummation. In a case where the petitioner, a widower with children, went through the form of marriage in May, 1893, with the respondent, a widow without children, and lived and cohabited with her at divers places until the latter part of October, 1893, during which time he, being admittedly able and anxious to consummate the marriage, made repeated attempts to do so, but was always repelled by the respondent, who refused to allow any attempt at connection : the court, notwithstanding the fact that, upon medical inspection, the respondent exhibited no structural impediment nor signs of virginity, pronounced a decree nisi annulling the marriage upon the ground that it was open to the court to draw from the facts the inference of some latent incapacity on the part of the respondent. *F.* v. *P.* (f. c. *F.*), 75 L. T. 192.

Impotence of Petitioner.]—An impotent man

cannot maintain a nullity suit merely on the ground of his own impotency; but if a woman altogether repudiates the relation of wife and the obligations of the marriage contract, the impotent man may show that there is no verum matrimonium, and maintain such a suit. *A.* v. *A.* (f. c. *B.*), 19 L. R., Ir. 403.

—— **Evidence — Marriage Voidable.**] — A marriage was declared null and void on the ground of impotency, after cohabitation of little more than six months, on strong medical testimony. A marriage is not void but voidable only on the ground of impotency. *Ib.*

When onus probandi thrown on Respondent.] —After a cohabitation of fourteen years, a woman presented a petition for a decree of nullity of marriage, on the ground of the man's impotence. The report of the inspectors and the medical evidence showed that the woman was virgo intacta et apta viro, and that there was no apparent defect or malformation in the man. The court was satisfied that the marriage had never been completely consummated, but was not satisfied that the non-consummation arose from the incapacity of the man, and therefore dismissed the petition:—Held, that the woman was entitled to a decree that the marriage was null and void, on the ground that the cohabitation had been for a much more lengthened period than was required to raise the presumption against a husband, and that the onus was thrown upon the respondent, either of disproving the facts, or of showing, by clear and satisfactory evidence, that the result was attributable to other causes than his own impotency. *Lewis*, f. c. *Hayward* v. *Hayward*, 35 L. J., Mat. 105—H. L.

Triennial Cohabitation Rule.]—The canon law rule of triennial cohabitation has not been recognised in England beyond this point, that where a husband or a wife seeks a decree of nullity propter impotentiam, if there is no more evidence than that they have for a period of three years lived together in the same house and with ordinary opportunities of intercourse, and it is clearly proved that there has been no consummation, then, if that is the whole state of the evidence, inability on the part of the one or of the other will be presumed. On the other hand, the presumption to be drawn from the fact of non-consummation after three years' cohabitation is capable of being rebutted. And, also, every case need not be fortified with the presumption; for although no presumption can be raised from the absence of consummation within a less period than three years, yet positive evidence may be given, from which the same inference of inability may be drawn. *Ib.*

The presumption of impotency from the fact of non-consummation does not arise when the cohabitation has been less than three years. *Marshall*, f. c. *Hamilton* v. *Hamilton*, 33 L. J., Mat. 159; 10 Jur. (N.S.) 853; 10 L. T. 787; 13 W. R. 108.

The presumption of impotency arising from non-consummation is liable to rebuttal. *Ib.*

Where there had been a cohabitation for two years and ten months without consummation, but the court was not satisfied on the evidence that the failure to consummate arose from the impotency of the husband, it suspended its decree, and intimated that the petitioner should forthwith return to cohabitation, in order to give an opportunity for consummation. *Ib.*

But afterwards, on affidavits to the effect that the woman had returned to cohabitation, and that the marriage remained unconsummated, the court made a decree of nullity, the husband not appearing. *S. C.*, 34 L. J., Mat. 12; 11 L. T. 317.

The object of the triennial cohabitation rule is to provide that sufficient time may be afforded for ascertaining beyond a doubt the true condition of the party complained of. If the court can be satisfied by circumstances that the complaint of the promoter of the suit is well founded, it never ought to be driven sine gravissimâ causa after a cohabitation though less than three years to order a return. *U.*, f. c. *F.* v. *F.*, 2 Robertson, E. R. 618.

If impotence is clearly proved the court never resorts to the rule. *F.*, f. c. *D.* v. *D.*, 4 Sw. & Tr. 86.

—— **Acquiescence.**]—In a suit for nullity of marriage on the ground of impotency, there may be facts and circumstances proved which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect, but the doctrine designated as the "doctrine of want of sincerity" in an action of this kind has been too much extended in English decisions, and that doctrine, apart from "approbate" and "reprobate," has never been recognised by the Scotch law. Delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which upon the facts is doubtful; but there is no definite or absolute bar arising from it. *G.* v. *M.*, 10 App. Cas. 171; 53 L. T. 398—H. L. (Sc.) *And see* col. 688.

—— **Where Rule has been Relaxed.**]—Marriage declared null and void by reason of the husband's impotency, notwithstanding there had been triennial cohabitation, and there was no visible defect. *A.*, f. c. *B.* v. *B.*, 1 Spinks, 12.

Although the rule as to triennial cohabitation has been relaxed where the malformation is congenital or manifest and incurable, yet a cohabitation of only a few months will not be sufficient; especially if the impotency is ascribable to a temporary cause. *Stagg* v. *Edgecombe*, 3 Sw. & Tr. 240; 32 L. J., Mat. 153; 9 Jur. (N.S.) 698; 8 L. T. 643; 12 W. R. 19.

When the court is satisfied by other evidence, e.g. that of the petitioner herself, of the man's impotence, the rule of apparent virginity, after a cohabitation of three years, does not apply. *F.*, f. c. *D* v. *D.*, 4 Sw. & Tr. 86; 34 L. J., Mat. 66; 11 Jur. (N.S.) 307; 12 L. T. 84; 13 W. R. 546.

iii. Insanity.

Competency to Contract.]—In deciding whether a party was competent to enter into a contract of marriage, the question for the consideration of the court will be whether there was health or disease of mind at the time. If disease is shown, the court has no means of gauging the extent of the derangement consequent upon that disease, or of affirming the limits within which the disease might operate to obscure or divert the mental power. *Hancock and Hancock* v. *Peaty*, 36 L. J., Mat. 57; L. R. 1 P. 335; 16 L. T. 182; 15 W. R. 719.

When a guardian ad litem had been duly as-

signed by the registrar to a lunatic, a petitioner in a suit for nullity of marriage, the court declined during the hearing of the petition to adjourn the case on the application of the respondent, on the suggestion of the petitioner's recovery, and of her desire for the discontinuance of the suit, or to appoint two medical men to examine her, and proceeded to determine the only issue raised by the pleadings, namely, whether the petitioner was of sound mind at the time of the celebration of her marriage. *Ib.*

The court, being satisfied by the evidence that the petitioner was not of sound mind at the time of the celebration of her marriage with the respondent, postponed pronouncing its decree, in order to give the respondent an opportunity, if so advised, of establishing the fact of the petitioner's recovery, and intimated, that if satisfied of her recovery it would not pronounce a decree of nullity except at her instance. *Ib.*

The next of kin having delayed instituting the suit for three years, and the respondent having in the meantime contributed towards the petitioner's support, the court made no order as to costs. *Ib.*

The guardian ad litem, after the lapse of three weeks from the delivery of the judgment, obtained a rule nisi for the respondent to show cause why a decree of nullity should not be pronounced, and the respondent not showing cause against the rule, the decree of nullity was pronounced. *Ib.* And see *Durham* v. *Durham*, 10 P. D. 80, and *Yarrow* v. *Yarrow*, 61 L. J., P. 69; [1892] P. 92; 66 L. T. 383; *and* col. 628.

—— **Alleged Insanity of Petitioner—Guardian ad litem.**]—An order ought not to be made under r. 196 of the Divorce Rules assigning a guardian ad litem to a person alleged to be of unsound mind, where there is a substantial and bonâ fide dispute as to the unsoundness of mind of the person to whom it is proposed to assign the guardian. Whether r. 196 applies where the person has not been found lunatic by inquisition, quære. *Fry* v. *Fry*, or *Routh* v. *Fry*, 59 L. J., P. 43; 15 P. D. 50; 62 L. T. 501; 38 W. R. 615—C. A.

iv. Other Grounds.

Names Falsely Stated — Marriage by Banns.]—A marriage by banns, where, by the consent of both parties, the name of the man was falsely stated, was declared null and void, and the man was condemned in costs because he induced the woman to consent to the undue publication by telling her that it would not render the marriage invalid. *Midgeley*, f. c. *Wood* v. *Wood*, 4 Sw. & Tr. 267. *See* col. 637.

Fraud.]—The court of divorce has no power to pronounce a decree of nullity of marriage, or to dissolve a marriage, because of fraud in its inducement. *Templeton* v. *Tyree*, 41 L. J., Mat. 86; L. R. 2 P. 420; 27 L. T. 429; 21 W. R. 81.

Duress, For.]—*See* col. 628.

c. Inspection and Examination of Parties.

Appointment of Inspectors.]—When a question of impotence is raised, the appointment of two medical inspectors rests with the court; but it will allow the parties to select them, and should they not agree, each will be allowed to nominate one. *C.* v. *C.*, 32 L. J., Mat. 12.

In a suit of nullity on the ground of physical incapacity, each party has a right to nominate two medical inspectors to examine him or her. It is not necessary that both parties should be examined by the same inspectors. *B.*, f. c. *C.* v. *C.*, 32 L. J., Mat. 135.

The petitioner, on moving for an appointment of inspectors, should also move for an order that the respondent submit to inspection. *S.*, f. c. *E.* v. *E.*, 31 L. J., Mat. 164.

Inspection of Party presenting Petition.]—In a suit for nullity of marriage, on the ground of malformation of the wife, it is not the practice of the court to make an order for an inspection of the husband. *B.* v. *L.*, 16 W. R. 943.

Submission to Examination.]—In a suit for nullity by a man, on the ground of malformation, no evidence could be given that the respondent was suffering from an incurable defect, as she had never submitted to a medical examination, and, being out of the jurisdiction, had not been personally served with the citation. The court suspended its decree, in order to give the petitioner an opportunity of having her examined if she should hereafter be found within the jurisdiction. *T.* v. *M.*, f. c. *T.*, 35 L. J., Mat. 10; L. R. 1 P. 31; 13 L. T. 614.

In a suit for nullity of marriage by reason of malformation the respondent refused to comply with the order for inspection. The court declined to issue an attachment against her until after the hearing, but intimated that the attachment would issue forthwith if she attempted to remove out of the jurisdiction. *B.* v. *L.*, f. c. *B.*, 38 L. J., Mat. 35; L. R. 1 P. 639; 20 L. T. 280.

Report of Inspectors.]—On a petition for a decree of nullity, by reason of malformation of the woman, neither is the court nor are the parties concluded by the terms of the report of medical inspectors, but the inspectors themselves and other medical men may be examined. *Williams* v. *Homfray*, f. c. *Williams*, 2 Sw. & Tr. 240; 30 L. J., Mat. 73; 7 Jur. (N.S.) 315; 4 L. T. 89; 9 W. R. 619.

Upon the question of incapacity, although no application had been made for a monition, or an order for a personal inspection of either of the parties, the court received medical evidence of an examination. *Serrell* v. *Serrell and Bamford*, 2 Sw. & Tr. 422; 31 L. J., Mat. 55; 5 L. T. 691.

In a suit by a wife for nullity, on the ground of the husband's impotence, the only evidence of the alleged impotence was that of the petitioner, which was contradicted by the respondent. The evidence of the medical witnesses and the report of the inspectors were not inconsistent with either case. The court declined to grant a decree on the unsupported testimony of the petitioner. *U.*, f. c. *J.* v. *J.*, 37 L. J., Mat. 7; L. R. 1 P. 460; 16 W. R. 518.

Possibility of Cure.]—A woman married on 22nd of July, and lived with her husband till 23rd of September. She petitioned for a decree of nullity by reason of his inability to consummate the marriage. He did not appear. The report of medical inspectors negatived any apparent or incurable defect on his part, but ascribed the non-consummation to incapacity caused by a long-continued habit of self-abuse, which (as

further explained by their vivâ voce evidence) they considered might possibly, but not probably, be cured; the question being one of moral restraint. There was no report of inspectors as to the condition of the woman, and their vivâ voce evidence was equivocal as to proof of non-consummation from examination of her person. The court refused to make the decree. *Stagg* v. *Edgecombe*, 3 Sw. & Tr. 240; 32 L. J., Mat. 153; 9 Jur. (N.S.) 698; 8 L. T. 643; 12 W. R. 19.

Where the result of the medical evidence is, that the malformation might possibly, but at great risk to life, and with doubtful success as to the end desired, be removed, the petitioner need not call upon the respondent to submit to an operation; and such a state of things is equivalent to a permanent and an irremovable malformation. *Serrell* v. *Serrell* and *Bamford*, 2 Sw. & Tr. 422; 31 L. J., Mat. 55; 5 L. T. 691.

After a partial cohabitation of two years and eight months, it appeared that the woman was impotent, but that she might probably be cured if she would submit to an operation involving no great risk to life. This she refused to do. The court made a decree nisi of nullity of marriage. *L*—— v. *L*——, 51 L. J., P. 23; 7 P. D. 16; 47 L. T. 132; 30 W. R. 444.

d. Bars to.

Delay.] — Delay in instituting a suit for nullity of marriage on the ground of impotence is not an absolute bar to the suit, but renders it necessary that the evidence to support the suit should be of the clearest and most satisfactory kind. *Castleden* v. *Castleden*, 9 H. L. Cas. 186; 4 Macq. H. L. 159; 31 L. J., Mat. 103; 5 L. T. 164. Affirming *Hall*, f. c. *Castleden* v. *Castleden*, 1 Sw. & Tr. 605; 29 L. J., Mat. 81; 6 Jur. (N.S.) 348; 1 L. T. 489.

Where, therefore, a woman who had married in 1834, lived with her husband until 1838, then separated from him, in 1853 caused him to be sued for her debts, obtained from him an allowance, which was continued till October, 1858, and in November, 1858, instituted a suit for nullity of marriage on the ground of his impotency:—Held, that she was bound to give unequivocal proof of the truth of the allegation in the petition. *Ib.*

M. married B. in August, 1853, and slept in the same bed with him about two years, when, at his request, she occupied a separate room, but lived in his house till June, 1863, when she left it, and in the early part of 1864 petitioned for a decree of nullity, by reason of his impotency. The medical evidence showed her to be a virgin. He did not submit himself to inspection:—Held, that lapse of time, coupled with indirect motives in bringing the suit, disentitled her to the relief sought. *Marriott*, f. c. *Burgess* v. *Burgess*, 3 Sw. & Tr. 550; 33 L. J., Mat. 203; 10 Jur. (N.S.) 885; 10 L. T. 847.

Relief in suits of this nature is never accorded unless the petitioner is prompt in seeking it, and sincere in the motive for doing so. *M.*, f. c. *C.* v. *C.*, 41 L. J., Mat. 37; L. R. 2 P. 414; 26 L. T. 321; 20 W. R. 495.

A petitioner made cognisant within four or five years after her marriage of her husband's impotency could not delay proceedings for three years more, without being open to the charge of want of sincerity or promptitude. *Ib.*

The onus of proof is on the complainant. *Cuno* v. *Cuno*, L. R. 2 H. L. (Sc.) 300; 29 L. T. 316.

The objection of delay in seeking relief may be got over when the proof of impotency is complete; but not otherwise. *Ib.*

A wife lived with her husband for one year and nine months after the marriage. After a lapse of nine years she again lived with him for five years and six months, and left him in consequence of his ill-treatment. Twenty-seven years after the marriage, and when she was forty-eight years of age, she brought a suit for nullity of marriage by reason of his impotency. It was proved that she was virgo intacta:—Held, that she was not entitled to relief. *Reynolds* (otherwise *Wilkins*) v. *Reynolds*, 45 L. J., P. 89; 1 P. D. 405; 25 W. R. 25.

A delay of some years in bringing a suit for nullity of marriage on the ground of the wife's malformation, will induce the court to suspect that the suit is not bonâ fide, and, unless explained, will be a bar. *Ewens* v. *Tytherleigh*, f. c. *Ewens*, 3 Sw. & Tr. 312; 33 L. J., Mat. 37; 9 Jur. (N.S.) 1301; 9 L. T. 424; 12 W. R. 444.

When a husband, who was the petitioner in a suit for nullity on the ground of his wife's malformation, had not instituted the suit until upwards of eleven years after the marriage, the court required him to give an explanation of the delay before making a decree. *Ib.*

Want of Sincerity.]—At the end of seven years' cohabitation a marriage had not been consummated through the impotence of the alleged husband. The alleged wife subsequently cohabited with another man, and upon the alleged husband discovering her misconduct she instituted a suit for nullity of marriage against him, and he a suit for dissolution of marriage against her:—Held, that the proof of impotence being clear, her conduct did not show such a want of sincerity as to deprive her of her right to have the marriage annulled. When the impotence is undoubted mere delay is not sufficient to disentitle the injured party to relief. *M.* (falsely called *D.*) v. *D.*, 54 L. J., P. 68; 10 P. D. 75; 33 W. R. 657.

In a suit for nullity of marriage on the ground of impotency, there may be facts and circumstances proved, which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage, as to render it most inequitable, and contrary to public policy, that he or she should be permitted to go on to challenge it with effect; but the doctrine, designated as the "doctrine of want of sincerity" in an action of this kind, has been too much extended in recent English decisions, and that doctrine, apart from "approbate" and "reprobate," has never been recognised by the law of Scotland. *G.* v. *M.*, 10 App. Cas. 171; 53 L. T. 398—H. L. (Sc.)

Delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which, upon the facts, is doubtful; but there is no definite or absolute bar arising from it. *Ib.*

Where a wife seven years after marriage presented a petition for nullity, the court refused to dismiss the petition on the ground of insincerity, merely because of the delay in presenting the petition, and granted a decree nisi. *L.* (otherwise *B.*) v. *B.*, 64 L. J., P. 121; [1895] P. 274; 11 R. 673.

Agreement not to Sue—Consideration—Bar.]—In a petition by husband against wife praying that the marriage celebrated between them might be declared null and void on the ground of her incapacity, the respondent pleaded that she and the petitioner after a year's cohabitation had agreed to live apart, and had bound themselves not to make any claim against each other either in a court of law or equity; and that if either party should break the agreement the other should be entitled to an injunction to restrain such breach. That it was further agreed that if the respondent committed a breach of the agreement the petitioner should be entitled to proceed in this court for a declaration of nullity. Averment that there had been no breach of the agreement on the part of the respondent:—Held, that the respondent's agreement not to sue was a sufficient consideration for the husband's engagement to do the like, and that such an agreement although not by deed was therefore a bar to the petition for declaration of nullity. *Aldridge* v. *Aldridge*, or *A.* v. *M.*, 58 L. J., P. 8; 13 P. D. 210; 59 L. T. 896; 37 W. R. 240.

Age of Parties.]—There is no rule as to any particular age constituting a bar to a petition for nullity of marriage by reason of malformation of the woman. *Williams* v. *Homfray*, f. c. *Williams*, 2 Sw. & Tr. 240; 30 L. J., Mat. 73; 7 Jur. (N.S.) 315; 4 L. T. 89; 9 W. R. 619.

Invalidity of Celebration.]—C. and D., being native subjects of France, and domiciled in that country, came over to London in June, 1854, and were married by licence according to the law of England, but without the observance of certain formalities and consents required by the law of France in respect to the marriage of its own subjects in foreign countries. C. and D. returned to France, when D., the man, refused to celebrate the marriage according to the French law, and C. instituted a suit for nullity in the French courts, which D. did not defend, and in December, 1854, C. obtained decree of nullity. C. subsequently came to reside in England, and petitioned for a decree of nullity; personal service of the citation was effected on D. in Naples, who did not appear:—Held, first, that D. having entered into a contract in this country, was subject to the jurisdiction of the courts in this country, in respect of the personal status resulting from such contract. *Simonin*, f. c. *Mallac* v. *Mallac*, 2 Sw. & Tr. 67; 29 L. J., Mat. 97; 6 Jur. (N.S.) 561; 2 L. T. 327.

Held, secondly, that the personal status resulting from such contract is to be ascertained by the law of this country, in which the contract was made, and not any special law of the country of the domicil of the parties to the contract. *Ib.* *And see* cols. 625, 730.

e. Intervention of the Queen's Proctor.

Before 36 & 37 Vict. c. 31, the Queen's proctor had no power to intervene in suits for nullity of marriage, however collusive or concerted. *D.* v. *M.*, f. c. *D.*, 28 L. T. 73; 21 W. R. 417. *See* col. 892.

f. Procedure.

Service of Citation and Petition.]—When every reasonable effort has been made to trace the respondent for the purpose of effecting a personal service of the citation and petition in a suit for dissolution of marriage, but without success, the court will dispense with such personal service. *Appleyard* v. *Appleyard and Smith*, L. R. 3 P. 257. *See* col. 865.

Suit on behalf of Minor.]—In a suit for nullity instituted by the father of a minor, it must appear upon the face of the petition whether the father has instituted the suit in his own right, or as guardian of the minor. *Wells* v. *Cottam*, f. c. *Wells*, 3 Sw. & Tr. 364; 33 L. J., Mat. 41; 10 Jur. (N.S.) 444; 10 L. T. 138; 12 W. R. 672.

A guardian cannot appear and plead on behalf of a minor without having been duly elected and appointed. *Ib.*

Under 43 Eliz. c. 2, s. 7, a father has sufficient interest to institute a suit to establish the nullity of his daughter's marriage; but where a father died after such suit was instituted, and the pleadings in it were finished, but before trial:—Held, that the court had no authority to allow the widow and executrix of the father to take up the suit at the point at which it was left at the father's death. *Beavan* v. *M'Mahon and Beavan*, 2 Sw. & Tr. 58; 28 L. J., Mat. 127; 5 Jur. (N.S.) 686; 2 L. T. 255; 8 W. R. 453.

Answer.]—A husband presented a petition, praying that his marriage, de facto celebrated with the woman, might be annulled, by reason of her malformation. She denied the malformation, pleaded cruelty, and prayed for a judicial separation by reason thereof:—Held, that in a suit for nullity of marriage, the only question to be decided is, marriage or no marriage, and that consequently a charge of cruelty against the husband, and a prayer for a judicial separation, contained in an answer, must be struck out. *Williams* v. *Homfray*, f. c. *Williams*, 6 Jur. (N.S.) 151; or *Humphrey* v. *Williams*, f. c. *Humphrey*, 2 Sw. & Tr. 30; 29 L. J., Mat. 62.

To a petition by a woman for a decree of nullity of marriage, on the ground of impotence, the respondent pleaded, that since the marriage the petitioner had committed adultery. The court ordered the plea to be struck out as impertinent. *Taverner*, f. c. *Ditchford* v. *Ditchford*, 33 L. J., Mat. 105.

Interrogatories to Party — Jurisdiction of Divorce Division.] — In a suit for nullity of marriage the court has power to order interrogatories. *Euston* v. *Smith*, 9 P. D. 57; 32 W. R. 596.

In a suit for nullity of marriage, the court has power to give leave to administer interrogatories between the parties to the suit; for suits of that kind were formerly within the jurisdiction of the ecclesiastical courts, which had power to allow interrogatories to be administered between the parties, and now all the jurisdiction of the ecclesiastical courts as to suits for nullity of marriage (including matters of practice and procedure) is vested in the probate, divorce, and admiralty division. And, further, even if the power to allow interrogatories to be administered between the parties did not otherwise exist, it would be conferred upon the probate, divorce, and admiralty division by the Supreme Court of Judicature Act, 1873; for at the time of passing that statute the superior courts of common law and the court of chancery had power to allow interrogatories to be administered between the parties to a suit; and by s. 16, all

the jurisdiction of those courts, including the ministerial powers and authorities incident thereto, was transferred to and vested in the high court of justice, and by s. 23 the jurisdiction transferred to the high court may (so far as regards procedure and practice) be exercised in the same manner as it might have been exercised by any of the courts whose jurisdiction has been transferred. *Harvey* v. *Lovekin*, 54 L. J., P. 1; 10 P. D. 122; 33 W. R. 188—C. A.

And see *Redfern* v. *Redfern*, 60 L. J., P. 9; [1891] P. 139; 64 L. T. 68; 39 W. R. 212; 55 J. P. 37—C. A.

—— **Application to whom Made.**]—Semble, that inasmuch as proceedings for divorce and for other matrimonial causes are excluded from the operation of the Rules of the Supreme Court, 1883, by Ord. LXVIII. r. 1 (*d*), an application for leave to administer interrogatories between the parties to a suit ought not to be made to a registrar of the divorce division; but it ought to be made in the first instance to one of the judges of the court. *Ib.*

Proof by Affidavit.]—In a suit for nullity, on the ground of bigamy, the court has no power to permit the facts to be proved by reading affidavits taken in a suit in chancery. *Lumley* v. *Victor*, f. c. *Lumley*, 26 L. T. 141.

In a suit of nullity by a woman, the court, with the consent of the respondent, allowed her evidence to be given on affidavit. *B.*, f. c. *C.* v. *C.*, 32 L. J., Mat. 135.

Right of Beginning.]—Where, in a suit for dissolution by husband against his wife, she pleaded that the marriage was null on account of his impotency:—Held, that there being substantially a traverse of the marriage, the petitioner had the right to begin. *Serrell* v. *Serrell and Bamford*, 2 Sw. & Tr. 422; 31 L. J., Mat. 55; 5 L. T. 691.

Hearing in Camera.]—A suit of nullity of marriage, on the ground of alleged impotency, is unfit to be tried before a jury or in open court; and the judge has a discretionary power to hear in camera all suits which the ancient ecclesiastical courts would have heard privately. *A.* v. *A.*, or *Anstey* v. *Anstey*, 44 L. J., Mat. 15; L. R. 3 P. 230; 31 L. T. 801; 23 W. R. 386.

And see *C.* v. *C.*, L. R. 1 P. & D. 640; 20 L. T. 280.

Decree.]—The legislature having extended to suits for nullity of marriage the provisions of 23 & 24 Vict. c. 144, s. 7, whereby a decree nisi for divorce is not to be made absolute under six months, unless the court otherwise directs, the judge ordinary will not exercise his discretion to shorten the period in cases of nullity of marriage except under very special circumstances. *M.*, f. c. *B.* v. *B.*, 43 L. J., Mat. 42; L. R. 3 P. 200; 30 L. T. 345, 910; 22 W. R. 556.

Costs.]—In a suit for nullity of marriage, instituted by the father of the de facto husband, in which the de facto husband and the de facto wife are both made respondents, and the marriage is pronounced null, he is not liable for the payment of her costs, unless the court, in the exercise of its discretion, thinks proper to order him to pay them. *Wells* v. *Cottam*, 3 Sw. & Tr. 593; 34 L. J., Mat. 12; 10 Jur. (N.S.) 1208; 11 L. T. 318; 13 W. R. 279.

The court refused to order costs of a de facto wife to be paid by the de facto husband, when it was satisfied that her defence to the suit, instituted by his father, was unnecessary. *Ib.*

In a woman's petition for nullity of marriage by reason of the impotency of the man, the court dismissed the respondent from the suit on the ground that the petitioner had failed in her proof, but made no order as to costs. On appeal to the House of Lords, the decree of the judge ordinary was reversed, the marriage declared null and void ab initio, and the cause remitted back to the court to do further therein as should be just and consistent with the declaration and judgment of the house, but no order was made as to costs, though they were prayed for on the appeal, and were mentioned at the time of the judgment. The court ordered the judgment of the House of Lords (it being first verified by affidavit) to be placed upon the records, but declined to make any order as to costs. *Lewis*, f. c. *Hayward* v. *Hayward*, 36 L. J., Mat. 76; L. R. 1 P. 293; 15 L. T. 299; 15 W. R. 319.

—— **Wife with Separate Estate.**]—A wife married in 1863, cohabited with her husband until 1870, and in 1871 instituted a suit for nullity by reason of his impotency. Having failed to establish the charge, her suit was dismissed, and as she had separate property she was condemned in costs. *M.*, f. c. *C.* v. *C.*, 41 L. J., Mat. 37; L. R. 2 P. 414; 26 L. T. 321; 20 W. R. 495. *See* cols. 955, 1302.

—— **Security for.**]—The court has power to order a wife, who is a petitioner in a nullity suit, to give security for costs, but will decline to do so where it is not proved that she has a separate income. *De B.* v. *De B.*, 44 L. J., Mat. 41; 33 L. T. 263.

The guardian who institutes a suit for dissolution of marriage on the behalf of an infant husband, on the ground of his wife's adultery, will be ordered to pay into the registry, or give security for, a sum of money to meet the wife's costs of the hearing. *Beavan* v. *Beavan*, 31 L. J., Mat. 166; 8 Jur. (N.S.) 769.

In a suit for nullity, instituted by the father of the pretended husband in his own right, the alleged wife has no right to an order for the payment of her costs by the petitioner before the hearing. *Wells* v. *Cottam*, f. c. *Wells*, 3 Sw. & Tr. 364; 33 L. J., Mat. 41; 10 Jur. (N.S.) 444; 10 L. T. 138; 12 W. R. 672. *And see* cols. 955, 1279, 1303.

Cross Suits for Nullity and Dissolution—Cross-examination.]—The parties had presented cross-suits, one for nullity of marriage on the ground of the man's impotence, the other for dissolution on the ground of the woman's adultery:—Held, in the course of the nullity suit that the woman might be cross-examined as to her adultery with the co-respondent in the dissolution suit. *M.* (f. c. *D.*) v. *D.*, 10 P. D. 175; 34 W. R. 48.

Alimony—Decree Nisi.]—In a suit for nullity alimony continues payable after the decree nisi until the decree is made absolute. *S.* (f. c. *B.*) v. *B.*, 53 L. J., P. 63; 9 P. D. 80; 32 W. R. 756.

—— **De facto Marriage—Alimony pendente lite—Decree Nisi.**]—In a suit for nullity of marriage brought by the so-called husband, a de facto marriage being established, the court has jurisdiction to order alimony pendente lite, though a decree nisi has been made. *Bird* v. *Bird* (1 Lee,

209) followed; *Blackmore* v. *Mills* (16 W. R. 893) commented on. *Foden* v. *Foden*, 63 L. J., P. 163; [1894] P. 307; 6 R. 633; 71 L. T. 279; 42 W. R. 689—C. A. *See* col. 828.

Provision for Children — Postponement of making Decree Absolute.]—A decree nisi was made declaring a de facto marriage void, as not having been solemnised according to law. Shortly before the expiration of the period of six months, a petition was presented for a provision for the child of the marriage. On a motion to make the decree absolute, the court held that a provision for the child ought to be inserted in the final decree, and refused to make the decree absolute until materials were furnished for deciding what provision ought to be made:—Held, on appeal, that under 23 & 24 Vict. c. 144, s. 7, there is no absolute right to have a decree made absolute at the end of the six months, and that although the judge might have made a provision after the decree absolute, he had jurisdiction to suspend the making the decree absolute for the purpose of inserting in it the provision which he considered necessary, and the court would not interfere with his discretion, there being nothing to show that he had exercised it unreasonably. The act 20 & 21 Vict. c. 85, s. 35, enables the court to order a provision to be made for the children of a marriage which the court has declared to be void. *Langworthy* v. *Langworthy*, 55 L. J., P. 33; 11 P. D. 85; 54 L. T. 776; 34 W. R. 356—C. A.

Variation of Settlements—Re-transfer of Property.]—After a decree declaring a marriage null, the court upon a petition for variation of settlements, made an order that the property brought into settlement should be reconveyed to the parties, in the proportion in which they had respectively contributed to the settled fund, and freed from all the trusts of the settlement. *A.* (f. c. *M.*) v. *M.* (10 P. D. 178), followed. *Leeds* v. *Leeds*, 52 L. T. 373—Butt, J.

By a settlement executed in contemplation of marriage, certain property belonging absolutely to the wife was assigned to trustees upon trust for the wife till the solemnisation of the marriage, and after the solemnisation thereof to pay the income to the wife for life for her separate use, and after her death to pay the income, with certain exceptions, to the husband for life, and after the death of the husband and wife, in trust for the issue of the marriage, and in default of issue to such persons as the wife should appoint, and in default of appointment for the next-of-kin of the wife. The wife obtained a decree declaring the marriage null and void on the ground of her husband's impotence, and afterwards presented a petition for variation of the marriage settlements. The court made an order extinguishing the husband's life interest under the settlements, and afterwards made a further order directing the trustees to retransfer or otherwise put under the petitioner's legal control all the property brought into settlement, for her own use and benefit, free from the trusts of the settlements. *A.* (f. c. *M.*) v. *M.*, 54 L. J., P. 31; 10 P. D. 178; 33 W. R. 232. *See* col. 806.

g. Compromise of Suit.

Validity—Public Policy.]—An agreement to put an end to a suit for nullity of marriage on the ground of impotency is not void as against public policy. *Wilson* v. *Wilson*, 14 Sim. 405. Affirmed, 1 H. L. Cas. 538. See *S. C.*, 5 H. L. C. 40.

h. Effect on Covenant to Settle.

To a declaration on a covenant in a deed executed in anticipation of marriage whereby the defendant covenanted to pay an annuity during the life of his intended son-in-law, the defendant pleaded on equitable grounds that the marriage was null and void by reason of the husband's impotence, and that the consideration for the deed had wholly failed:—Held, a bad plea. *Cavell* v. *Prince*, 35 L. J., Ex. 162.

6. Action for Breach of Promise of Marriage.

a. When Maintainable.

Administrator.]—An administrator cannot maintain an action for a breach of promise of marriage to the intestate, where no special damage is alleged. *Chamberlain* v. *Williamson*, 2 M. & S. 408; 15 R. R. 295.

Promise—Third Person.]—An expression to third persons of an intention to marry another, not uttered in the hearing of or communicated to such person by the authority of the party expressing the intention, does not amount to a promise so as to sustain the action. *Cole* v. *Cottingham*, 8 Car. & P. 75.

Contract made out of Jurisdiction of Court.]—Two British subjects, being in Germany, became engaged to marry. The plaintiff came to England, and there received a letter written and posted by the defendant in Germany, in which she declined to carry out her engagement. The plaintiff issued a writ of summons under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 18:—Held, that the words "cause of action," in the section, meant the whole cause of action, and do not apply where a contract has been made out of the jurisdiction and the breach has occurred in England. *Cherry* v. *Thompson*, 41 L. J., Q. B. 243; L. R. 7 Q. B. 573; 26 L. T. 791; 20 W. R. 1029.

Held, also, that the breach of the contract to marry occurred in Germany, the receipt of the letter only furnishing evidence of the breach and not constituting the breach itself. *Ib.*

A defendant made a promise of marriage to the plaintiff whilst they were residing abroad. Both afterwards came to England, where the defendant wrote a letter to the plaintiff renouncing the contract. He afterwards left the country. The plaintiff issued a writ of summons for service abroad. The defendant, having been served with the writ abroad, moved to set it aside:—Held, that the writ was rightly issued; but per Pigott and Cleasby, BB., that cause of action in s. 18 of the Common Law Procedure Act, 1852, means the act or omission constituting the violation of duty complained of, and not the whole cause of action. *Durham* v. *Spence*, 40 L. J., Ex. 3; L. R. 6 Ex. 46; 23 L. T. 500; 19 W. R. 162.

Mutuality of Promise.]—In an action by a woman for breach of promise of marriage, it must appear, not only that the defendant pro-

posed, or even promised to marry the plaintiff, but that she promised to marry him; for in this case, as in all other cases, a contract must be mutual; and although the assent to the engagement on both sides need not appear to have been strictly concurrent, it must appear to have been within a reasonable time. *Vineall* v. *Veness*, 4 F. & F. 344.

A promise to marry by a plaintiff is not essential to the consideration of the defendant's promise to marry a plaintiff. *Harvey* v. *Johnston*, 6 D. & L. 120; 6 C. B. 295; 17 L. J., C. P. 298; 12 Jur. 981.

Therefore, where a declaration alleged the consideration for the defendant's promise to be, that the plaintiff, being sole, and unmarried, would go to Lisahoppin, in that part of the United Kingdom of Great Britain and Ireland, called Ireland, for the purpose of marrying him, the defendant:—Held, that the consideration was sufficient. *Ib.*

Promise by Married Man.]—A declaration averred that in consideration that the plaintiff, being unmarried, at the request of defendant, promised the defendant to marry him within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; that the plaintiff, confiding in the defendant's promise, has hitherto remained unmarried, and has always been ready to marry the defendant, until she had notice he was a married man. Breach, that the defendant has not married the plaintiff, but on the contrary, at the time the defendant made his promise he was married, and still is married, to another woman. The plaintiff obtained a verdict. On motion to arrest the judgment:—Held, that the declaration showed a sufficient consideration. *Wild* v. *Harris*, 7 C. B. 999; 7 D. & L. 114; 18 L. J., C. P. 297; 13 Jur. 961.

Held, also, that the defendant's promise was not unlawful, there being, at the time the promise was made, a possibility of performance, as the defendant's wife might have died within a reasonable time. *Ib.*

Held, also, that the allegation that the plaintiff remained unmarried for a reasonable time, was a sufficient consideration, as being a prejudice to her caused by the conduct of the defendant.

A declaration alleged that in consideration that the plaintiff, at the defendant's request, promised to marry him, he promised the plaintiff to marry her. Averments that the plaintiff continued and still is unmarried, and until the discovery of the defendant's marriage, was ready and willing to marry him; that after the defendant's promise the plaintiff discovered that the defendant at the time of his promise was and still is married; and that the plaintiff had not at the time of his promise any notice of the defendant's marriage:—Held, on motion in arrest of judgment, that the declaration was good, and that the plaintiff's remaining unmarried was a sufficient consideration to support the defendant's promise. *Millward* v. *Littlewood*, 5 Ex. 775; 20 L. J., Ex. 2.

A promise by a married man to marry another woman after his wife's death, is illegal and void. Per Pollock, C.B. *Ib.*

Renunciation of Promise.]—An action for breach of promise of marriage is maintainable against a man who has promised to marry a woman after the death of his father, and has afterwards absolutely declared his intention never to fulfil his promise, although his father is living at the time when the action is brought. *Frost* v. *Knight*, 41 L. J., Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471—Ex. Ch.

An action for breach of promise to marry at a time certain may be maintained upon a renunciation of the promise before the time fixed for its performance has arrived. *Donoghue* v. *Marshall*, 32 L. T. 310.

In an action for breach of promise to marry, the declaration alleged a promise to marry at a time elapsed, and the evidence showed a promise to marry at a time not elapsed, and a renunciation by the defendant of such promise:—Held, that the declaration might be amended at the trial. *Ib.*

Personal Representatives of Promisor, Action against—Survival of Cause of Action—Special Damage.]—An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor. The special damage which would cause the right of action to survive must be damage to the property, and not to the person, of the promisee, and must be within the contemplation of both parties at the date of the promise. and the action can be brought against the executors for such special damage only and not for general damages. *Finlay* v. *Chirney*, 57 L. J., Q. B. 247; 20 Q. B. D. 494; 58 L. T. 664; 36 W. R. 534; 52 J. P. 324—C. A.

Infant, Action against—Ratification.]—The plaintiff and defendant, who were both under age, became engaged to be married in April, 1886. In September, 1886, the defendant came of age. In October, 1886, the plaintiff's father made an assignment of his property to his creditors, and immediately afterwards informed the defendant of the fact, and told him if he wished to be released from his engagement he could. The defendant then refused to be released, and said he was quite willing to marry the plaintiff, and asked her whether she thought they were old enough; to which the plaintiff replied they had better wait awhile. The defendant subsequently broke off the engagement. and refused to marry the plaintiff:—Held, that there was evidence to go to the jury that there had been a new promise to marry made by the defendant after he came of age. *Holmes* v. *Brierley*, 36 W. R. 795—C. A. Reversing 59 L. T. 70; 52 J. P. 711—D.

b. Grounds of Defence.

Physical and Mental.] — Bodily infirmity arising after the contract is a good reason for either of the parties to break off. *Atchinson* v. *Baker*, Peake's Add. Cas. 103.

Action by a woman for breach of promise to marry within a reasonable time, that a reasonable time had elapsed, and that the defendant refused to marry. Plea, that after the promise, and before breach, he was and still is afflicted with a dangerous disease, by reason whereof he became and was, and thenceforth hitherto has been, and still is incapable of marriage, without danger to his life and therefore unfit for the married state, whereof the plaintiff had notice before action. The jury found the plea proved, except the notice:—Held, by a majority of the court, that a party cannot set up as an excuse for the breach

of a promise to marry, that the performance of the conjugal duties would be dangerous to his life, and that the plea disclosed no good defence to the claim for damages. *Hall* v. *Wright*, El. Bl. & El. 746 ; 29 L. J., Q. B. 43 ; 6 Jur., (N.S.) 193 ; 1 L. T. 230 ; 8 W. R. 160—Ex. Ch.

Held, by the minority, that there is an implied condition in a contract of marriage that the parties remain in sufficient health to undergo the excitement of the ceremony of marriage, and to perform the functions of the married state without danger to life ; that the circumstances set forth as to the state of health of the defendant were a bar to the plaintiff's claim to maintain an action for the breach of contract ; and that the averment of notice to the plaintiff was immaterial. *Ib.*

To an action for a breach of promise of marriage, it is no answer that after the promise the man discovered that the woman had been previously a lunatic, and confined in an asylum as a lunatic. *Baker* v. *Cartwright*, 10 C. B. (N.S.) 124 ; 30 L. J., C. P. 364 ; 7 Jur. (N.S.) 1247.

Misrepresentation and Fraud.]—If it appears that the defendant was induced to make the promise, or to continue the connection, either by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff ; this goes in bar of the action, and not to the damages only. *Wharton* v. *Lewis*, 1 Car. & P. 529; 28 R. R. 785. And see *Horam* v. *Humphreys*, Lofft, 80.

If the defence set up is, that the defendant was induced to make the promise through misrepresentations made to him, and it is proved that the plaintiff knew that her father wrote letters to the defendant, in which he made statements respecting her ; such letters are evidence for the defendant, although there is no proof that the plaintiff had read them, or was acquainted with their exact contents ; but the plaintiff could not be considered answerable for the particular expressions contained in them. *Foote* v. *Hayne*, 1 Car. & P. 546; R. & M. 165 ; 28 R. R. 788.

Declaration by a woman on an agreement between herself and the defendant to marry one another within a time elapsed before action ; averment, that a reasonable time had elapsed before action, and that the plaintiff had always been ready and willing to marry the defendant, but he had refused to do so. A plea that before and at the time of the agreement the plaintiff and A. had agreed to marry one another, which agreement was in full force as the plaintiff knew, but of which the defendant was ignorant ; and that, though the plaintiff ought fully to have disclosed the same to the defendant before the agreement, and though he would not have made the agreement had the same been disclosed to him before, the plaintiff, at the time of the agreement withheld and concealed the same from the defendant, and he made the agreement whilst he was wholly ignorant of the same, is a bad plea, there being no express allegation of fraud. *Beechey* v. *Brown*, El. Bl. & El. 796 ; 29 L. J., Q. B. 105 ; 6 Jur. (N.S.) 345 ; 1 L. T. 479 ; 8 W. R. 292.

Social and Moral.]—It is a sufficient justification for the non-performance of a woman's promise to marry, if the person to whom she has given the promise turns out upon inquiry to be a man of bad character ; but mere accusation and suspicion is not sufficient. The charges which she makes against him must, if capable of proof, be substantiated, or they go only to the damages. *Baddeley* v. *Mortlock*, Holt, 151 ; 17 R. R. 626.

If on the part of the defendant it is proved that the plaintiff is a loose and an immodest woman, and that he broke his promise on that account, it goes in bar of the action ; but if it also appears that, when he made the promise, he was aware of these circumstances, it is no defence. In such an action the defendant may, in mitigation of damages, go into evidence to show that his relations disapproved of the match. *Irving* v. *Greenwood*, 1 Car. & P. 350.

In an action for a breach of promise of marriage, the defendant pleaded, first, that after the supposed promise he received information that the plaintiff was an unchaste person, and had committed fornication with A., which information was true ; wherefore he refused to marry her. Secondly, that after the supposed promise, he received information that the plaintiff had committed fornication with some person or persons to the defendant unknown, and was pregnant with a child, which child he averred was subsequently born a bastard ; wherefore he refused to marry the plaintiff :—Held, that the pleas were good. *Young* v. *Murphy*, 3 Bing. (N.C.) 54 ; 3 Scott, 379 ; 2 Hodges, 144 ; 6 L. J., C. P. 180.

If a man enters into a promise of marriage in ignorance of the fact that the woman has had an illegitimate child, and discovers that before the marriage, and on that ground declines entering into the marriage, he has a right to do so, although the transaction as to the child may have taken place ten or more years ago, and the conduct of the woman may have been since perfectly correct ; but if the man knew, or had reason to know, at the time of the promise, that the woman had such child, and gave that, afterwards, as his reason for refusing to marry, that would be no defence in point of law. *Beach* v. *Merrick*, 1 Car. & K. 463.

Mutual Releases.]—To a declaration founded on mutual promises to marry within a reasonable time, it is a good plea, that after the promise, and before any breach, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof. *King* v. *Gillet*, 7 M. & W. 55 ; 10 L. J., Ex. 164.

It was proved that the defendant, having written a letter to the plaintiff desiring to terminate the engagement, called at her father's house, and a conversation took place respecting the return of letters. The defendant returned the plaintiff's letters ; the plaintiff said, "No, I can't give up your letters, it would be like giving you up altogether." The plaintiff left her home and went to reside with an aunt for a long period and no correspondence took place between the parties for two years :—Held, that this was evidence from which a jury might infer that the plaintiff had exonerated the defendant from his promise before any breach. *Davis* v. *Bomford*, 6 H. & N. 245 ; 30 L. J., Ex. 139 ; 3 L. T. 279.

Offer to carry out Contract before Writ—Not Communicated to Plaintiff.]—Upon an action for breach of promise, the defendant pleaded that he was ready and willing to marry the plaintiff,

in it is laid as special damage, that the defendant debauched the plaintiff and ruined her character. it would be misdirection to tell the jury that they might give her damages as a solatium for the injured feelings of her parents and family; but, where the defendant is a person of property, they may take into their consideration not only the plaintiff's pecuniary loss in not becoming his wife, but the injury done to her future prospects of marriage, her injured feelings and affections, and the mortification she must suffer in not being able to look her family in the face. *Berry* v. *Da Costa*, 1 H. & R. 291; 35 L. J., C. P. 191; L. R. 1 C. P. 331; 12 Jur. (N.S.) 588; 14 W. R. 279.

In such action the damages cannot be measured by a known standard, as in commercial cases; but the amount is peculiarly a question for the jury; and where no witnesses were called for the defendant, and it appeared that imputations had been cast upon the plaintiff, a person in humble life, and her witnesses, which failed, and the jury gave 2,500*l*. damages against the defendant, who was a person of property; and a new trial was asked for simply upon the ground that the damages were excessive, the application was refused. *Ib.*

On Motion for New Trial.]—Upon a motion for a new trial in an action for breach of promise of marriage, on the ground of surprise and excessive damages, the affidavit of the defendant, though required for the purpose of pledging himself to the bona fides of the application, cannot be looked at for the purpose of explaining or contradicting the evidence adduced at the trial. *Smith* v. *Woodfine*, 1 C. B. (N.S.) 660.

In such an action, the court will not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives. *Ib.*

Quære, whether an affidavit made by the defendant, contradicting and explaining the evidence given at the trial, can be properly used in support of an application on his behalf for a new trial. *Berry* v. *Da Costa*, supra.

7. Jactitation of Marriage.

Who may institute Suit.]—A suit of jactitation of marriage can only be instituted by one of the parties to the pretended marriage. *Campbell* v. *Corley*, *Campbell*, *Ex parte*, 31 L. J., Mat. 60.

Defences.]—To a jactitation suit there are three defences available—a denial of the boasting, a fact of marriage, and acquiescence. *Bodkin* v. *Case*, Milward's Ir. E. C. 356.

Acquiescence.]—The court will not make a decree in favour of the petitioner in a jactitation suit if the petitioner has at any time acquiesced in the assertion of the defendant that the defendant was the husband of the petitioner. *Hawke* (*Lord*) v. *Corri* (2 Hagg. Cons. 280), discussed and approved. *Thompson* v. *Rourke*, 62 L. J., P. 46; [1893] P. 70; 1 R. 501; 67 L. T. 788—C. A.

Trial by Jury—Undefended Suit.]—It is not the practice of the court to order a suit of jactitation of marriage to be tried by a jury if the defendant has put in no defence. *Thompson* v. *Rourke*, 61 L. J., P. 132; [1892] P. 244; 67 L. T. 137—C. A.

8. Marriage Brocage.

Injunction against Enforcing Note or Bond.]—Where plaintiff gave defendant a note for undertaking to procure him a marriage, and the fact was supported by affidavit, the court made an order upon the defendant to keep the note in his possession, and not assign or indorse it, but would not extend the injunction to prevent his proceeding at law. *Smith* v. *Aykewell*, 3 Atk. 566.

Bill of exchange given on marriage brocage consideration; injunction was granted to prevent proceeding on it in hands of indorsee, under the circumstances. *Cotton* v. *Cattlyn*, 2 Eq. Abr. 525.

Bond on procuring marriage declared void against one who had married obligee, though she had no provision. *Goldsmith* v. *Bruning*, 1 Eq. Abr. 90.

A bond, given as remuneration to obligee for having assisted obligor in effecting an elopement and a marriage without consent of the friends of the wife, declared void, though given voluntarily after the marriage, and without any previous agreement for the same. *Williamson* v. *Gihon*, 2 Sch. & Lef. 357.

Demurrer to bill of discovery in support of an action to recover the expenses of entertainment given by the plaintiff, under an agreement with the defendant to introduce him to a woman of fortune, with a view of marriage, allowed. *King* v. *Burr*, 3 Mer. 693.

A marriage brocage bond decreed to be delivered up, and a gratuity of fifty guineas, actually paid, to be refunded. *Smith* v. *Bruning*, 2 Vern. 392.

A., under a pretence that B. was instrumental in procuring a beneficial marriage for C., obtains a bond from C. to B. for 1,000 guineas as a reward for his services. The bond is paid when due, but in nine years afterwards C. discovers the whole to be a gross imposition in A., and that he received all the money. On a bill brought, A. was decreed to repay C. the whole money with interest and costs. *Booth* v. *Warrington* (*Earl*), 4 Bro. P. C. 163.

Lease set Aside.]—Tenant in tail made a lease to A., in consideration of his procuring a marriage between the lessor and a lady of fortune:—Held, that the consideration was fraudulent, and the lease accordingly set aside. Decree of the Court of Chancery, dismissing the bill for relief against the lease, reversed. *Scribblehill* v. *Brett*, 4 Bro. P. C. 144.

Lease granted by tenant in tail, in consideration of procuring a match, set aside at the suit of the remainderman. *S. C.*, 2 Vern. 446; Pre. Ch. 165.

Marriage brocage bond decreed to be delivered up, the marriage being had without the consent of the woman's parents. Such bonds not to be countenanced. *Drury* v. *Hooke*, 1 Vern. 442; 2 Ch. Ca. 176. S. P., *Arundel* v. *Trevillian*, 1 Ch. Rep. 87.

Bond given to the wife's father in order to obtain his consent to the marriage of his daughter, to repay part of the portion if the daughter dies without issue, where the daughter was entitled to her portion by a collateral ancestor. Bond set aside as a marriage brocage

bond. *Keat* v. *Allen*, 2 Vern. 588. *Anon.*, Pre. Ch. 267.

Compromise.]—Bond by infant for a just debt. His mother and infant sister (being entitled on death of A. without issue to 4,000*l.* stock for the mother for life, after to her children, according to appointment, if no children to the mother) after death of the son covenanted to pay that debt when either should become entitled to that stock. Upon marriage of the daughter, the mother made an appointment of the stock in her favour; but next day, the husband having notice of and approving the covenants to pay the son's debt, and his reciting his and his wife's intention to secure it as hereafter mentioned, released all their right to that stock to the mother, and covenanted, that when the wife should be twenty-one, all their interest should be vested in her; and a trust was declared, that if the obligee should have a right to recover that debt, it should be paid out of that stock. Afterwards, a bill was filed to set aside the settlement as an appointment by the mother for her own benefit without consideration, the parties were, by agreement, mutually released from the covenant in it; and the husband covenanted, that if the obligee should have a right in life of the mother to recover the debt, it should be paid out of the stock. The mother died intestate before A. Determined that a fair assignee of the debt had no specific lien on the fund, which could be liable only by being brought back into the mother's assets, as taken out in fraud of her creditors; for which it must be said either that there was no pretence for the compromise, or that no pretence for its providing for the debt only, if suable in the mother's life; but the marriage brocage in the settlement was sufficient ground for the compromise, and the bill did not go on the other ground. Therefore, the common decree for account of assets, debts, and funeral expenses, without reference to that fund, was made against the husband and wife, as administrators. The debt of the son was sufficient consideration for the covenants: and if the mother had survived A. there would have been a specific lien. *Johnson* v. *Boyfield*, 1 Ves. J. 314.

9. Collusive and Underhand Agreements Respecting.

Frauds on Settlements.]—A. made an absolute conveyance of lands to B. and his heirs, in consideration of 1,500*l.*, which was at that time the full value; but on the next day B. executed a defeasance, declaring that if A. or his heirs should, within sixteen years, pay B. the 1,500*l.*, the conveyance should be void. B. entered and enjoyed the lands; and about three years afterwards made a settlement thereof upon his marriage, and to this settlement A. was privy, but took no notice of the defeasance, or even attempted to refute the general opinion, that B. was the sole and absolute owner of the lands. After B.'s death, A. set up the defeasance, and filed a bill to redeem, to which the son and heir of B. pleaded the purchase deeds and marriage settlement of his father:—Held, that the intent of the conveyance being to enable B. to obtain a marriage, and a considerable portion, such intention was fraudulent, and therefore a perpetual injunction was awarded against A. to stop all further proceedings under the defeasance. *Webber* v. *Farmer*, 4 Bro. P. C. 170.

Underhand agreement to defeat an agreement made on marriage set aside as fraudulent. *Peyton* v. *Bladwell*, 1 Vern. 240.

A disposition in fraud of a covenant in marriage articles, to give a fourth part of the covenantor's real and personal estate at the time of his death rescinded. *Gregor* v. *Kemp*, 3 Swan. 404.

Bond given as a reward for using influence over another's estate for benefit of the obligor, decreed to be delivered up without costs. Bonds in fraud of marriage agreements set aside on public policy. *Debenham* v. *Ox*, 1 Ves. 277.

Upon a treaty of marriage between A. and B., the mother of A. being entitled to one-third of a farm and stock of which A. was in possession represented to the father of B. that the farm and stock belonged to A., and that A. was not indebted to anybody. The mother afterwards takes a bond from A. for the amount of her one-third part of the farm and stock, &c., which were settled on the marriage. Equity will relieve A. and B. against that bond, as being a fraud upon the marriage. Quære, whether the wilful concealment by a creditor of his debt (otherwise good) from the parent of a woman upon a treaty of marriage between her and the debtor is alone sufficient to vitiate the debt. *Scott* v. *Scott*, 1 Cox, 366.

An obligation procured from an infant by the father of his intended wife in fraud of marriage articles publicly agreed to by infant and his friends is absolutely void. *Morisone* v. *Arbuthnot*, 8 Bro. P. C. 247.

A son on his marriage is to have 3,000*l.* portion with his wife, and privately, and without notice to his parents who treated for the marriage, gives a bond to the wife's father to pay back 1,000*l.* of the portion seven years afterwards. This bond void in equity, and will not be made better by being assigned to creditors. *Turton* v. *Benson*, 1 P. Wms. 497; 2 Vern. 764; Pre. Ch. 522; 10 Mod. 455; 1 Stra. 240.

—— **Secret Indemnity.**]—The brother adds 160*l.* to his sister's portion, to make it up the sum desired, but takes a bond from her privately to repay it. The husband and wife both die. Bond put in suit by administrator. Bond to be delivered up as fraudulent. *Gale* v. *Lindo*, 1 Vern. 475.

A mother, having the right of dower, to encourage the marriage of her son to A. B., releases her dower, and shows the release to the wife and her relations. It shall bind the mother, though the release was obtained by a fraudulent suggestion. *Beverley* v. *Beverley*, 2 Vern. 133.

A widow, on the marriage of her son, agrees to release her jointure, that he might make a settlement, and the son privately agrees to assign a leasehold estate to his mother. This agreement of son's set aside as fraudulent. *Lamlee* v. *Hanman*, 2 Vern. 466.

Bond given to refund part of portion without father's privity is void. *Kemp* v. *Coleman*, 1 Salk. 156.

Settlement of jointure by father upon marriage of son. Bond of indemnity of same date, by son to father, is void as a fraud on contract. *Palmer* v. *Neave*, 11 Ves. 165.

Parent's Consent.]—Bond given to the wife's father in order to obtain his consent to the marriage of his daughter, to repay part of the portion if the daughter dies without issue, where the

daughter was entitled to her portion by a collateral ancestor. Bond set aside as a marriage brocage bond. *Keat* v. *Allen*, 2 Vern. 588; *Anon.*, Pre. Ch. 267.

Where parent had objected to daughter's marriage with an individual, and she entered into a secret bond to forfeit 500*l.* if she did not marry him in thirteen months after parent's death; on her application for relief against bond, decreed that it should be cancelled, such a transaction being encouragement to disobedience and fraud on parents. *Woodhouse* v. *Shepley*, 2 Atk. 535.

Though a parent has no power to prevent the marriage of his child, yet his consent is expected, and by the laws of some countries necessary. *Id.* 539.

The above transaction, compared to the cases of bonds given before marriage, to return a part of the portion, where the fraud was not between the contracting parties, but on the parents of one of them, who, being deceived in this respect, has induced the court to set aside such bonds. *Ib.*

Upon a treaty of marriage between A. and the daughter of B.; A. being indebted 200*l.* by bond, B. would not consent to the match; to remove which objection, the brother of A. takes up A.'s bond and gives his own in the room of it, and privately (the daughter of B. being privy to it) takes a counter-bond from his brother to indemnify him. A. dies, the wife administers and is relieved against this counter-bond, though a party to the fraud. A. himself might have been relieved against the counter-bond. *Redman* v. *Redman*, 1 Vern. 348.

Covenant to Release Wife's Guardian.]—Covenant before marriage to release wife's guardian within two days after, of all accounts of mesne profits, set aside in equity. *Hamilton (Duke)* v. *Mohun (Lord)*, 1 Salk. 158; 1 P. W. 118; 2 Vern. 652; 2 Bro. P. C. 239.

Making Good Misrepresentation.]—Injunction granted to restrain defendant from recovering a demand from one of the plaintiffs, he having represented to the agent of the other plaintiffs, on a treaty of marriage with his daughter, that there was no such demand existing. *Neville* v. *Wilkinson*, 1 Bro. C. C. 543.

Material representations of circumstances of party contracting marriage, directed to be made good, even at the instance of parties concerned in fraudulently defeating such misrepresentations. *De Manneville* v. *Crompton*, 1 Ves. & B. 355.

Creditor, at the desire of his debtor about to marry, gives in a false account of his demand to the father of the intended wife: after the marriage the creditor is bound thereby as against the debtor. *Eastabrook* v. *Scott*, 3 Ves. 460.

Fraudulent Assignment.]—A., already married, performed the ceremony of marriage with W., and joined with her in executing an assignment of her life interest in a trust fund to purchaser, B. The fraud practised upon W. by A. did not affect the validity of the assignment, nor was it necessary to make A. a party to suit by B., to obtain the benefit of the assignment. *Sturge* v. *Starr*, 2 Myl. & K. 195.

Children not Affected by Fraud of Father.]—In cases of frauds on marriage, though the husband be a party to such fraud, yet his interest cannot be affected if either wife or child (who is an object of such settlement) be living. *Thompson* v. *Harrison*, 1 Cox, 345.

Parent not Necessary Party.]—The parent is not a necessary party to a suit to set aside a deed fraudulent on marriage, but is a competent witness to prove the fraud, on a bill filed by the husband and wife. *Id.* 367.

Treaty on Second Marriage of Father.]—A. treats for the marriage of his son, and in the settlement on the son there was a power reserved to the father to jointure any wife whom he should marry in 200*l.* per annum, paying 1,000*l.* to the son. The father treating about marrying a second wife, the son agreed to the second wife's relations to release the 1,000*l.*, and did release it, but took a private bond from the father for the payment of this 1,000*l.* Equity would not set aside this bond, because it would be injurious to the first marriage, which, being prior in time, was to be preferred. *Roberts* v. *Roberts*, 3 P. Wms. 66.

Other Matters.]—A., being a widow, gives a bond to pay B. 100*l.* if she marry again, and B. gives a bond to the widow to pay her executors the like sum if she should not marry again. The widow soon after marries. Her bond decreed to be delivered up. *Baker* v. *White*, 2 Vern. 215.

Bond by husband to leave wife so much beyond her jointure is good. *Gifford* v. *Gifford*, 1 Eq. Abr. 89.

A power to jointure having been executed under an agreement that the creditor of the husband should have part of the jointure, the appointment was set aside as far as the creditors were to benefit. *Lane* v. *Page*, Ambl. 233.

Bond to marry or obtain money established at law, but injunction granted till hearing, on ground of public policy, being an engagement upon expectations under will of third person, though not a relation, from whom it was kept secret, to marry at his death, and no mutual obligation. *Cock* v. *Richards*, 10 Ves. 429.

Though a husband have imposed on a wife by giving her a bond void at law, yet the court will establish the agreement according to the intention of the parties. *Watkyns* v. *Watkyns*, 2 Atk. 97.

Bond in common form for payment of money, but proved that the agreement was that the obligor should marry such a man, or should pay the money due on the bond, court relieved against the bond. *Key* v. *Bradshaw*, 2 Vern. 102.

Marriage a Valuable Consideration.]—Marriage is a valuable consideration. *Churchman* v. *Harvey*, Ambl. 340.

Marriage is alone a sufficient consideration for an agreement. *Marsh, Ex parte*, 1 Atk. 158.

10. Status of Wife—Generally.

a. Control of Husband over Person of Wife.

Where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights. *Reg.* v. *Jackson*, 60 L. J., Q. B. 346; [1891] 1 Q. B. 671; 64 L. T. 679; 39 W. R. 407; 55 J. P. 246.

Where there is a restraint of personal liberty of a feme covert, the court, in favourem libertatis, will grant a habeas corpus directed to the husband to bring up the body of his wife. *Cochrane, In re*, 8 D. P. C. 630; 4 Jur. 534.

The husband has, by the common law of England, a right to the custody and control of his wife; she is under his guardianship, and he is entitled to prevent her from indiscriminate intercourse with the world by enforcing cohabitation and a common residence; therefore, when a wife appears at masked balls unprotected by the presence, and without the permission of her husband, he has a right to restrain her from the power to frequent such places. *Ib.*

A husband, in order to prevent his wife eloping, with a view to live apart from him against his will, may legally confine her in his own dwelling, and deprive her of her liberty for an indefinite time, using no hardship or unnecessary restraint. *Ib.*

The court will not grant a habeas corpus to bring up the body of a feme covert, on an affidavit that she is desirous of disposing of her separate property, and that her husband will not admit the necessary parties to see her; and that she is confined by illness, and not likely to live long; nor will they, under such circumstances, grant a rule to show case why the necessary parties should not be admitted to see her; for, if there is no restraint of personal liberty, the matter is only cognisable in a court of equity. *Rex* v. *Middleton*, 1 Chit. 654; 22 R. R. 826.

Where there are articles of separation, the wife may have a habeas corpus, if her husband confines her. *Vane's (Lord) Case*, 13 East, 173, n.; 12 R. R. 317.

The court will not deliver a wife to her husband who has used her ill. *Rex* v. *Brook*, 4 Burr. 1991.

Where a wife is, by her own desire, living apart from her husband, and is under no restraint, the court will not grant a habeas corpus on the application of the husband, for the purpose of restoring her to his custody. *Reg.* v. *Leggatt*, 18 Q. B. 781. *S. C.*, nom. *Sandilands, Ex parte*, 21 L. J., Q. B. 312; 17 Jur. 317.

But a husband being, until guilty of cruelty, or until judicial separation, entitled to the custody of his wife, and to detain her if she desires improperly to leave him, a habeas corpus obtained on her behalf against him will be discharged in such a case. *Price, In re*, 2 F. & F. 263.

On a motion for a habeas corpus to a private person on the application of a husband, to bring up the body of his wife, the affidavit must state that she is detained against her will. *Rex* v. *Wiseman*, 2 Smith, 617; 8 R. R. 724.

Attorney—No Power to Appoint.]—A feme covert cannot appoint an attorney. *Oulds* v. *Sansom*, 3 Taunt. 261.

Managing Legal Proceedings on Behalf of Husband.]—The wife of a plaintiff cannot claim to manage the cause for him at nisi prius, he being absent and in custody. *Cobbett* v. *Hudson*, 15 Q. B. 988.

In an application directly concerning his liberty, as a motion for a habeas corpus, the wife may be heard on behalf of her husband. *Ib.*

Guardian ad litem of Infant—Next Friend.]—Notwithstanding the Married Women's Property Act, 1882, a married woman is still incompetent to act as next friend or guardian ad litem. *Somerset (Duke), In re, Thynne* v. *St. Maur*, 56 L. J., Ch. 733; 34 Ch. D. 465; 56 L. T. 145; 35 W. R. 273.

Nuisance—Action for.]—A bill was filed by a married woman in respect of her separate property, alleging a nuisance by reason of a noisy trade, which destroyed her rest, and depreciated the value of her property. The evidence as to the nuisance was conflicting, and no action had been brought. Semble, that in respect of the mere personal nuisance the wife could not sue alone; and that as to mere depreciation of her property she could not maintain a bill, as that would not amount to nuisance. *White* v. *Cohen*, 1 Drew. 312.

Loss of Consortium of Husband.]—A married woman cannot maintain an action for being deprived of the society of her husband by the slander of another upon her character, though the husband deserts her in consequence. *Lynch* v. *Knight*, 9 H. L. Cas. 577; 5 L. T. 291.

Homine Replegiando.]—A wife cannot, either by herself or her prochain ami, bring a homine replegiando against her husband. *Atwood* v. *Atwood*, Pre. Ch. 492.

Criminal Proceedings—Wife against Husband—Defamation.]—A wife could not before and cannot since the Married Women's Property Acts take criminal proceedings against her husband for defamatory libel. *Reg.* v. *London Corporation*, 55 L. J., M. C. 118; 16 Q. B. D. 772; 54 L. T. 761; 34 W. R. 544; 16 Cox, C. C. 81; 50 J. P. 614.

—— **Husband taking Wife's Money.**]—It is no offence for a husband to take his wife's money while they are living together; sed aliter while they are living apart. *Lemon* v. *Simmons*, 57 L. J., Q. B. 260; 36 W. R. 351.

Domicil of Wife, As to.]—*See* INTERNATIONAL LAW.

b. Contractual Capacity of Wife.

i. *Since Married Women's Property Act*, 1882. *See* col. 1054.

ii. *Where Wife Possessed of Separate Property.* *See* cols. 1022, 1095.

iii. *Where Wife not Possessed of Separate Property.*

a. Generally.

Promise during Coverture not Binding.]—A promise during coverture does not bind a wife; but if repeated after the husband's death it is a confirmation. *Smith* v. *French*, 2 Atk. 245. And see *Watson, Ex parte*, 16 Ves. 266.

Undertaking after Discoverture.]—As to the effect of feme covert's subsequent undertaking, when sole, to pay her bond, given during coverture; the creditor was left to law. *Lee* v. *Muggeridge*, 1 Ves. & B. 118.

Effect in Equity.]—Equity will not make good against a married woman a contract, on

which she cannot be sued at law. *Bolton (Duke)* v. *Williams*, 2 Ves. J. 156; 4 Bro. C. C. 297.

Agreement to Join Husband on Levying Fine.]—Where a feme covert agrees to join with her husband in making a surrender, or levying a fine, and he dies before it is done, equity will compel her to perform the agreement. Sed quære. *Baker* v. *Child*, 2 Vern. 61.

Joining with Husband in an Act.] — How far wife by joining with husband in any act can bind herself. *Hody* v. *Lun*, 1 Rol. Abr. 375; 1 Eq. Abr. 61.

Contract not to have Cause Reheard.]—An heiress-at-law being a married woman cannot contract not to have a cause reheard, nor can she, by her conduct, be in any way bound, nor can her consent inserted in an order establishing a will in any way prejudice her right. Petition of rehearing restored to the file. Decree varied, by striking out the consent of the heiress-at-law and adding words reserving to her if she should survive her husband, and to her heirs if she should die in his lifetime, the right to dispute the will; but although the will was inoperative against the heiress-at-law to bind her inheritance, it was conclusive as against the husband, as tenant by the curtesy, to the extent of his estate; the decree being, in fact, a bargain that all his and his wife's costs, to which he was alone liable, should be costs in the cause, he agreeing that they would no longer dispute the wlll. *Turner* v. *Turner*, 2 De G. M. & G. 28; 21 L. J., Ch. 422. Varying 15 Jur. 711.

Compromise of Suit against Trustee.]—The court has jurisdiction to sanction on behalf of a married woman a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which she has a reversionary interest. *Wall* v. *Rogers*, *Wall* v. *Ogle*, 39 L. J., Ch. 204; 381; L. R. 9 Eq. 58; 21 L. T. 654.

De facto Wife—Execution of Deed.]—If a woman married de facto to one whom she knows to have another prior wife, executes a deed as his wife jointly with him, she is bound as a feme sole. *Anstie* v. *Mason*, 3 Anstr. 833.

Agreement to leave Land.]—Parol agreement by feme whilst sole, that if she died without issue, she would leave her heir-at-law the land, or 500*l*. Agreement decreed to be executed. *Goilmere* v. *Battison*, 1 Vern. 48.

Acknowledgment of Wife's Deposit by Husband.]—Where a wife made deposit as security on part of husband without his knowledge, but he subsequently acknowledged it as proper; from fraudulent conduct on part of husband, court would not decree deposit back again. *Naish* v. *East India Co.*, 2 Comb. 462.

Wife living Separate from Husband—Property in Goods Supplied in Tradesman.]—A tradesman supplying a married woman, living apart from her husband, with furniture upon hire, does not thereby divest himself of the property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract; and therefore if the sheriff take such goods in execution at the suit of the husband's creditor, trover lies by the tradesman. But if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine the contract given to the sheriff's officer, and not to the other contracting party, would not be sufficient to determine the contract. *Smith* v. *Middlesex* (*Sheriff*), 15 East, 607.

Plea of Payment to Wife, Effect of.]—To an action for work done and attendance given, by the wife of the plaintiff for the defendant, the latter pleaded payment to the wife, without averring that she had authority to receive it:—Held, bad. *Offley* v. *Clay*, 2 Scott (N.R.) 272; 2 Man. & G. 172; 4 Jur. 1203.

b. With Husband.

a. Ante-Nuptial.

Bond to secure Conveyance on Marriage.]—Feme gives a bond to her intended husband, that in case of their marriage she will convey her lands to him in fee. They marry, the wife dies without issue, and then the husband dies: the bond, though void in law, is yet good evidence of an agreement in equity, and the heir of the husband shall obtain specific performance against the heir of the wife. *Cannel* v. *Buckle*, 2 P. Wms. 243. And see *Acton* v. *Pearce*, 2 Vern. 480.

Covenant with Intended Wife—Effect on Marriage.]—A man covenants with his intended wife, that she should have power to dispose of 300*l*. of her estate; whether the marriage discharges the covenant, quære. *Fursor* v. *Penton*, 1 Vern. 408. And see *Darcy* v. *Chute*, 1 Ch. Ca. 21.

Covenant to pay Woman Annuity—Marriage—Suspension of Right.]—A man covenanted to pay a woman an annuity for her life, payable half-yearly, for her separate use, and free from anticipation. The covenantor afterwards married the annuitant, and died leaving her surviving:—Held, that the annuity was not extinguished, but only suspended by the marriage, and that the widow was entitled to recover arrears accrued subsequently to the death of her husband. *Fitzgerald* v. *Fitzgerald*, 5 Moore, P. C. (N.S.) 180; 37 L. J., P. C. 44; L. R. 2 P. C. 83.

Intending Husband paying off Wife's Mortgages.]—Previously to a marriage then in contemplation, the intending husband, by his agent, paid off two equitable mortgage debts of the intended wife, secured by a deposit of title-deeds belonging to her. He did this apparently to save the expense of a legal mortgage, which would otherwise have been required by the mortgagees. The title deeds still remained in the custody of the mortgagees. The marriage was solemnised; there was no settlement, or agreement for a settlement. There was no issue of the marriage; the husband predeceased the wife, intestate. His widow took out administration to him:—Held, that the husband did not intend to make a gift to the wife of the money which he had paid for her, and that the debt still existed on the security of the equitable mortgage in favour of the personal estate of the deceased husband. *Gooch* v. *Gooch*, 15 Jur. 1166.

Executrix marrying Obligor of Bond.]—Plaintiff being an executrix, and the residuary legatee of her former husband, lent 100*l.* to A. and B., and took a note for it in her own name, and a bond in a trustee's name, and afterwards married B., one of the obligors; the bond is not extinct. *Cotton* v. *Cotton*, 2 Vern. 290; 2 Ch. Rep. 138; Pre. Ch. 42.

β. Post-Nuptial.

Power of Wife to Contract.]—A wife can contract in respect of her separate estate with her husband; and if she hands him money, part of the income of her separate estate, upon a contract of loan, she may sue him upon that contract. *Woodward* v. *Woodward*, 3 De G. J. & S. 672; 9 Jur. (N.S.) 882; 8 L. T. 749; 11 W. R. 1007.

A wife can contract with her husband whenever the circumstances sufficiently show that she can form an independent judgment, totally free from his control; but such capacity is limited to contract in relation to the circumstances which enable her to be thus independent. *Vansittart* v. *Vansittart*, 4 Kay & J. 63; 27 L. J., Ch. 222; 4 Jur. (N.S.) 276; 6 W. R. 238. Affirmed 2 De G. & J. 249; 27 L. J., Ch. 289; 4 Jur. (N.S.) 519; 6 W. R. 386—L.JJ.

The capacity of the wife to contract with her husband is not confined to the case where she has separate estate, and contracts in reference to it. *Ib.*

Therefore, where a wife has instituted a suit in the ecclesiastical court for a divorce, an agreement between the husband and wife alone for the compromise of the suit will be supported, provided it contains no stipulations which the court cannot enforce. *Ib.*

But where an agreement for the compromise of a suit for a divorce, provided that the wife should have the custody of two of the children, and should educate them in a particular manner, the first part of such provision being contrary to public policy, and the latter incapable of being enforced against the wife, a demurrer to a bill filed by her for specific performance was allowed. *Ib.*

A wife's disability to contract with her husband ceases when she is in such relations of antagonism towards him, separation from him, and independence on him, as negative the general presumption of submission to his control, which, in the absence of prescribed safeguards, nullifies her acts, because they are supposed to be wanting in spontaneity and freedom. *Cahill* v. *Martin*, 7 L. R. Ir. 361.

—— **Without Intervention of Trustee.**]—A husband and wife having taken out cross-summonses against each other for assaults, entered into a verbal agreement with each other to withdraw the summonses and to live apart, the husband allowing the wife a weekly sum for maintenance, and the wife indemnifying the husband against any debts she might contract. An action having been brought in the county court by the wife against her husband for six weeks' arrears of maintenance under the agreement:—Held, that the husband and wife had power to contract, without the intervention of a trustee, to live apart, in consideration of their agreeing not to take legal proceedings against one another, and that the action was maintainable. *McGregor* v. *McGregor*, 57 L. J., Q. B. 591; 21 Q. B. D. 424; 37 W. R. 45; 52 J. P. 772—C. A. Affirming 58 L. T. 227. And see *Moore* v. *Freeman*, Bunb. 205; and *Freeman* v. *Moore*, 1 Bro. P. C. 237.

Evidence of Agreement.]—Husband receiving proceeds of a sale of wife's estate, and promising by a note or receipt to lay it out pursuant to to trust relative to other property; this note held evidence of the agreement antecedent to the sale, and estates purchased afterwards by the husband were held to be bound. *Att.-Gen.* v. *Whorwood*, 1 Ves. 534.

Release by Wife—Specific Performance of.]—A married woman was entitled by an antenuptial settlement to a jointure real-charge after her husband's death secured upon his real estates in Ireland. The wife having left him, the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up and signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification that no further steps were to be taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise and was executed by the husband, but the wife refused to execute it or to return to her husband, and the husband afterwards died:—Held, that the wife was not, when she signed the document, in all respects in the same position as a feme sole, and that even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4, c. 92, ss. 68, 71; and that specific performance of the agreement to release her jointure could not be decreed against her. *Hunt* v. *Hunt* (4 De G. F. & J. 221) and *Besant* v. *Wood* (12 Ch. D. 605) commented on by the Earl of Selborne, L. C. *Cahill* v. *Cahill*, 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861—H. L. (Ir.)

Agreement as to Separate Property.]—Husband and wife agree that the property settled to her separate use, and also her contingent reversionary interest, in the event of her surviving him, shall be paid to the husband, the agreement carried into execution by decree of this court. *Ellis* v. *Atkinson*, 3 Bro. C. C. 565. But see *id.* n.

Bond by Husband to leave to Wife.]—Bond by husband to leave wife so much beyond her jointure is good. *Gifford* v. *Gifford*, 1 Eq. Abr. 89.

Annuity in Consideration of Discontinuance of Cohabitation.]—A contract to grant an annuity, in consideration of the discontinuance of cohabitation, and of the release of an alleged promise of marriage can be enforced in equity. *Keenan* v. *Handley*, 2 De G. J. & S. 283; 10 Jur. (N.S.) 905; 10 L. T. 800; 12 W. R. 1021.

Loan by Deceased Wife's Sister to Cohabiting Trader.]—A trader lived with his deceased wife's sister as her husband. In 1858 she received a legacy of 3,000*l.*, which she handed over to him upon an agreement that the money should be advanced and used by him in his business

but that as to 2,000*l.* he should be a trustee for her, and a settlement should be executed to carry out that agreement. The money was accordingly used by him in his business, but no settlement was ever executed. The trader having gone into liquidation in 1876:—Held, that inasmuch as by its primary destination under the agreement the fund was to be and was used in the business, no trust could be imposed upon it to the disadvantage of the creditors, and the wife could not prove in the liquidation for any part of it. *Corbidge, Ex parte, Beale, In re*, 46 L. J., Bk. 17; 4 Ch. D. 246; 35 L. T. 768; 25 W. R. 324.

The course is not to establish a deed between husband and wife on her separate estate without the presence of the wife in court, where the trustees put the parties to file a bill. *Milnes* v. *Bush*, 2 Ves. J. 500. *And see* cols. 1054, 1266.

c. Right of Voting.

Municipal Corporation.]—By 32 & 33 Vict. c. 55. s. 9, women are entitled to vote in the election of councillors, auditors, and assessors of municipal corporations.

Neither at common law, nor by statute, are women entitled to vote at parliamentary elections. *Charlton* v. *Lings*, 38 L. J., C. P. 25; L. R. 4 C. P. 374; 19 L. T. 534; 17 W. R. 284; 1 Hopw. & C. 1.

There is no provision in the Municipal Franchise Act (32 & 33 Vict. c. 55), or in the Married Women's Property Act (33 & 34 Vict. c. 93), which enables a married woman to be placed on the burgess roll and to vote at the election of town councillors. *Reg.* v. *Harrald*, 41 L. J., Q. B. 173; L. R. 7 Q. B. 361; 26 L. T. 616; 20 W. R. 328.

d. Other Matters.

Municipal Councillor.]—A woman is not a "fit" person under the Municipal Corporation Act, 1882, to be a town councillor. *Hope* v. *Sandhurst (Lady)*, 58 L. J., Q. B. 316; 23 Q. B. D. 79; 61 L. T. 150; 37 W. R. 548.

Sexton.]—A woman is capable of being elected to the office of sexton, and may vote at the election of a candidate for such office. *Olive* v. *Ingram*, 7 Mod. 263; 2 Strange, 1114.

Governor of Workhouse.]—A married woman may be appointed governor of a workhouse, and may act by deputy. *Anon*, 2 Ld. Raym. 1014.

Overseer.]—And may be appointed an overseer of the poor. *Rex* v. *Stubbs*, 2 Term Rep. 395; 1 R. R. 503.

Deserting Children not Punishable as Vagrant.]—The provisions contained in 5 Geo. 4, c. 83, s. 4, with reference to persons absconding, and leaving their children chargeable to a parish, do not apply to a wife who has been deserted by her husband, and has not the means of supporting them. *Peters* v. *Cowie*, 46 L. J., M. C. 177; 2 Q. B. D. 131; 36 L. T. 107. *But see* 45 & 46 Vict. c. 75, s. 21.

Estoppel.]—A feme covert cannot be estopped by her own act. *Parker* v. *Manning*, 7 Term Rep. 539.

If a woman married de facto to one whom she knows to have another wife, executes a deed as his wife jointly with him, she is bound as a feme sole. *Anstie* v. *Mason*, 3 Anst. 833.

But a woman who has declared herself to be a feme sole, and as such has executed deeds, and maintained actions, if herself sued as a feme sole, is not estopped from setting up the defence of coverture. *Davenport* v. *Nelson*, 4 Camp. 26. And see *Bateman* v. *Faber*, 66 L. J., Ch. 721; [1897] 2 Ch. 223; 77 L. T. 71; 46 W. R. 151.

Infant Widow—Funeral Expenses of Husband.]—An infant widow is liable to pay for her deceased husband's funeral expenses. *Chapple* v. *Cooper*, 13 M. & W. 252; 13 L. J., Ex. 286.

Judgment confessed to Feme covert.]—A judgment confessed to a feme covert is void, and so is her bond. *Roberts* v. *Pierson*, 2 Wils. 3.

But a judgment confessed to a feme covert as if a feme sole, is not void. *Haydon* v. *Shearman*, 4 Ir. C. L. R. 169.

11. Restitution of Conjugal Rights.

a. Demand.

Notice or Demand prior to Citation—Form of Notice.]—The written demand for cohabitation and restitution of conjugal rights required to be made before commencing proceedings upon the party to be cited need not be made by the petitioner himself, and therefore where it was made by the petitioner's solicitor at the petitioner's request, such demand is sufficient. Though no hard and fast rule can be laid down as to the form of such demand, yet, as a general rule the demand should be conciliatory in its tenour, and therefore where there had been no previous friendly negotiations on the subject, a demand for the restitution of conjugal rights couched in the form of a formal lawyer's letter, is not a compliance with the true meaning of r. 175 of the rules in divorce causes. *Field* v. *Field*, 58 L. J., P. 21; 14 P. D. 26; 59 L. T. 880; 37 W. R. 134—C. A.

Written Demand for Cohabitation—Form.]—In a petition by a wife for restitution of conjugal rights it appeared that after eleven years' separation, and before filing the petition, she addressed a letter to her husband expressing a desire to return to cohabitation, and demanding restitution of conjugal rights, and threatening to commence legal proceedings in case of refusal. The husband acknowledged the receipt of his wife's letter, but refused to receive her back:—Held, that the wife's letter was a sufficient demand within the meaning of r. 175 of the Additional Rules and Regulations, 1875, and that she was entitled to a decree for restitution of conjugal rights. *Field* v. *Field* (14 P. D. 26) distinguished. *Smith* v. *Smith*, 59 L. J., P. 9; 15 P. D. 47; 62 L. T. 237; 38 W. R. 276—C. A.

—— **Substituted Service.**]—Before a citation in a suit for restitution of conjugal rights is permitted to issue, the court must be satisfied by affidavit that a written demand for cohabitation and resitution of conjugal rights has previously been made by the petitioner on the party to be cited. Where it was shown that a wife petitioner had forwarded two such demands to her husband

through the post by registered letter, both of which had been returned unopened by the husband's solicitor, who subsequently refused to give the husband's address, or that of any third person through whom he might be communicated with, and it was also shown that the husband had left the country, the court made an order for substituted service of such demand upon the husband's solicitor. *Tucker, Ex parte*, 66 L. J., P. 65; [1897] P. 83; 77 L. T. 140; 45 W. R. 656. *And see* cols. 724, 725.

Upon the hearing of a suit for restitution of conjugal rights instituted by a wife, where, prior to the institution of any proceedings, friendly and conciliatory applications have been made by the petitioner to her husband, and a letter has been subsequently written by her solicitors, asking the respondent to take his wife back, and threatening proceedings in case of his refusal; and that letter followed by a formal and peremptory demand in writing, by the wife, upon his non-compliance with those requests for cohabitation:—Held, that, taken together, these demands for cohabitation constituted a sufficient compliance with the statute and r. 175. *Mason* v. *Mason*, 61 L. T. 304.

Evidence of Incontinence—Allowance.]—Evidence of alleged incontinence on the part of the petitioner for restitution of conjugal rights before marriage, with the view of showing that her child, born after marriage, was not the respondent's child, is inadmissible, on the ground of irrelevance to the issue. The court also refuse to consider, on the hearing of the petition for restitution of conjugal rights, any question as to the amount of allowance which the respondent should be ordered to pay to his wife, in the event of a decree of restitution being pronounced, and of his refusing to comply therewith. *Ib.*

b. Grounds for Resisting.

Delay in Presenting Petition—Decree—Practice.]—The court will not dismiss a petition for the restitution of conjugal rights solely on the ground of delay in presenting the petition. *Beauclerk* v. *Beauclerk*, 6 R. 657; 71 L. T. 376; 59 J. P. 8.

Separation Deed.]—An agreement to live separate is no answer or bar to a petition for restitution of conjugal rights. *Spering* v. *Spering*, 3 Sw. & Tr. 211; 32 L. J., Mat. 116; 9 L. T. 24; 11 W. R. 810.

Although a deed of separation is no bar to a suit for restitution of conjugal rights, it may be alleged, in answer to an allegation in the petition, that from the date of the deed the respondent has without just cause refused to cohabit with the petitioner. *Anquez* v. *Anquez*, 35 L. J., Mat. 93; L. R. 1 P. 176; 14 L. T. 635; 14 W. R. 972.

A covenant on the part of a husband in a separation deed, that it should be lawful for the wife to live separately and apart from him, and that he would not compel her to cohabit with him by any legal proceedings, is enforceable in equity by an injunction against proceedings in the divorce court for the restitution of conjugal rights. *Hunt* v. *Hunt*, 4 De G. F. & J. 221; 31 L. J., Ch. 161; 8 Jur. (N.S.) 85; 5 L. T. 412, 778; 10 W. R. 215.

By a deed of separation dated in December, 1862, husband and wife agreed to live separate and apart, the husband to allow the wife an annuity of 200*l.* for their joint lives and twelve months after the husband's death if the wife survived him. The trustee of the deed covenanted with the husband that the wife should not molest him, and that she should not seek to compel him to live with her again, or "bring any citation in the divorce court for the restitution of conjugal rights." The annuity had been duly paid. The wife commenced proceedings in the divorce court for a restitution of conjugal rights. Thereupon the husband filed a bill for an injunction to restrain the wife from further proceedings in the divorce court:—Held, that the wife ought to be restrained from further proceedings until the hearing, the deed not having been impeached—and an injunction was granted, with liberty for her to file a cross bill to impeach the deed, or as she would be advised without filing it in the name of a next friend. *Kitchin* v. *Kitchin*, 19 L. T. 674.

Where a deed of separation had been executed between a husband and wife who had continued to live apart, and the wife more than five years afterwards, by counterclaim to an action by the husband to enforce the deed, claimed as against him a judicial separation on the ground of alleged cruelty:—Held, that her right to judicial separation was barred by lapse of time and by the execution of the deed of separation. *Besant* v. *Wood*, 12 Ch. D. 605; 40 L. T. 445.

A married woman can contract to live apart from her husband, and the husband is entitled to come to the court to enforce specific performance of such a contract. A husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part. Where, in a separation deed, the husband had covenanted to allow an infant child to reside with the wife, and had subsequently concurred as next friend of the infant in a petition under the Infants Custody Act (36 Vict. c. 12) for the removal of the infant from the wife's custody, which had been ordered by the court:—Held, that this was a breach of the husband's covenant. Injunction granted to restrain the wife from suing for restitution of conjugal rights. *Ib.*

—— **Covenant not to Sue for.**]—An answer to a suit for restitution of conjugal rights alleged that the petitioner in a deed of separation covenanted not to compel or endeavour to compel the respondent to cohabit with him; and this averment was held irrelevant, and was struck out. *Hunt* v. *Hunt*, 32 L. J., Mat. 168.

In a suit for restitution of conjugal rights, the respondent moved for an injunction and stay of proceedings, upon affidavit showing that the petitioner was bound by deed not to institute such a suit:—Held, that such a defence must be alleged by plea, and afforded no ground for summary dismissal of the suit. *Marshall* v. *Marshall*, 48 L. J., P. 49; 5 P. D. 19; 39 L. T. 640; 27 W. R. 399.

Upon such defence being subsequently alleged by plea:—Held, that it was such an equitable plea as the divorce court since the Judicature Acts is bound to consider. *Ib.*

Held, also, that a wife is bound by a deed of separation, containing a covenant not to sue her husband for restitution of conjugal rights. Suit

instituted by her in violation of such a covenant dismissed. *Ib.*

A separation deed, executed by a husband and wife, containing a covenant by trustees for the wife not to sue her husband for the restitution of conjugal rights, is a bar to a suit by the wife for the restitution of conjugal rights. *Marshall* v. *Marshall* (5 P. D. 19) approved. *Clark* v. *Clark*, 54 L. J., P. 57; 10 P. D. 188; 52 L. T. 234; 33 W. R. 405; 49 J. P. 516—C. A.

The parties in a suit for restitution of conjugal rights had been living apart under a deed of separation by which the wife covenanted not to take any proceedings to compel her husband to cohabit with her. The husband, who had not fulfilled his covenant to pay his wife 200*l.* a year, did not appear in the suit. The court notwithstanding the covenant in the deed, granted the wife a decree of restitution. *Tress* v. *Tress*, 56 L. J., P. 93; 12 P. D. 128; 57 L. T. 501; 35 W. R. 672; 51 J. P. 504.

Return Unsafe—Former Suit.]—In a wife's petition for restitution of conjugal rights the husband's answer alleged all the circumstances and the evidence in a former suit for judicial separation, on the ground of her cruelty. It also alleged that he allowed her 260*l.* a year to live separately from him, and it set out at great length a series of subsequent acts tending to show her insanity. The court, on motion to reform the answer, directed all the particulars of the cruelty and the former suit to be struck out, and the fact of the suit simply to be pleaded. It also struck out the allegation of the allowance; and, as to the insanity, directed that only such facts should be pleaded as tended to show that it was unsafe for the husband to live with his wife. *Radford* v. *Radford*, 20 L. T. 279.

Dismissed Charges.]—A wife brought a suit for judicial separation against her husband by reason of his adultery, which was heard by the judge without a jury, and was dismissed. The husband subsequently petitioned for restitution of conjugal rights against the wife, who, in her answer, set out the identical charges which she had made against her husband in the prior suit:—Held, that it was not competent for her to plead the identical charges which had been in issue between the same parties in the former suit, and had been disposed of. *Sopwith* v. *Sopwith*, 2 Sw. & Tr. 160; 30 L. J., P. 131; 7 Jur. (N.S.) 554; 4 L. T. 256.

Impotence.]—When the wife pleads the impotence of her husband, the court will, upon her application, appoint medical inspectors to examine her. It is convenient that the same medical inspectors should examine both parties. *C.* v. *C.*, 32 L. J., Mat. 31.

The court refused to allow a jury in a suit by the husband for restitution of conjugal rights, the respondent having pleaded impotency of her husband, and prayed for a decree of nullity of marriage. *Ricketts* v. *Ricketts*, 35 L. J., Mat. 92; 13 L. T. 761.

Act not amounting to Legal Offence.]—In a wife's suit for restitution the husband's answer set out that she made his home uncomfortable and systematically aggravated him in order that he might commit some act of violence which would entitle her to a judicial separation, and that they had separated by mutual consent:—Held, that these statements were relevant and ought not to be struck out of the answer. *Woodey* v. *Woodey*, 31 L. T. 647; 23 W. R. 386.

It is no ground for dismissing a wife's suit for restitution of conjugal rights that she has been guilty of impropriety of behaviour not amounting to a matrimonal offence, nor yet that she has previously refused to permit conjugal intercourse. *Rippingall* v. *Rippingall and Delacour*, 24 W. R. 967.

According to the law of Ireland, desertion by the wife, even though wilful, is no bar to a suit by her for restitution of conjugal rights. *Manning* v. *Manning*, Ir. R. 7 Eq. 520.

Conjugal rights can be defeated only by acts sufficient to found a decree for a divorce. *Ib.*

Nothing can be pleaded in bar to a suit for restitution but what would entitle the respondent to a judicial separation. *Burroughs* v. *Burroughs*, 2 Sw. & Tr. 303; 30 L. J., Mat. 186; 7 Jur. (N.S.) 610; 4 L. T. 374; 9 W. R. 680.

In a suit for restitution of conjugal rights, the court could not reject, on demurrer, an answer which contains only facts which apparently do not constitute a case of legal cruelty. *Stace* v. *Stace*, 37 L. J., Mat. 51; 18 L. T. 740; 16 W. R. 1176.

Misconduct of Wife—Effect of Violence and Threats.]—Violent and uncontrollable temper, habitual intemperance, violent conduct in the presence of the husband's guests, assaults on him, acts or threats of violence and offensive language, and false and scandalous statements against his daughters, by which he was obliged to remove them from his house, acts of violence towards his servants—all tending to affect his health and social position—constitute a legal defence to a suit by a wife for restitution of conjugal rights. The court accordingly refused to set aside and amend the respondent's answer pleading them as vague, irrelevant, and raising immaterial issues but ordered the respondent to give particulars of the alleged violence, &c. Cruelty may consist of the aggregate of acts alleged in a pleading, and each paragraph need not allege an independent act of legal cruelty, sufficient in itself to warrant the relief sought. *D'Arcy* v. *D'Arcy*, 19 L. R., Ir. 369.

Adultery.]—In a wife's suit for restitution of conjugal rights, the husband pleaded that he had been induced to marry her on a false representation that she was pregnant by him; that she had, since their separation, committed adultery; and that he was not able to maintain her. The court ordered the first plea to be struck out, and allowed the second to stand. The charge of adultery is directed to be pleaded in the usual manner with particulars. *Green* v. *Green*, 21 L. T. 401.

A petition for restitution of conjugal rights, to which an answer has been filed charging adultery and praying for a judicial separation, is not a suit or proceeding "instituted in consequence of adultery," and therefore the evidence of the parties is admissible. *Blackborne* v. *Blackborne*, 37 L. J., Mat. 73; L. R. 1 P. 563; 18 L. T. 450.

A respondent in a suit for restitution of conjugal rights, who alleged adultery of the petitioner and prayed for a judicial separation, was examined in support of the charge of adultery, and a jury found that the petitioner was guilty of adultery. A decree of judicial separation was pronounced on that verdict. *Ib.*

Adultery by the wife may be pleaded by way of defence to a suit by her for restitution of conjugal rights. *Moore* v. *Moore*, 3 Moore, P. C. 84.

Withdrawal of Petition—Prayer for Judicial Separation.]—When an answer to a petition for restitution of conjugal rights contains a prayer for judicial separation, the respondent has a right to proceed and prove the allegations in the answer on which the prayer is founded, notwithstanding the withdrawal of the prayer for restitution by the petitioner. *Blackborne* v. *Blackborne*, supra.

Prayer for Restitution in Answer.]—A decree of restitution of conjugal rights is not the relief for desertion contemplated by 29 & 30 Vict. c. 32, s. 2; therefore a wife who filed an answer to a petition for dissolution of marriage, wherein she denied the adultery charged, and alleged desertion and wilful separation, was not allowed to add a prayer for restitution to the answer. *Drysdale* v. *Drysdale*, 36 L. J., Mat. 39; L. R. 1 P. 365; 15 L. T. 512.

Amendment of, after Delayed Demurrer.]—To a petition by a wife for restitution of conjugal rights, the answer of her husband pleaded previous desertion by her, and neglect of their children on her part, whereby one of them in particular had suffered greatly. To this answer the wife, after nearly four years, filed a demurrer, with the subsequent sanction of the judge of the court, who, by his order, reserved liberty to the husband to move to amend his answer. He having applied accordingly, such leave was refused him on the ground that the proposed amendments, either by themselves or in connexion with his original answer, did not set out any valid defence to the suit, as they contained no averment which would afford a foundation for a divorce à mensâ et thoro. The demurrer was subsequently allowed, and a decree for restitution pronounced, whereupon the husband having appealed:—Held, that, having regard to the circumstances of the case and the public interests, the three last-mentioned orders should stand discharged; that accordingly he should be at liberty to file his amended answer within one month; and that, with these declarations, the cause should be remitted to the court. *Manning* v. *Manning*, Ir. R. 7 Eq. 365—C. A.

Setting out Cause of Withdrawal.]—An answer, denying that the respondent withdrew from cohabitation without just cause, should state the cause of such withdrawal. If it does not, it is bad on demurrer; but the objection is waived by filing a replication. *Ward* v. *Ward*, 32 L. J., Mat. 120.

c. When Decree will be Granted.

The court will decree a restitution of conjugal rights in favour of a wife in every case where she has not been guilty of such misconduct as would entitle the husband to a decree for a judicial separation. *Yeatman* v. *Yeatman*, 16 W. R. 734. But as to enforcing, *see the* Matrimonial Causes Act, 1884, and col. 727.

Both Parties Guilty of Adultery.]—A wife brought a suit for divorce against her husband, by reason of his adultery; the husband recriminated her adultery, and the suit was dismissed on the ground that both parties were proved to have been guilty of adultery. The wife subsequently instituted a suit for restitution of conjugal rights. The husband brought in an allegation pleading in bar of her suit the previous suit and sentence:—Held, that the wife, by reason of her adultery (though the husband had also been guilty of adultery), could not sustain a suit for the restitution of conjugal rights. *Hope* v. *Hope*, 1 Sw. & Tr. 94; 27 L. J., Mat. 43; 4 Jur. (N.S.) 515; 6 W. R. 585.

A. sued B. (her husband) for restitution of conjugal rights. He pleaded in bar her adultery. A., in her replication, denied her adultery, and recriminated B.'s adultery. The admission of so much of A.'s replication as recriminated B.'s adultery was opposed:—Held, that the doctrine of compensatio criminis applied to a suit for restitution of conjugal rights; that A. was entitled to recriminate B.'s adultery; and that where both parties had been guilty of adultery, the court would, at the suit of one of them, make a decree for restitution of conjugal rights. *Seaver* v. *Seaver*, 2 Sw. & Tr. 665, App. II.

Desertion.]—When the court refused to decree a restitution of conjugal rights on the ground of desertion alleged in the answer, and proved in the evidence, it granted a decree for judicial separation prayed for by the respondent on the same ground. *Meara* v. *Meara*, 13 W. R. 50.

Cruelty—Judicial Separation.]—A wife persisted in bringing against her husband by word of mouth, and in letters written to members of his family and others, a charge of having committed an unnatural offence, the charge not being true nor believed by her to be true:—Held (Rigby, L.J., dissent.), that she had not been guilty of such cruelty as would entitle the husband to a decree for judicial separation: Held, also, by the whole court, that desertion of the wife by the husband in the circumstances was not desertion without cause entitling her directly to a decree for judicial separation; and that since the passing of the Matrimonial Causes Act, 1884, the court was not bound, on refusing the husband's claim for judicial separation, to grant the wife a decree for restitution of conjugal rights, and thus enable her to obtain a decree for judicial separation indirectly under section 5 of that Act. *Russell* v. *Russell* (No. 1), 64 L. J., P. 105; [1895] P. 315; 73 L. T. 295; 44 W. R. 213—C. A. Affirmed as to first point in H. L., see post, col. 745; as to second point, debated but not decided.

Conduct of Petitioner falling short of a Matrimonial Offence—Discretion of Court.]—In a suit for restitution of conjugal rights brought by a wife, where the respondent alleged that he was justified in leaving the petitioner on account of her misconduct, although such misconduct fell short of a legal matrimonial offence:—Held, that the effect of the decision in *Russell* v. *Russell* (supra) appears to be that in cases where the conduct of the petitioner has led to desertion by the respondent, and has amounted to sufficient cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the court is now empowered to refuse to pronounce a decree of restitution of conjugal rights, although such misconduct on the part of the petitioner may not be sufficiently grave to enable the respondent to obtain a

judicial separation. In the present case the court held that the misconduct alleged against the petitioner was not sufficiently serious to justify it in refusing to pronounce a decree of restitution. *Oldroyd* v. *Oldroyd*, 65 L. J., P. 113; [1896] P. 175; 75 L. T. 281.

Willingness to take Wife back.]—A wife having filed a petition for restitution of conjugal rights, the husband, in his answer, stated his willingness to take his wife home. The court refused to give directions as to the mode of trial, but ordered the matter to be adjourned into chambers, and that the respondent should file an affidavit in support of the averments in his answer. *Crothers* v. *Crothers*, L. R. 1 P. 568; 19 L. T. 661.

Cruelty Conditionally Condoned.]—In a husband's suit for restitution of conjugal rights, it was proved that he had been for several years since the marriage a habitual drunkard, but had not given way to intemperance for some twelve months previous to the filing of the petition, during which period he was without any pecuniary means. It was further proved that, while under the influence of drink, he had been repeatedly guilty of acts of violence towards his wife, not of a very serious character, but yet such as to create in her a constant apprehension of bodily injury, and as also to affect her health. The parties had had no matrimonial intercourse for nearly five years before the institution of the suit, but had occasionally resided together during the earlier portion of that time: latterly the husband, who had forfeited all his property by bankruptcy, had been supported by a weekly allowance paid by his wife to a third person, on the discontinuance of which the petition was filed:—Held, that the conduct of the husband amounted to legal cruelty, which had only been conditionally condoned by his wife; that his enforced sobriety could not be regarded as a proof of reformation; and that, as his wife's return to cohabitation would be attended with danger to her health and safety, his petition should be dismissed. *Ruxton* v. *Ruxton*, 5 L. R., Ir. 455—C. A.

Respondent Husband a Foreigner.]—Y., whose domicil of origin was Ireland, came over to England when a minor, for the purpose of receiving a military education, obtained a commission in the Royal Artillery, and was afterwards stationed in Scotland. The head quarters of the Royal Artillery have been always in England. He subsequently married in Scotland L., whose domicil origin was England, and was afterwards remarried to her in Ireland, according to the rites of the Roman Catholic Church. The parties cohabited together at various places in Scotland, England and France until 1858, when Y. deserted L. in France, and returned to Scotland, where he had since remained, refusing to cohabit with L., and subsequently in Scotland married another woman:—Held, in a suit by L. for restitution of conjugal rights, that, as Y. was a foreigner by origin, had never acquired an English domicil, and had never resided in England except temporarily, and was not in England at the commencement of the suit, he was not subject to the jurisdiction of the court. *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; 29 L. J., Mat. 34; 6 Jur. (N.S.) 24; 1 L. T. 194; 8 W. R. 134. *See* DIVORCE, infra, col. 730.

Not unless Marriage Proved.]—In this suit, the court has no jurisdiction to make a decree until the marriage has been formally proved, although the respondent may have filed an answer not taking issue on the marriage. *Scott* v. *Scott*, 4 Sw. & Tr. 113; 34 L. J., Mat. 23; 12 L. T. 211.

Unless a respondent can establish a legal defence to the petition, the petitioner will be entitled to a decree, and the court has no discretion to inquire into the sincerity of the petitioner in bringing the suit. *Ib.*

A decree will not be granted in an undefended suit, upon mere proof of the marriage; evidence of the other facts of the case must be given. *Pearson* v. *Pearson*, 33 L. J., Mat. 156.

Custody of Children.]—The court has no power in suits for restitution of conjugal rights to make any order as to the custody of the children of the marriage. *Chambers* v. *Chambers*, 39 L. J., Mat. 56; 22 L. T. 727; 18 W. R. 528.

d. Procedure and Practice.

Service of Petition out of Jurisdiction.]—The court has no power to allow service abroad of a petition for restitution of conjugal rights. *Chichester* v. *Chichester*, 10 P. D. 186; 34 W. R. 65.

—— **Proceedings.**]—A wife, by her husband's consent, went temporarily to reside in a convent. She subsequently went away, leaving directions that all letters should be sent to her solicitor. She was found to have gone to Paris, but no further traces of her could be discovered. Neither the lady superior of the convent nor the trustees of the wife's settlement knew where she had gone. The husband having commenced a suit for restitution of conjugal rights, the court directed substituted service upon the wife's solicitor of the petition and the demand of cohabitation. *Waters* v. *Waters*, 34 L. T. 33; 24 W. R. 190.

When there was reason to believe that the husband was keeping out of the way to avoid a suit for restitution of conjugal rights, the court allowed the written demand required by r. 175 to be served on his father, coupled with the requirement that it should be advertised. *Sheehy, In re*, 1 P. D. 423; 34 L. T. 367.

The 20 & 21 Vict. c. 85 (the Divorce Act, 1858), s. 42, gives the court no power to order service out of the jurisdiction of a petition for restitution of conjugal rights. *Firebrace* v. *Firebrace*, 47 L. J., P. 41; 4 P. D. 63; 39 L. T. 94; 26 W. R. 617.

It is not inconsistent with the principle that a wife's remedy for matrimonial wrongs must be usually sought in the place of the husband's domicil, that she may be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident though not domiciled. But where the husband, who, while resident in England, refused to receive his wife into his home, left the country before the institution by her of a suit for restitution of conjugal rights, the court held that it had no jurisdiction to entertain the suit. *Ib.* *See* col. 730.

Substituted Service of Proceedings.]—Where in a suit for restitution, the petitioner being unable to ascertain the whereabouts of the respondent, applied for substituted service of—

first, the written demand for cohabitation necessary to satisfy r. 175; secondly, the citation; and, thirdly, the petition:—Held, that the demand to return to cohabitation might be served on the respondent's solicitor, but that the citation and petition must be made the subject of a further application. *Macarthur* v. *Macarthur*, 58 L. J., P. 70; 61 L. T. 308.

Suit in formâ pauperis.]—Quære, whether a husband, petitioning in formâ pauperis for restitution of conjugal rights, where he alleges in his affidavit that he has no home or property, and it appears in evidence that the wife has no means of her own, is not estopped from prosecuting his suit further. *Meara* v. *Meara*, 13 W. R. 50.

Answer — Pleading — Application to Strike out.]—In answer to a petition by the wife for restitution for conjugal rights, the husband pleaded that the petition was not presented in good faith with the object of obtaining the relief sought for, inasmuch as the petitioner had alleged in a former suit for judicial separation, in which she had failed, and inasmuch as she still alleged, that her husband had been guilty of an abominable crime. The respondent further pleaded that this amounted to cruelty on the petitioner's part, and he prayed for a judicial separation on this ground. Upon a summons to strike out the answer on the ground that it contained no allegation of a matrimonial offence and disclosed no bar to the prayer of the petition:—Held, that the case ought to be left to be dealt with on the merits, it being the practice of the court not to strike out a pleading where a reasonable doubt existed as to the legal effect of the allegation therein contained, and, where such legal effect could properly be discussed after all the facts had been elicited in evidence at the trial. *Russell* v. *Russell*, 71 L. T. 268.

—— **No Answer Filed.**]—When no answer was filed, the court allowed the petition to be proved by affidavit. *Ford* v. *Ford*, 36 L. J., Mat. 86.

Right to Begin.]—In a petition for restitution of conjugal rights by a husband, to which the wife answered by pleading his cruelty, and the husband took issue thereon:—Held, that substantially, the affirmative issue was on the respondent, and that her counsel had a right to begin. *Cherry* v. *Cherry*, 1 Sw. & Tr. 319; 28 L. J., Mat. 36.

When a wife's petition is heard before the court without a jury, her counsel has a right to begin, though the substantive issue may be raised on the husband's answer. *Burroughs* v. *Burroughs*, 2 Sw. & Tr. 544; 31 L. J., Mat. 56; 5 L. T. 771.

If before a jury, semble, that the respondent's counsel has a right to begin. *Meara* v. *Meara*, 13 W. R. 50.

Evidence of Parties where Counter-prayer.]—If an answer to a suit for restitution of conjugal rights charges adultery, and on that ground prays for a judicial separation, the evidence of the parties is admissible if the respondent contents himself with resisting the suit for restitution, but not if he seeks to obtain a decree of judicial separation, as the answer will then be considered a proceeding instituted in consequence of adultery. *Burroughs* v. *Burroughs*, 31 L. J., Mat. 124; 8 Jur. (N.S.) 624.

When the respondent upon such a state of pleadings is examined at the hearing, and the court finds the charge of adultery established, it will dismiss the petition, but will not decree a judicial separation. *Ib.*

Plea of Insanity.]—A wife petitioned for restitution of conjugal rights. The husband alleged her insanity and a morbid hatred towards himself, which rendered cohabitation unsafe. The wife's responsive allegation, allowing that she had been insane, but asserting her recovery, and denying the facts on which the husband relied to show continuance of insanity, admitted to proof. *Hayward* v. *Hayward*, 1 Sw. & Tr. 81; 6 W. R. 638.

Costs out of Wife's Separate Estate.]—A husband having sued for restitution of conjugal rights, the wife in her answer made charges of serious misconduct against him, which, however, were abandoned at the hearing. The court made a decree in favour of the husband; but the wife evaded service of such decree by remaining out of the jurisdiction of the court. On being satisfied that the wife had a sufficient separate income, the court condemned her in the costs of the proceedings. *Miller* v. *Miller*, 39 L. J., P. 4; L. R. 2 P. 13; 21 L. T. 471; 18 W. R. 152.

In a suit for restitution of conjugal rights against a wife, there being no defence, the usual order was made that she should return to her husband's house within a certain number of days, and certify to the court that she had done so, and, on the court being satisfied that she had a considerable separate estate, it further ordered that she pay the costs of the proceedings. She was abroad, and did not obey the order to return to her husband at all, or to pay the costs until after a long delay. The court ordered a writ of sequestration to issue against her estate, in the first instance, without attachment. *Miller* v. *Miller*, 39 L. J., Mat. 38; L. R. 2 P. 54; 22 L. T. 418; 18 W. R. 585. See *Milne* v. *Milne and Fowler*, L. R. 2 P. 202, and *Morris* v. *Freeman*, 3 P. D. 65.

Hearing Suit in Camerâ.]—The court has power to hear suits for restitution of conjugal rights in camerâ. *Anstey* v. *Anstey*, 44 L. J., Mat. 15; L. R. 3 P. 230; 31 L. T. 801; 23 W. R. 386. *And see* col. 734.

Agreement to Stay Proceedings.]—A wife who agrees, or authorises her solicitor to agree, to stay proceedings in a suit instituted by her for restitution of conjugal rights, on certain terms, will be bound by such agreement, and will not be allowed to set the cause down for hearing. *Stanes* v. *Stanes*, 47 L. J., P. 19; 3 P. D. 42; 39 L. T. 46; 26 W. R. 238.

Stay on Equitable Ground.]—In a suit for restitution of conjugal rights, the respondent moved for an injunction and stay of proceedings, upon affidavit showing that the petitioner was bound by deed not to institute such a suit:—Held, that such a defence must be alleged by plea, and afforded no ground for summary dismissal of the suit. *Marshall* v. *Marshall*, 48 L. J., P. 49; 5 P. D. 19; 39 L. T. 640; 27 W. R. 399.

Upon such defence being subsequently alleged by plea:—Held, that it was such an equitable plea as the divorce court since the Judicature Acts is bound to consider. *Ib.*

Held, also, that a wife is bound by a deed of separation, containing a covenant not to sue her husband for restitution of conjugal rights. Suit instituted by her in violation of such a covenant dismissed. *Ib.* S. P., *Besant* v. *Wood*, 12 Ch. D. 605; 40 L. T. 445. *See* col. 718.

Rehearing.]—In a suit for restitution of conjugal rights by a husband, the respondent appeared, but did not file an answer. After due notice to her the cause was set down for hearing. Subsequently, upon the motion of the petitioner, the court ordered the cause to be heard out of its turn, and a decree was made, the respondent having received no notice of the motion or the order. Upon her application the court reversed the decree, and ordered the cause to be reheard, giving the respondent, who had a defence on the merits, leave to file an answer. *Keane* v. *Keane*, 41 L. J., Mat. 41; 25 L. T. 857; 20 W. R. 304.

e. Remedies for Disobedience to Decree.

Under Matrimonial Causes Act, 1884, s. 5, *non-compliance with a decree for restitution may be treated as desertion and a judicial separation decreed.*

Service of Decree—Respondent Abroad.]—Where, at the time of pronouncing a decree of restitution of conjugal rights, the respondent was abroad, the court directed that the decree should be served on his return to England, and that it should require him to certify within a fortnight after such service that he had obeyed it. *Pearson* v. *Pearson*, 33 L. J., Mat. 156.

Duty of Respondent—Attachment.]—A husband who has been served with a decree in a suit for restitution of conjugal rights, ordering him to take his wife home, is bound to take the first step by inviting her to return to him. If he does not, an attachment will be issued. *Alexander* v. *Alexander and Amos*, 2 Sw. & Tr. 385; 30 L. J., Mat. 173; 5 L. T. 138; 9 W. R. 620.

If he has not appeared, notice of motion for an attachment is not requisite. *Ib.*

Sufficient Obedience.]—The duty of the court to issue an attachment for non-obedience of a decree for restitution of conjugal rights is the same since the Divorce Acts as it was before. It is not a sufficient compliance by a husband with a decree for restitution of conjugal rights that he has provided his wife with a suitable establishment and sufficient income. *Weldon* v. *Weldon*, 53 L. J., P. 9; 9 P. D. 52; 32 W. R. 231.

—— **Disobedience — Contempt—Attachment.**]—A respondent being in contempt for non-obedience of an order for restitution of conjugal rights, the petitioner applied for a writ of attachment against him:—Held, that since the passing of the Matrimonial Causes Act, 1884, the writ could not be issued notwithstanding that the contempt existed prior to that act:—Held, also, that the writ could not issue for non-payment of costs. *Weldon* v. *Weldon*, 54 L. J., P. 60; 52 L. T. 233; 33 W. R. 427; 49 J. P. 517—C. A.

Neglect to comply with Decree—Judicial Separation.]—Where a husband had refused to comply with a decree ordering him to resume cohabitation within fourteen days of the service thereof, the court, under the 5th section of the Matrimonial Causes Act of 1884, granted a decree of judicial separation, although the period of two years had not elapsed. *Harding* v. *Harding*, 55 L. J., P. 59; 11 P. D. 111; 56 L. T. 919. And see *Bigwood* v. *Bigwood* (57 L. J., P. 80; 13 P. D. 89; 58 L. T. 62; 36 W. R. 928), col. 757.

In Ecclesiastical Courts.]—In the ecclesiastical courts, before a party could be pronounced in contempt for disobedience of a decree for restitution of conjugal rights, a monition issued calling upon him to obey the decree. *Cherry* v. *Cherry*, 29 L. J., Mat. 141.

The decree should contain an order that it be obeyed within a time specified; if it does not, the court will not grant an attachment until such order has been served. *Ib.*

Order for Settlement.]—Where a wife had refused to obey a decree of restitution of conjugal rights, and was in the enjoyment of a separate income, part of which was payable under the trusts of the marriage settlement, the court ordered her to settle a permanent maintenance on her husband. *Swift* v. *Swift*, 59 L. J., P. 61; 15 P. D. 118; 62 L. T. 669.

—— **Periodical Payments — Proportion of Husband's Income payable to the Wife—Deductions from Husband's Income on account of Losses.**]—By the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), the court may, after a decree for restitution of conjugal rights upon the application of the wife, order that in the event of such decree not being complied with the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation. Where a husband has not complied with a decree of restitution of conjugal rights obtained by the wife within the time named in the decree, the court ordered that he should secure to her for their joint lives a "periodical payment" equal to one-third of their joint incomes. In estimating the amount of the husband's average income the court refused to allow a deduction in respect of losses sustained by him during the previous three years in a branch of his business which had been closed. *Theobald* v. *Theobald*, 59 L. J., P. 21; 15 P. D. 26; 62 L. T. 187.

—— **Amount of Allowance—Alleged Misconduct of Petitioner, short of Matrimonial Offence—Admissibility.**]—Allegations of misconduct, short of a matrimonial offence, are relevant to a question of what allowance is to be made by a respondent to a petitioner, upon non-compliance with a decree for restitution of conjugal rights, and such allegations are for the consideration of the learned judge. The registrar is not to reject evidence as to these allegations, but is to leave it, and them, for the learned judge, to whom his report is to be made, to consider and act upon, in his (the judge's) discretion. The court allowed evidence as to alleged misconduct by a petitioner to be given upon affidavit, reserving to the incriminated party leave to cross-examine the deponents thereon, if so desired. *Swift* v. *Swift*, 63 L. T. 262.

—— **Right to give Evidence as to Conduct of Petitioner to Respondent during Cohabitation.**]—On an application for a settlement or allowance by virtue of s. 3 of the Matrimonial Causes

Act, 1884 (47 & 48 Vict. c. 68), out of the estate of a husband or wife against whom a decree of restitution of conjugal rights has been pronounced in an undefended suit, it is competent for the party making such application to tender evidence as to the conduct of the other party during cohabitation. *Swift* v. *Swift*, 60 L. J., P. 14; [1891] P. 129: 63 L. T. 711.

The husband's power of earning money must also be taken into account. *Ib.*

—— **Petition for Settlement—Costs.**]—A wife having refused to comply with a decree obtained by her husband for restitution of conjugal rights, he presented a petition under s. 3 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), for a settlement of her property for the benefit of himself and the children of the marriage; it appeared that the whole of the wife's property had been settled on the occasion of the marriage to her separate use without power of anticipation. The court decided that there was no power to order a settlement of the property, which was subject to restraint on anticipation:—Held, that the petition for a settlement must be dismissed; but that under the circumstances the petitioner ought not to be ordered to pay the respondent's costs of the petition. *Michell* v. *Michell*, [1891] P. 305.

—— **Restraint on Anticipation.**]—The court has not power under s. 3 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), to order a settlement out of property settled to the separate use of a wife without power of anticipation. *Michell* v. *Michell*, 60 L. J., P. 46; [1891] P. 208; 64 L. T. 607; 39 W. R. 680—C. A. See col. 1075.

—— **Restraining Removal of Property.**]—The court, in the absence of authority, refused, upon an ex parte application, to restrain a respondent, who was in contempt, from removing property out of the country, the object of the application being to put pressure upon the respondent in respect of the decree which had been disobeyed, and which could not be enforced owing to the respondent being now outside the court's jurisdiction. *Wallis* v. *Wallis*, 65 L. T. 796.

f. Custody of Children.

Pending Suit.]—The court has no power to make an order as to the custody of children pending a suit for restitution of conjugal rights. *Chambers* v. *Chambers*, 39 L. J., Mat. 56; 22 L. T. 727; 18 W. R. 528.

—— **Service of Order — Disobedience.**] — A husband obtained a decree for restitution of conjugal rights, which was not complied with, and the court afterwards made an order giving the petitioner the custody of the only child of the marriage. A copy of the order for custody was left at the house where the respondent was residing, but the respondent had not given up the child to the petitioner. The court, being satisfied that the order as to the custody of the child had come to the knowledge of the respondent, ordered a writ of sequestration to issue against her for non-compliance with the order, without a previous writ of attachment, and ordered the respondent to pay the costs of the motion. *Allen* v. *Allen*, 54 L. J., P. 77; 10 P. D. 187; 33 W. R. 826. See also *Hyde* v. *Hyde*, 57 L. J., P. 89; 13 P. D. 166; 59 L. T. 529; 36 W. R. 708.

II. DIVORCE.

1. Jurisdiction and Duty of the Court.

Jurisdiction of English Court.] — Great caution ought to be observed in allowing a petition for divorce to proceed in the English divorce court where there is ground for supposing that the parties are domiciled out of the jurisdiction. *Sinclair's Divorce Bill*, [1897] A. C. 469—H. L. (Ir.)

Where Domicil of Parties English.]—When the domicil of the parties is English, the jurisdiction of the court is founded, though the marriage and adultery may have taken place abroad. *Ratcliffe* v. *Ratcliffe and Anderson*, 1 Sw. & Tr. 467; 29 L. J., Mat. 171; 5 Jur. (N.S.) 714; 7 W. R. 726.

Therefore where the parties to a suit for dissolution of marriage were British subjects, and had their legal domicil in England when the adultery was committed, and when the petition was presented; but the marriage and the adultery relied upon took place in the East Indies:—Held, that the court had jurisdiction to entertain the suit. *Ib.*

A Scotchman married a Scotchwoman in Scotland, and cohabited with her in Scotland until he discovered her adultery. He thereupon, in 1866, broke up his home and removed to England; and in 1871 he instituted a suit in England for the dissolution of his marriage, on the ground of the adultery committed in Scotland previously to the separation. He swore in his examination that he had left Scotland with the intention of taking up his permanent abode in England. The court, believing his evidence, held that he had abandoned his domicil of origin and acquired an English domicil, and that it had jurisdiction to dissolve the marriage. *Wilson* v. *Wilson*, 41 L. J., Mat. 74; L. R. 2 P. 435; 27 L. T. 351; 20 W. R. 891.

The oath of the person whose domicil is in question as to his intention to change his domicil is not conclusive, but the question for the court is whether, upon a review of all the circumstances, it gives credit to his evidence. *Ib.*

The domicil of the husband will sustain the jurisdiction of the court over the wife, though married abroad, always after marriage resident abroad, and accused of adultery committed abroad. *Gillis* v. *Gillis*, Ir. R. 8 Eq. 597.

Domicil without residence is sufficient to sustain the jurisdiction of the court; and the jurisdiction of the court is not defeated by non-residence, except in cases where the non-residence affects the domicil. *Ib.*

Long residence abroad raises a presumption in favour of the acquisition of a new domicil, but such presumption may be rebutted by circumstances, showing that there was no intention of acquiring a new domicil. *Ib.*

Where the jurisdiction exercised is in accordance with the principles of international law, the decree ought to be respected by the tribunals of every civilised country; but where it is derived solely from some rule of the municipal law of the particular country, it cannot claim extra-territorial authority if it trenches upon the interests of any other country to whose tribunals the spouses are amenable. *Le Mesurier* v. *Le Mesurier*, 64 L. J., P. C. 97; [1895] A. C. 517; 72 L. T. 873; 11 R. 527.

There is no such thing as a matrimonial domicil. *Ib.*

And see *Goulder* v. *Goulder*, 61 L. J., P. 117; [1892] P. 240; *Green* v. *Green*, 62 L. J., P. 112; [1893] P. 89; 68 L. T. 261; 41 W. R. 591; and *Christian* v. *Christian*, 67 L. J., P. 18; 78 L. T. 86.

Foreign Marriage — Husband resident in England.]—The court has jurisdiction to dissolve a marriage solemnised between foreigners in a foreign country, on the ground of the adultery of the wife committed abroad, if the husband, at the time when the adultery is committed, and at the time when the petition is presented, is bonâ fide and permanently resident in England; although, for the purpose of succession, he may not have acquired an English domicil. *Brodie* v. *Brodie*, 2 Sw. & Tr. 259; 30 L. J., Mat. 185; 4 L. T. 307; 9 W. R. 815.

—— **But Residence must be bonâ fide.**]—The court has not jurisdiction to entertain a suit for judicial separation when the petitioner is domiciled abroad, and is not bonâ fide resident in England. *Manning* v. *Manning*, 40 L. J., Mat. 18; L. R. 2 P. 223; 24 L. T. 196; 19 W. R. 479.

Mere residence in England at the time of the institution of a matrimonial suit is not sufficient to found the jurisdiction of the court. *Ib.*

The residence of the petitioner must be bonâ fide, and not casual or as a traveller. *Ib.*

A husband, whose domicil of origin was Irish, having presented a petition for judicial separation on the ground of desertion, the wife appeared under protest and pleaded to the jurisdiction, and although the husband made an affidavit, to the effect that he was permanently settled in England, and had no intention of returning to the place of his domicil of origin, the court came to the conclusion that he was not a bonâ fide resident in England, and therefore dismissed the petition. *Ib.*

Parties were married in Ireland in 1847. In October, 1872, the husband, who was a medical man, came over to England with the intention, as it was alleged, of purchasing a practice at Lowestoft, but he almost immediately returned to Ireland. The petition and citation were served upon him while lodging in London:—Held, that he had not acquired a residence in the country, and that the jurisdiction of the court did not attach. *Burton* v. *Burton*, 21 W. R. 648.

English Subjects — Change of Domicil of Husband.]—D., a natural-born English subject, married C., an Englishwoman, in England; he afterwards left her, acquired a domicil in the United States, and intermarried there with E. C. petitioned for a dissolution of marriage:—Held, first, that C. being a native-born Englishwoman, was entitled to present her petition. *Deck* v. *Deck*, 2 Sw. & Tr. 90; 29 L. J., Mat. 129; 2 L. T. 542; 8 W. R. 666.

Held, secondly, that D., being a natural-born English subject, could not shake off his liability to the authority of the laws of his native country, and the court pronounced for the jurisdiction and dissolved the marriage. *Ib.* But see *Le Sueur* v. *Le Sueur*, infra.

C., a natural-born Englishwoman, married B. in England, and lived with him partly in England and partly in Ireland; in the latter country they stayed on one occasion with B.'s father, on another at a house which B. himself was occupying. Cruelty was proved both in England and Ireland, and adultery in Ireland. The citation was served on B. in England, where he was then living; he did not appear:—Held, that C. was entitled to present her petition, and that it did not so distinctly appear that B.'s domicil was Irish as to oblige the court to consider whether its jurisdiction over a foreigner could be maintained, and it pronounced for the jurisdiction. *Bond* v. *Bond*, 2 Sw. & Tr. 93; 29 L. J., Mat. 143; 8 W. R. 630.

When a husband was domiciled in Ireland, and had only a temporary abode in England at the date of filing the petition, and the wife appeared and submitted to the jurisdiction of the court, the full court dissolved their marriage, which had been celebrated in Ireland, on the ground of adultery committed by the wife in England and on the Continent. *Callwell* v. *Callwell and Kennedy*, 3 Sw. & Tr. 259.

Domicil of Husband Foreign.] — A wife having been deserted by her husband, who went to reside in the United States of America, acquired a bonâ fide domicil in England, and instituted a suit for dissolution of marriage against him by reason of his adultery and desertion. The original place of domicil of marriage and of matrimonial cohabitation of the parties was in Jersey, and the adultery proved was committed there. The husband had never had or acquired a domicil in England:—Held, that even if the wife, without a sentence of judicial separation, could acquire a distinct domicil in this country, she could not make her husband amenable to the lex fori of her new domicil. *Le Sueur* v. *Le Sueur*, 45 L. J., P. 73; 1 P. D. 139; 34 L. T. 511; 24 W. R. 616.

The court has jurisdiction to grant a divorce against a foreigner. A marriage was solemnised at Gibraltar between a Frenchman and an Englishwoman. The husband resided for several years in England, but being a consul for France he retained his domicil of origin. The wife presented a petition for a divorce, alleging adultery committed in England, and desertion. The husband appeared under protest and prayed to be dismissed:—Held, by James and Cotton, L. JJ., Brett, L.J., dissenting, that the court had jurisdiction to grant a divorce. *Niboyet* v. *Niboyet*, 48 L. J., P. 1; 4 P. D. 1; 39 L. T. 486; 27 W. R. 203—C. A.

Declaration of Nullity of Marriage.]—The personal capacity of parties to enter into the contract of marriage depends upon their domicil; and where both parties had a foreign domicil, and by the law of their domicil their marriage was invalid by reason of consanguinity, a marriage which was contracted in England, and which would have been valid according to English law, was held invalid. *Sottomayer* (otherwise *De Barros*) v. *De Barros*, 47 L. J., P. 23; 3 P. D. 1; 37 L. T. 415; 26 W. R. 455—C. A.

Two natives of Portugal, one of whom was domiciled in England, the other in Portugal, contracted a marriage in England in 1866; they were first cousins, and were incapable, according to the law of Portugal, of intermarrying on account of consanguinity without a papal dispensation. The petitioner (the wife) filed a petition praying that her marriage with the respondent might be declared null and void:—Held, that the lex loci contractûs should prevail in the

matter; and the marriage being valid, according to the law of England, the court dismissed the petition. *Sottomayer* (otherwise *De Barros*) v. *De Barros* (the queen's proctor intervening), 49 L. J., P. 1; 5 P. D. 94; 41 L. T. 281; 27 W. R. 917.

The court has jurisdiction to inquire into the validity of a marriage in England between foreigners domiciled abroad at the time of the marriage. *Simonin*, f. c. *Mallac* v. *Mallac*, 2 Sw. & Tr. 67; 29 L. J., Mat. 97; 6 Jur. (N.S.) 561; 2 L. T. 327.

A. and B., domiciled French subjects, of the respective ages of twenty-two and twenty-nine, were married by license in England in June, 1854. On the following day they returned to Paris. The marriage was never consummated. In December, 1854, a decree was made by the Civil Tribunal of the First Instance for the Department of the Seine, annulling this marriage, by reason that it had been celebrated without the publications prescribed by the French law, and without the parties having sought or obtained the consent of their parents; and more especially, that the parties, in coming to England, had a formal intention to evade the laws of France. In 1857 A. came to reside permanently in England, and in 1859 petitioned the court to annul the same marriage with B. B. was personally served at Naples with a copy of the citation and of the petition, and did not appear:—Held, that as there is nothing contrary to natural justice in calling upon a respondent to have the validity or invalidity of a supposed contract ascertained and determined by the tribinal of the country where it was entered into, the court of divorce is competent to entertain such a suit. *Ib.*

Stipulation for an English Residence by Wife.]—An English lady consented to marry the eldest son and heir of a Neapolitan nobleman, on condition of their always having, after marriage, a residence in England, and of their residing there six months at least in each year. The marriage was celebrated in August, 1854, in England. There were five English trustees of the marriage settlements, which contained a proviso that they should be construed according to the law of England. A few months after the marriage a London residence was taken and furnished by the parties, which they occupied for six months in each year, with two or three exceptions, from 1855 to 1872, living for the remainder of the year in apartments in the palace of the husband's father, at Naples, or at other places on the Continent. In 1872, the lady separated from her husband in consequence of his cruelty and adultery, and she continued up to the hearing to reside in their London residence. In 1873 the husband's father died, when he succeeded to his title and estates and palace at Naples, and since then he had resided sometimes at Naples, but principally at other places on the Continent. The petition and citation were served on the husband at Paris, and he had entered no appearance:—Held, that the court had jurisdiction to dissolve the marriage. *Santo Teodoro* v. *Santo Teodoro*, 49 L. J., P. 20; 5 P. D. 79; 42 L. T. 331.

Colonial Domicil treated as Foreign.]—For the purposes of the jurisdiction of the divorce court, the British Colonies, as well as Scotland and Ireland, are deemed to be foreign countries. *Firebrace* v. *Firebrace*, 47 L. J., P. 41; 4 P. D. 63; 39 L. T. 94; 26 W. R. 617.

Although a wife's remedy for matrimonial wrongs must usually be sought in the place where her husband is domiciled, it is not inconsistent with this principle that she may be in some cases allowed to obtain relief against her husband in the place where she is resident though not domiciled. Where a husband who had refused to receive his wife into his home while he was resident in England, left England before the institution by her of a suit for restitution of conjugal rights, the court held it had no jurisdiction. *Ib.*

Admitting Jurisdiction.]—As to, *see* col. 871. *See also* INTERNATIONAL LAW and PROCEEDINGS FOR DIVORCE, col. 860.

Right of Public to hear Cause.]—The judge ordinary has no power, even with the consent of the parties, to exclude the public from court during the hearing of a cause. *Barnett* v. *Barnett*, 29 L. J., Mat. 28. S. P., *H.* f. c. *C.* v. *C.*, 1 Sw. & Tr. 605; 29 L. J., Mat. 29; 6 Jur. (N.S.) 348; 1 L. T. 489. *And see* TRIAL, cols. 929, 935.

Hearing Causes in Camerâ.]—Under 20 & 21 Vict. c. 85, s. 22, the court may hear a suit in camerâ, if brought for nullity of marriage or judicial separation, but there is no authority given to the court by the statute to hear a petition for dissolution of marriage except in open court. *C.* v. *C.*, 38 L. J., Mat. 37; L. R. 1 P. 640; 20 L. T. 280. And see *Anstey* v. *Anstey*, col. 691.

Compromise of Suits.]—So long as a suit remains on the court book, the court cannot consider as binding any agreement to compromise, made by counsel of parties, to a matrimonial suit, but is bound to hear such suit, if either party desires it, after such agreement made. *Hayward* v. *Hayward*, 1 Sw. & Tr. 333. *And see* col. 926.

Counter-charges.]—The 20 & 21 Vict. c. 85, s. 29, imposes on the court the obligation to inquire into any counter-charge made against any person petitioning for a divorce. *Lautour* v. *Queen's Proctor*, 10 H. L. Cas. 685; 33 L. J., Mat. 89; 10 Jur. (N.S.) 325; 10 L. T. 198; 12 W. R. 611.

Adultery alleged to have been committed by a petitioner at any time during the marriage, in which term is included the period between a decree for a divorce à mensâ et thoro and the actual dissolution of the marriage, is a counter-charge into which the court is bound to inquire. *Ib.* *And see* col. 884.

Variation of Settlements.]—In proceedings for a judicial separation only, the court has no power to alter settlements. *Gandy* v. *Gandy*, 51 L. J., P. 41; 7 P. D. 168; 46 L. T. 607; 30 W. R. 673—C. A. *See* col. 806.

Jurisdiction of Justices.]—A husband having been convicted of an aggravated assault upon his wife, the justices, under the 41 Vict. c. 19, s. 4, made an order reciting that the wife's safety was in peril, and directing that she should be no longer bound to cohabit with her husband, that the husband should pay to the wife a weekly allowance of 3*l.*, and that the wife should have the legal custody of the only child of the marriage:—Held, that although the act gave the justices no jurisdiction to make an order as to the permanent legal custody of the child, the order was valid until the child should have attained the age of ten years. *Grove* v. *Grove*, 39 L. T. 546; 27 W. R. 324. *And see* col. 816.

2. GROUNDS FOR DISSOLUTION OF MARRIAGE.

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85) *is the principal act governing divorce, i.e. dissolution of marriage and judicial separation. Section* 27 *enables any husband to petition the court for a dissolution on the ground of his wife's adultery, and any wife on the ground of her husband's incestuous adultery, or bigamy with adultery, or rape, &c., or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce à mensâ et thoro, or of adultery coupled with desertion without reasonable excuse for two years or upwards.*

a. Adultery of Wife.

Well-Conducted Wife—Court unwilling to presume Against.]—Where a wife has conducted herself during a married life of twenty years with propriety, the court will not conclude that she has been guilty of adultery, charged to have been committed without the slightest regard for decency or fear of detection, unless established by cogent evidence. *Alexander* v. *Alexander and Amos*, 2 Sw. & Tr. 95; 6 Jur. (N.S.) 56; 8 W. R. 452.

Existence of Criminal Intention.]—Shortly after marriage the wife renewed her acquaintance with a young man to whom she had been attached, and carried on a clandestine correspondence with him. During the absence of her husband he visited her at her lodgings during the day, and once during the night, when undue familiarities passed between them; they also walked and rode out together:—Held, that, as the criminal intention existed, and, as shown by evidence, ample opportunities had offered, it must be assumed that adultery had been committed. *Davidson* v. *Davidson*, 1 Deane, Ecc. Rep. 132; 2 Jur. (N.S.) 547; 4 W. R. 590.

Wife left without Provision.] — A husband lived separately from his wife for many years, without making any provision for her maintenance from his means, which were sufficient:—Held, not to be entitled to a divorce though the adultery of the wife was clearly proved. *Simmon's Divorce Bill*, 12 Cl. & F. 339.

Evidence must be Clear.]—A charge of adultery not sustained by the evidence. *Winscom* v. *Winscom and Plowden*, 3 Sw. & Tr. 380; 33 L. J., Mat. 45; 10 Jur. (N.S.) 321; 10 L. T. 100; 12 W. R. 535.

No Cohabitation.]—In a suit for dissolution, though the parties had gone through a ceremony of marriage in the district registry ten years before the adultery of the wife, there had been no cohabitation. The court, on being satisfied that the husband had done all in his power to induce his wife to cohabit with him, granted a decree nisi. *Waters* v. *Waters and Gentel*, 33 L. T. 579.

It is doubtful whether a husband who has been guilty of cruelty and desertion can obtain a judicial separation on the ground of his wife's adultery. *Lempriere* v. *Lempriere and Roebel*, 37 L. J., Mat. 78; L. R. 1 P. 569; 19 L. T. 50; 16 W. R. 1192.

Wife addicted to Drink—Counter-charge—Degree of Cruelty necessary to bar Husband's right to Relief.]—Upon a husband's petition for divorce on the ground of his wife's adultery, where the adultery is fully established against her, but where she counter-charges cruelty as having been committed by her husband towards her, and where it appears that the wife is a woman of drunken habits, and that what she alleges as violence has been used upon her in consequence of her drunkenness; the court requires a very strong case to be made out against the husband in order to bar his right to relief from the marriage tie. Unless it is proved that he has been guilty of such gross violence towards her as the court cannot allow to be excused on the ground that he was provoked to it by her intemperance, the decree in his favour should not be withheld. *Forsyth* v. *Forsyth*, 63 L. T. 263.

Adultery of Wife—Former Decree of Judicial Separation at suit of Wife.]—The wife obtained in March, 1887, a decree for a judicial separation on the ground of cruelty, and was given the custody of her only child. On the 4th May, 1888, the husband was ordered to pay permanent alimony at the rate of 80*l.* a year from the date of the decree. This he did not pay, though he had the means. On the 17th September, 1888, a deed was executed by the husband and wife, by which the latter relinquished the custody of the child and all her right to alimony, in consideration of a lump sum of 75*l.* then paid to her by her husband. Some little time after that deed was signed the husband became aware that his wife was committing adultery with the co-respondent, with whom she went to live. The husband then filed his petition, asking for the dissolution of his marriage:—Held, that, as the cruelty on the part of the husband was not of such a nature as would induce the court to withhold a decree, and as the deed of release was executed by the wife with her eyes open, the husband should not be refused the relief prayed, and that a decree nisi should accordingly be pronounced in his favour. *Badham* v. *Badham*, 62 L. T. 663.

Marriage before Decree Absolute in former Suit by Petitioner—No Intervention by Queen's Proctor—Decree Absolute—Further Ceremony of Marriage with Second Wife—Adultery—Relief not Barred.]—In 1878 the husband obtained a decree nisi against his first wife. Before decree absolute he married the present respondent. The queen's proctor not opposing, the decree was afterwards made absolute. The petitioner and respondent subsequently went through a fresh ceremony of marriage:—Held, upon a petition by the husband, that he was entitled to have this marriage dissolved by reason of his wife's adultery, and that his claim to relief was not barred by reason of his adultery committed prior to the final dissolution of the first marriage. *Styles* v. *Styles*, 62 L. T. 613.

As to practice on petition alleging adultery, *see* col. 862.

b. Adultery of Husband coupled with Cruelty or Desertion.

Bigamy with Adultery of Husband.]—Quære, whether a husband's bigamy condoned by the wife would be revived by his subsequent marital misconduct, so as to found a sentence of dissolution of marriage. *Furness* v. *Furness*, 2 Sw. & Tr. 63; 29 L. J., Mat. 133; 2 L. T. 439.

In a suit for a dissolution of marriage on the

ground of bigamy with adultery, there should be proof of adultery and bigamy with the same woman. Proof of a bigamous marriage with one woman and of adultery with another is not sufficient. *Horne* v. *Horne*, 2 Sw. & Tr. 48; 27 L. J., P. 50.

A., being only sixteen years of age, was privately married to B., aged thirty-six, without the consent of her family. On its being discovered that B. was an unsuitable husband for her, A. was removed to the continent, and never saw him again. He made no attempts to procure cohabitation with her, and subsequently contracted a bigamous marriage:—Held, that there had been a reasonable excuse for the separation, and the marriage dissolved on the ground of B.'s bigamy and adultery. *Du Terreaux* v. *Du Terreaux*, 1 Sw. & Tr. 555; 28 L. J., Mat. 95.

—— **Abroad.**]—Two natural-born English subjects were married in England. The husband afterwards went to America, became domiciled there, and there committed bigamy and adultery; the wife petitioned for a dissolution of marriage. The citation and a copy of the petition were personally served on the husband in America, but he did not appear:—Held, that notwithstanding the husband's change of domicil, the court had jurisdiction to dissolve the marriage. *Deck* v. *Deck*, 2 Sw. & Tr. 90; 29 L. J., Mat. 129; 2 L. T. 543; 8 W. R. 666.

To establish bigamy as a ground for the sentence of the court, there must be proof of such a ceremony as, but for the former marriage, would constitute a valid marriage. If the bigamy relied upon took place abroad or in a colony, it will be necessary to give formal proof of the marriage law of that country or colony. *Burt* v. *Burt*, 2 Sw. & Tr. 88; 29 L. J., Mat. 133; 2 L. T. 439; 8 W. R. 552.

Condonation of Cruelty.]—To a suit by a wife for dissolution of marriage on the ground of adultery, coupled with cruelty, condonation of the cruelty is no bar. *Dempster* v. *Dempster*, 2 Sw. & Tr. 438; 31 L. J., Mat. 20; 8 Jur. (N.S.) 44; 5 L. T. 433.

Where it is necessary for a petitioner in a suit for dissolution of marriage by reason of cruelty and adultery to establish two points, in order to obtain the prayer of the petition, the court will not, even if dissatisfied with the verdict of the jury on one point, send that down for a new trial, because if a different verdict was found on that point, it would not be sufficient to ground the relief prayed. *Fitzgerald* v. *Fitzgerald*, 10 L. T. 510.

Adultery subsequent to Separation.]—A wife obtained a decree of judicial separation on the ground of the husband's cruelty, and continued to live separate from him, and he subsequently committed adultery, and upon proof of such adultery, and of the decree for judicial separation, the court made a decree nisi for the dissolution of the marriage. *Bland* v. *Bland*, 35 L. J., Mat. 104; L. R. 1 P. 237; 15 W. R. 9.

After a decree of divorce a mensâ et thoro against a husband for cruelty, the wife sued for dissolution of the marriage, on the ground of adultery committed by him while separate:—Held, that she was entitled to a decree of divorce a vinculo matrimonii. *Ritchie* v. *Ritchie*, 4 Macq. H. L. 162.

A wife, who has obtained a decree of judicial separation by reason of her husband's adultery, may afterwards institute a suit to dissolve the marriage on the ground of her husband's adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during the cohabitation. *Green* v. *Green*, 43 L. J., Mat. 6; L. R. 3 P. 121; 29 L. T. 251; 21 W. R. 824.

Virginity of Wife—Adultery of Husband.]—A. and B. were married in 1845, and lived together till 1853. In a suit brought by A. against B. for adultery, B. pleaded her virginity and recriminated. A. admitted he had not consummated the marriage, and the medical evidence proved the virginity:—Held, that B. was not guilty of adultery, and entitled to a separation on the ground of his adultery, which was proved. *Hunt* v. *Hunt*, 4 W. R. 356.

Cruelty — Want of Self-control.] — A wife charged her husband with adultery and cruelty. The cruelty consisted chiefly in acts not of great violence, but showing a want of self-control on the part of the husband when intoxicated, and of indignity:—Held, sufficient, coupled with adultery, to authorise the court to dissolve the marriage. *Waddell* v. *Waddell*, 2 Sw. & Tr. 584; 31 L. J., Mat. 123; 8 Jur. (N.S.) 623; 6 L. T. 552.

Adultery of Husband coupled with Desertion—Orders to contribute to Wife's Support.]—A husband deserted his wife, and cohabited with another woman. On two occasions he was taken before magistrates, and compelled to contribute to her support:—Held, that, nevertheless, she was entitled to a dissolution of her marriage by reason of her husband's adultery, coupled with his desertion. *Oliver* v. *Oliver*, 5 Jur. (N.S.) 606.

Desertion—Must be against Will of Wife.]—In a suit by a wife for dissolution of marriage, on the ground of adultery and desertion by her husband, it appeared that the parties were married in 1848, and that shortly afterwards the husband became drunken and dissipated, and on many occasions ill-treated her. In 1852 he sold off part of their furniture to buy drink, told his wife that she might go on the streets for a living, and then left her, telling her that he was going to leave B., where they resided, and that she would never see him again. He then left B., and was absent some years. The wife stayed in the house a fortnight after her husband had left her, and then removed, and took up her abode with her sister, who lived in B., with whom she afterwards resided by maintaining herself, without ever receiving any assistance from her husband. She made no inquiries after him until 1858, when, having discovered that he was living with another woman at B., application was made to him on her behalf to do something towards her support. He refused. It did not appear that the husband knew where his wife resided after he left her. The court refused to decree a dissolution of marriage, holding that desertion was not proved, as there was no evidence that when the parties separated the husband went away against the will of the wife, but, on the contrary, it appeared highly probable that they parted by mutual consent. *Smith* v. *Smith*, 1 Sw. & Tr. 359; 28 L. J., Mat. 27; 7 W. R. 382.

—— **No Attempt to see Wife.**]—In 1856 a husband having obtained an appointment in the Commissariat, left England and his wife for

China. During his absence he frequently wrote to her in affectionate terms, expressed regret for past misconduct, and promised amendment, but in no one letter did he suggest a desire to return to cohabitation, and in some he stated an intention never to visit England again. Each letter contained a demand for pecuniary assistance. To another person he stated that he had accepted the appointment in China because he was miserable at home. In 1859 he returned to England, continued to press his wife for money, but gave no address, and made no attempt to see her or her friends. Adultery was proved:—Held, that the wife was entitled to a dissolution of her marriage by reason of the adultery, coupled with desertion, of her husband. *Lawrence* v. *Lawrence*, 2 Sw. & Tr. 575; 31 L. J., Mat. 145; 8 Jur. (N.S.) 972; 6 L. T. 550.

—— **Imprisonment of Husband.**]—A., on the 4th of October, 1854, deserted his wife without reasonable excuse, and never returned to her again. On the 16th of November, 1856, he was arrested on a charge of felony, and was subsequently convicted and sentenced to four years' penal servitude. Between the 4th of October, 1854, and the 16th of November, 1856, he was twice imprisoned for debt; on the first occasion for seven, on the second for nineteen days. These facts having been proved in a suit by the wife, commenced before the expiration of the term of penal servitude, for a dissolution of marriage on the ground of adultery and desertion:—Held, that the husband had been guilty of desertion for two years and upwards. *Astrope* v. *Astrope*, 29 L. J., Mat. 27.

—— **Condition Imposed by Wife as to Renewal of Cohabitation.**]—A husband in 1851 left his wife, and never afterwards lived with her or contributed to her support. He visited her occasionally, and at an interview in 1854 the wife offered to renew cohabitation, provided he would give up gambling and drinking. He refused to do so, and only twice went to her again, on one occasion asking her to sign a paper, undertaking not to trouble him any more. Prior to the wife's conditional offer to renew cohabitation, he had formed an adulterous connection with another woman, with whom he continued to live, refusing in 1858 to leave her, and stating that he had washed his hands of his wife, and would have no more to do with her:—Held, that though the wife had annexed a condition to a renewal of cohabitation, the refusal of the husband to abandon his bad habits, when viewed in connection with the other facts of the case, amounted to desertion from that time. *Gibson* v. *Gibson*, 29 L. J., Mat. 25.

Desertion by Wife.]—Judicial separation decreed by reason of the wife's desertion of her husband for two years and upwards without reasonable cause. *Millar* v. *Millar*, 8 P. D. 187; 32 W. R. 95.

Desertion completed after Commencement of Suit—Amendment of Petition.]—Where an undefended suit (in which no appearance had been entered on behalf of the respondent) for dissolution on the ground of the respondent's adultery and cruelty, was part heard, and the court was satisfied with the evidence adduced on behalf of the petitioner in confirmation of the charge of adultery alleged against the respondent, but adjourned the case for the production of further evidence as to the alleged charges of cruelty: the court granted leave to amend the petition by adding the charge of desertion; the requisite two years, though complete at the time of the making of the application, not having been completed until subsequent to the filing of the petition in the suit. *Kettlewell* v. *Kettlewell*, 41 L. T. 737. *See* col. 750.

Wife's Petition withdrawn at Hearing—Fresh Petition Filed after Delay.]—The respondent eloped with a Miss S. on the 2nd January, 1877, leaving his wife destitute. On the 16th of April, 1877, she filed a petition for divorce on the ground of his adultery and cruelty, but withdrew the petition at the hearing on the 22nd of November, 1877, it being doubtful on the evidence whether the charge of cruelty could be sustained. On the 12th of February, 1880, she filed a fresh petition praying for a decree on the ground of the respondent's adultery and desertion. The respondent had never contributed towards her support since he left her in 1877, and he was still living with Miss S. when the copy petition and citation were served on him on the 25th of February, 1880:—Held, that the petition was well presented, and that the petitioner was entitled to a decree on the ground of the respondent's adultery and desertion. *Knapp* v. *Knapp*, 49 L. J., P. 69; 6 P. D. 10; 43 L. T. 384; 29 W. R. 80.

Cruelty, and not Adultery, Proved.]—In a suit for dissolution of marriage on the ground of cruelty and adultery, if one of the charges only is established, the petitioner is entitled to a decree of judicial separation without the consent of the respondent. *Bromfield* v. *Bromfield*, 41 L. J., Mat. 17; 26 L. T. 264.

In a suit for dissolution by a wife on the ground of her husband's adultery and cruelty, the husband's cruelty only was established, and the court granted the wife a decree of judicial separation, notwithstanding that she had been proved guilty of adultery. The husband subsequently sought for a reversal of the decree on the ground that the wife's adultery barred her right to relief. The court, on a review of the circumstances, rescinded the decree and dismissed the petition, but intimated an opinion that adultery on the part of a wife does not necessarily bar her right to relief in the case of her husband's cruelty. *Grossi* v. *Grossi*, 42 L. J., Mat. 69; L. R. 3 P. 118; 28 L. T. 371; 21 W. R. 551.

The court refused to grant a decree of judicial separation on the ground of the husband's cruelty where the wife had committed adultery, being of opinion that she did not require the protection of the court. *Ib.*

As to alleging adultery in petition. *See* col. 862.

3. What constitutes Cruelty.

a. In Husband.

Bodily Injury or Reasonable Apprehension thereof.]—Bodily injury, reasonable apprehension thereof, or injury to health, are the general tests of legal cruelty. *Tomkins* v. *Tomkins*, 1 Sw. & Tr. 168.

When a question of cruelty comes before a jury as a ground for judicial separation, the jury

is to determine, not only whether the acts complained of were done, but whether they constitute legal cruelty. *Ib.*

To entitle a person to a decree of judicial separation on the ground of cruelty, the acts relied on must be of such a nature as to show that further cohabitation is unsafe; there must be proof of ill-treatment and bodily injury, or of a reasonable apprehension of such bodily injury. *Curtis* v. *Curtis*, 1 Sw. & Tr. 192; 27 L. J., Mat. 73. Affirmed, 28 L. J., Mat. 55.

Whatever may be the cause or motive of a husband's misconduct, the wife is entitled to the protection of the court, if cohabitation is rendered unsafe, unless she is herself greatly to blame. *Ib.*

A decree of judicial separation, on the ground of cruelty, will not be granted, unless the court is satisfied that further cohabitation is unsafe. *Smallwood* v. *Smallwood*, 2 Sw. & Tr. 397; 31 L. J., Mat. 3; 8 Jur. (N.S.) 63; 5 L. T. 324; 10 W. R. 65.

Where the evidence showed that a wife had reasonable ground for apprehending personal violence if she returned to live with her husband:—Held, that she was warranted in presenting her suit, though one object might have been that she might have access to her children. *Cooke* v. *Cooke*, 3 Sw. & Tr. 126; 32 L. J., Mat. 154; 9 Jur. (N.S.) 754; 8 L. T. 644; 11 W. R. 957.

Continual quarrels between husband and wife, caused by his acts of adultery, and leading to violence of demeanour, and occasional acts of violence on his part, including mental and bodily suffering in the wife, amount to cruelty. *Knight* v. *Knight*, 4 Sw. & Tr. 103; 34 L. J., Mat. 112; 11 Jur. (N.S.) 568; 11 L. T. 252.

A wife is not entitled to a decree for a divorce a mensâ et thoro on the ground of cruelty of her husband, unless it is proved by reliable evidence that he has treated her with violence, physical or moral, dangerous to her life or health, so that cohabitation is for her unsafe; and further, that her troubles are not owing to misconduct of her own. *M'Keever* v. *M'Keever*, Ir. R. 11 Eq. 26.

If force, whether physical or moral, is systematically exerted by a husband to compel the submission of his wife, in such a manner, to such a degree, and during such a length of time, as to break down her health and render a serious malady imminent, it is legal cruelty, and she will be entitled to a judicial separation. *Kelly* v. *Kelly*, 39 L. J., Mat. 28; L. R. 2 P. 59; 22 L. T. 308; 18 W. R. 767.

Cruelty is in its character a cumulative charge. It must be sustained and evince a continued want of self-control, and it must be referable to permanent causes so as to endanger the future safety of the wife's person or health. Where the charges were confined to three days alone of a cohabitation of three years, the court held that the legal offence of cruelty had not been committed. *Plowden* v. *Plowden*, 23 L. T. 266; 18 W. R. 902.

The essential feature of cruelty (such as, when coupled with adultery, will entitle a wife to a divorce) is, that there must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it. *Milford* v. *Milford*, 37 L. J., Mat. 77—H. L. Affirming, L. R. 1 P. 295; 36 L. J., Mat. 30; 15 L. T. 392; 15 W. R. 319.

Single Acts of Violence.]—A single act of personal violence by a husband towards his wife, not producing any considerable injury to the person and not repeated, is not, although unwarrantable, sufficient to found a decree of judicial separation. *Smallwood* v. *Smallwood*, 2 Sw. & Tr. 397; 31 L. J., Mat. 3; 8 Jur. (N.S.) 63; 5 L. T. 324; 10 W. R. 65.

But where one act of violence is of such a character as to found a reasonable apprehension of further violence in case of cohabitation, the wife is entitled to the protection of the court. *Reeves* v. *Reeves*, 3 Sw. & Tr. 139; 32 L. J., Mat. 178; 8 L. T. 174; 10 W. R. 111.

When the evidence of actual violence used by a husband towards the wife is not sufficient of itself to warrant a decree on the ground of cruelty, the court will take into consideration his general conduct towards her, and if this is of a character tending to degrade the wife, and subjecting her to a course of annoyance and indignity injurious to her health, will feel itself at liberty to pronounce the cruelty proved. *Swatman* v. *Swatman*, 4 Sw. & Tr. 135.

Where a husband threatened to cut his wife's throat, but did not accompany the threat with any act of violence, and subsequently, after cohabitation had ceased, broke into the house in which his wife was living, and kicked through her bedroom door:—Held, that these acts did not amount to legal cruelty. *Brown* v. *Brown*, 14 W. R. 318.

Acts of Violence under Cerebral Excitement.]—Acts of violence committed under the influence of an acute disorder, such as brain fever, where, the disorder having been subdued, there is no danger of their recurrence, would not be a ground for a decree of judicial separation. Aliter, if the result of such disease is a new condition of the brain, rendering the person liable to ungovernable fits of passion, which would make further cohabitation dangerous. *Curtis* v. *Curtis*, 1 Sw. & Tr. 192; 27 L. J., Mat. 73.

A husband for many years led a life of gross intemperance, and on various occasions, apparently whilst suffering from delirium tremens, treated his wife with cruelty:—Held, that as she could not return to cohabitation without incurring great peril of a renewal of the bodily injuries before inflicted on her, she was entitled to a decree of judicial separation. *Marsh* v. *Marsh*, 1 Sw. & Tr. 312; 28 L. J., Mat. 13; 5 Jur. (N.S.) 46; 7 W. R. 129.

When acts of violence towards a wife were proved, and at times a state of cerebral excitement arising from the fatigues and anxieties of business connected with some of the acts of violence:—Held, that renewed cohabitation would be attended with such a liability to the recurrence of ungovernable passion and cerebral excitement as would make cohabitation unsafe to the wife, and that she was, therefore, entitled to a decree of judicial separation. *Martin* v. *Martin*, 29 L. J., Mat. 106; 8 W. R. 367.

—— **By Insane Person.**]—But cruelty committed by an insane person is no ground for a judicial separation. *Hall* v. *Hall*, 3 Sw. & Tr. 347; 33 L. J., Mat. 65; 9 L. T. 810.

Habitual Drunkenness.]—Drunkenness, even when accompanied by acts of considerable violence, is not a substantial ground for a decree of

judicial separation. *Scott* v. *Scott*, 29 L. J., Mat. 64.

The court will not grant a decree of judicial separation to protect a wife from mere unhappiness resulting from an ill-assorted marriage, nor from the destruction of domestic comfort caused by drunkenness. *Hudson* v. *Hudson*, 3 Sw. & Tr. 314; 12 W. R. 354.

But a woman by knowingly marrying a drunkard does not take all risks from his drunken habits. *Walker* v. *Walker*, 77 L. T. 715.

On the question of cruelty, the court will not consider the liability of danger which a wife would incur by returning to cohabitation with a husband subject to uncontrollable fits of drunkenness, such husband having used a certain amount of violence to the wife while under the influence of drink; and particular acts of violence will be viewed in connection with the cumulative misconduct of the married life. *Power* v. *Power*, 4 Sw. & Tr. 173; 34 L. J., Mat. 137; 11 Jur. (N.S.) 800; 12 L. T. 824; 13 W. R. 1113.

Where a husband prayed for restitution of conjugal rights, and it was proved that he had been an habitual drunkard, but for the last eighteen or twenty months had not given way to intemperance, the court, upon hearing the evidence of cruelty given by the respondent, was not satisfied that she had proved legal cruelty, or that it would be unsafe for her to return to cohabitation, and decreed restitution of conjugal rights. *Ruxton* v. *Ruxton*, 5 L. R., Ir. 19.

Neglect and Insult.]—No general rule can be laid down as to what amount of mere insults or offensive conduct on the part of a husband towards a wife—in the absence of acts of physical violence—will amount to cruelty, so as to entitle a wife to a decree of dissolution of marriage on the ground of adultery and cruelty. *Beauclerk* v. *Beauclerk*, 60 L. J., P. 20; [1891] P. 189; 64 L. T. 35—C. A.

Neglect, coldness and insult, whereby the petitioner's health was injured and entirely gave way, and a continuance of which would, according to the medical evidence, have produced melancholia:—Held, to constitute legal cruelty. *Walmesley* v. *Walmesley*, 1 R. 529; 69 L. T. 152.

Degrading Treatment—Isolated Acts of Physical Violence condoned Years before—Deed of Separation not a Bar.]—Upon a petition by the wife for dissolution of her marriage on the grounds of cruelty and adultery, where the only acts of physical violence had long since been condoned:—Held, that wilfully depriving the wife of her proper position in the household, neglecting her, degrading her to the level of a servant, and compelling her to do the menial work of the house and to take her meals and to sleep apart from the rest of the household, was, in itself, cruelty which would entitle the wife to relief; and, although the wife had lived apart from her husband under a deed of separation, when coupled with adultery on the part of the husband, entitled the wife to have her marriage dissolved. *Aubourg* v. *Aubourg*, 72 L. T. 295. And see *Waddell* v. *Waddell*, col. 738.

Expressions of Hatred and Loathing.]—The husband, from the time of the marriage, repeatedly refused to occupy the same room with his wife, saying that he loathed being with her and hated the sight of her; he told her that her presence made his life a hell. On one occasion when the wife went into his room to speak to him he pushed her roughly away and she fell, but was not hurt. This was the sole act of physical violence deposed to. The health of the wife became very seriously impaired, and two doctors whom she consulted gave it as their opinion that the husband's conduct was accountable for this, and that, if persisted in, her life might even be endangered. During the prolonged absence of the husband on one occasion the wife's health materially improved. The wife was fond of her husband, and bore with his conduct in the hope of ultimately winning his affections. It was found eventually that the husband was carrying on an adulterous intercourse with another woman, the funds for which intrigue were derived from money brought into settlement by the wife. Upon a petition presented by the wife for a dissolution of the marriage on the grounds of cruelty and adultery:—Held, that the petitioner was entitled to a decree nisi for divorce. *Kelly* v. *Kelly* (L. R. 2 P. 59) followed. *Bethune* v. *Bethune*, 60 L. J., P. 18; [1891] P. 205; 63 L. T. 259.

Indifference, neglect, aversion to a wife's society, and cessation of matrimonial intercourse, without personal violence or words of menace, though the husband may be carrying on an adulterous intercourse with a servant in the same house in which he is living with his wife, do not amount to legal cruelty. *Cousen* v. *Cousen*, 4 Sw. & Tr. 164; 34 L. J., Mat. 139; 11 Jur. (N.S.) 656; 12 L. T. 712.

Neglect, silence, shunning the wife's company, and declarations by the husband that he will never cohabit with her, do not constitute that cruelty and maltreatment in respect of which the law would grant to the wife a divorce a mensâ et thoro. *Paterson* v. *Paterson*, 3 H. L. Cas. 308.

Actual personal violence, or the immediate menace of it, is not the only ground of maltreatment in respect of which such a divorce will be granted. *Ib.*

Undue Attention to Servant causing Wife's Jealousy.]—On a wife's petition for judicial separation by reason of her husband's cruelty towards her, certain acts of violence on his part being admitted, which took place in disputes between the parties arising, at least in part, out of the wife's jealousy of a maidservant, the court took into consideration the position in which the wife was placed in the family by reason of any authority or control exercised over her by the servants by the direction of the husband, and the state of the wife's feelings arising from reasonable suspicions of undue familiarity between the husband and a maidservant. *Anthony* v. *Anthony*, 1 Sw. & Tr. 594.

Spitting in Wife's Face.]—Spitting in a wife's face, accompanied with pushing, and dragging her about a room, and the admission by the husband that he had once slapped her face, is sufficient for a divorce by reason of cruelty. *Saunders* v. *Saunders*, 1 Rob. Ecc. Rep. 549.

Spitting in a wife's face, combined with other acts of violence, constitutes cruelty. A test of injuries, such as spitting in the face, is the sense in which they are received. If not resented at the time, less weight will be attached to the charge when brought forward. *Waddell* v. *Waddell*, 2 Sw. & Tr. 584; 31 L. J., Mat. 123; 8 Jur. (N.S.) 623; 6 L. T. 552.

Causing Insult to Wife.]—When a husband assaults his wife in the street in such a manner as to induce a passer-by to believe her to be and to treat her as a prostitute, although he has inflicted no personal injury upon her, yet he is guilty of cruelty. *Milner* v. *Milner*, 4 Sw. & Tr. 240; 31 L. J., P. 159.

Constructive Cruelty.]—It is an essential element of constructive cruelty to children that the acts should be done in the presence, and so directly shock the sensibility, of the injured parent. *Manning* v. *Manning*, Ir. R. 6 Eq. 417; 7 id. 520.

Acts of cruelty towards children committed in the presence of the mother may amount to cruelty to her. *Suggate* v. *Suggate*, 1 Sw. & Tr. 489; 28 L. J., Mat. 46; 5 Jur. (N.S.) 127.

A husband constantly abused and swore at his wife, and refused to provide delicacies ordered by her doctor. He also used threats towards her, and on several occasions wantonly beat her child in her presence:—Held, that such conduct did not constitute legal cruelty, it not appearing that the wife had suffered in health in consequence of it, or been apprehensive for her personal safety. *Birch* v. *Birch*, 42 L. J., Mat. 23; 28 L. T. 40; 21 W. R. 463.

Semble, that the wanton ill-treatment of a child in the mother's presence and for the purpose of giving her pain, would, if carried to such an extent as to affect the mother's health, constitute legal cruelty. *Ib.*

—— **Maltese Law.**]—By the law of Malta grievous wrongs (ingiurie gravi) are grounds for judicial separation, though they may not amount to cruelty such as would entitle to separation by English law, being moral wrongs and not physical injuries. *Sant* v. *Sant*, 43 L. J., P. C. 73; L. R. 5 P. C. 370; 30 L. T. 415; 22 W. R. 713.

Semble, that cruelty to children comes under the head of "ingiurie gravi." *Ib.*

Communication of Disease.]—In support of a charge of cruelty, evidence was given that the wife was infected with disease, and that she had not been unchaste before marriage or unfaithful after it; but there was no evidence, beyond the presumption arising from the state of the wife, that the husband had ever suffered from the disease. The husband positively denied that he ever was diseased. The jury found that the husband was guilty of cruelty:—Held, that there was not sufficient evidence to support the verdict. *Morphett* v. *Morphett*, 38 L. J., Mat. 23; L. R. 1 P. 702; 19 L. T. 801; 17 W. R. 471.

To a husband's petition for restitution of conjugal rights the wife pleaded cruelty, viz. the wilful communication of an infectious disease. The husband denied the charge, and on examination by medical men no trace of disease could be found upon him:—Held, first, that it devolved upon the wife to establish affirmatively that her husband having the disease himself, knew, either from medical advice or from the obvious character of the symptoms, that he had a disease, that it was an infectious disease, and that it existed in such a stage and form that connection with his wife was at least distinctly dangerous. *Ib.*

Held, secondly, that in the absence of actual proof of the existence of disease in him, it was incumbent on the wife, in the medical evidence adduced in support of her charge, to lay the foundation for a scientific conclusion which should take the place of such proof, and from which the jury could argue with reason, first, to the charge of knowledge, and through that to the charge of wilfulness. *Ib.*

Held, thirdly, that the verdict of the jury having, in absence of such actual or scientific proof, been for the wife, the husband was entitled to a new trial, the wife's costs in the previous trial being first paid by him. *Ib.*

Weight given by the court to a wife's evidence of unnatural connection had or attempted to be had with her by the husband, and to evidence tending to prove the existence of gonorrhœa, and of its wilful communication by husband to wife. *N.* v. *N.*, 3 Sw. & Tr. 234; 9 Jur. (N.S.) 1203; 9 L. T. 265.

But in an undefended suit the court refused to admit evidence that the respondent had infected the petitioner with the venereal disease, there being no allegation in the petition that cruelty of that nature had been committed, although there was a general charge of cruelty. *Squires* v. *Squires*, 3 Sw. & Tr. 541; 33 L. J., Mat. 172; 10 Jur. (N.S.) 756; 12 W. R. 1028.

A husband's state of health must be within his own knowledge; therefore, if he is charged with having communicated to his wife a loathsome disease, and being a competent witness, does not come forward to assert his ignorance, the court will hold the charge of wilful infection established. *Brown* v. *Brown*, 35 L. J., Mat. 13; L. R. 1 P. 46; 11 Jur. (N.S.) 1027; 13 L. T. 645; 14 W. R. 149.

If a husband, knowing that he is in such a state of health that by having connection with his wife he will run the risk of communicating the venereal disease to her, recklessly has connection with her, and thereby communicates the disease to her, he is guilty of cruelty. *Boardman* v. *Boardman*, L. R. 1 P. 233; 14 W. R. 1024.

Unnatural Practices.]—A wife's evidence of unnatural connection had, or attempted to be had, with her by the husband, is not sufficient to establish such a charge. *N.* v. *N.*, 3 Sw. & Tr. 234; 9 Jur. (N.S.) 1203; 9 L. T. 265.

b. In Wife.

Personal Violence.]—A husband will be entitled to the protection of the court where the wife's passions, from whatever cause, are so little under control that she is in the habit of using personal violence to her husband, from which habit he may be in danger of bodily injury, though no actual serious injury has been inflicted. *White* v. *White*, 1 Sw. & Tr. 591; 6 Jur. (N.S.) 28; 1 L. T. 197.

Though the physical effects of a wife's violence may not generally be so serious to the personal safety of the husband as the effects of his violence towards her, yet the moral result of the wife's violence to all the proper relations of married life is so serious that the court will interfere, and not drive the husband to the necessity of meeting force by force. *Pickard* v. *Pickard*, 3 Sw. & Tr. 523; 33 L. J., Mat. 158; 10 Jur. (N.S.) 830; 10 L. T. 789; 13 W. R. 188.

Where a husband petitioned for a judicial separation on the ground of cruelty, consisting of acts of personal violence by the wife, the court, although it appeared that the husband's safety was not endangered, granted a decree on the ground that by refusing to act in such a case it would impose on the husband the necessity of meeting force by force. *Forth* v. *Forth*, 36 L. J., Mat. 122; 16 L. T. 574; 15 W. R. 1091.

Constructive Cruelty—To Child.]—The doctrine of constructive cruelty is confined to cases of cruelty practised by a husband upon the children in the presence of their mother, and ought not to be applied to cases of mere neglect, nor where the wrongdoer is the wife. Cruelty must amount to violence, physical or moral, endangering personal health and safety, and cruelty practised by a mother towards a child in the absence of the father, is not legal cruelty by the wife to the husband. *Suggate* v. *Suggate*, 1 Sw. & Tr. 489; 28 L. J., Mat. 46; 5 Jur. (N.S.) 127.

Malâ fide Persistence in False Charges—Unnatural Offence.] — The persistence in a false charge of having committed an unnatural criminal offence, made by word of mouth and in writing by a wife against her husband, is not, even when the charge is not believed by the wife to be true, such cruelty as entitles the husband to a decree for judicial separation. *Russell (Earl)* v. *Russell (Countess)*, 66 L. J., P. 122; [1897] A. C. 395; 75 L. T. 249; 61 J. P. 756—H. L. (E.)

A wife persisted in bringing against her husband by word of mouth, and in letters written to members of his family and others, a charge of having committed an unnatural offence, the charge not being true nor believed by her to be true:—Held (dissentiente Rigby, L.J.), that she had not been guilty of such cruelty as would entitle the husband to a decree for judicial separation. Held also, by the whole court, that desertion of the wife by the husband in the circumstances was not desertion without cause entitling her directly to a decree for judicial separation; and that since the passing of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), the court was not bound, on refusing the husband's claim for judicial separation, to grant the wife a decree for restitution of conjugal rights, and thus enable her to obtain a decree for judicial separation indirectly under s. 5 of that act. *S. C.*, 64 L. J., P. 105; [1895] P. 315; 73 L. T. 295; 44 W. R. 213—C. A.

As to alleging in petition. *See* col. 863.

4. WHAT CONSTITUTES DESERTION.

20 & 21 Vict. c. 85, s. 16, is not Retrospective.]—A husband, in 1833, deserted his wife without cause. They never afterwards lived together. In 1850 the wife rejected an offer made to her by the husband to live with her again:—Held, that the wife was not entitled to a judicial separation on the ground of "desertion without cause for two years and upwards," within 20 & 21 Vict. c. 85, s. 16, as that section had not a retrospective operation, and that there had been no desertion since that act passed. *Brookes* v. *Brookes*, 1 Sw. & Tr. 326; 28 L. J., Mat. 38; 7 W. R. 143.

Facts constituting, Vary.]—The facts which constitute desertion, as ground for a decree, vary with the circumstances and mode of life of the married persons. So long as a husband treats his wife as a wife, by maintaining such degree and manner of intercourse as might naturally be expected from a husband of his calling and means, he cannot be said to have deserted her. *Williams* v. *Williams*, 3 Sw. & Tr. 547.

Must be for Two Years, and against the Will of the Wife.]—A. left his home at Birkenhead in 1843, and left unanswered letters from his wife, telling him that an execution was in the house. She was obliged to go into lodgings, and subsequently supported herself as a governess. In 1844, A. made by letter some vague offer of rejoining her, and in 1848 wrote, bidding farewell for ever.—Held, that there was a wilful desertion of the wife in the winter of 1843-44, and no distinct offer afterwards to find another home. *Cudlipp* v. *Cudlipp*, 1 Sw. & Tr. 229; 27 L. J., Mat. 64.

Where the offence of desertion without cause for two years is once completed, the wife deserted has, at least since the 20 & 21 Vict. c. 85, s. 16, came into operation, a complete right to the relief given by the statute, although the other party may, subsequently to the two years, have made a bonâ fide offer to return. *Cargill* v. *Cargill*, 1 Sw. & Tr. 235; 27 L. J., Mat. 69; 4 Jur. (N.S.) 764; 6 W. R. 870.

A husband, having sent his wife to her father's house, together with a letter, in which he expressed a determination never to live with her again, sold his furniture and proceeded to Australia. After an absence of seven years he wrote to his wife, proposing that they should again cohabit together:—Held, that the offence of desertion having been perfected, the wife has a right, of which she cannot be deprived without her concurrence, to proceed for a judicial separation, notwithstanding a bonâ fide offer be subsequently made by the husband to return to cohabitation. *Ib.*

To sustain the charge of desertion, the act relied on as such must have been done contrary to the will of the person charging it. *Ward* v. *Ward*, 1 Sw. & Tr. 185; 27 L. J., Mat. 63; 6 W. R. 867.

A husband who, by his ill-treatment, compels his wife to separate from him, and afterwards refuses to receive her again, is guilty of desertion. *Graves* v. *Graves*, 3 Sw. & Tr. 350; 33 L. J., Mat. 66; 10 Jur. (N.S.) 546; 10 L. T. 273; 12 W. R. 1016.

A separation which was never acted upon, either as to the husband and wife living apart, or as to stipulations about money matters contained in it, does not deprive the act of the husband subsequently leaving the wife against her will of the character of desertion. *Cock* v. *Cock*, 3 Sw. & Tr. 514; 33 L. J., Mat. 157; 10 Jur. (N.S.) 806; 10 L. T. 726.

Where a husband has been guilty of adultery and desertion for two years and upwards, an offer to return to cohabitation can be no bar to the wife's petition on the ground of adultery and desertion, the offence of desertion being complete before the offer was made. *Basing* v. *Basing*, 3 Sw. & Tr. 516; 33 L. J., Mat. 150; 10 Jur. (N.S.) 806; 10 L. T. 756.

To negative a charge of desertion it is not sufficient that a man should merely write to his wife "Come back," or that he should say to a third party that he is willing to take her back. The court will look to the whole of his conduct, and must be satisfied from it that when he offered to take her back, he really intended what he said. *Harris* v. *Harris*, 15 L. T. 448. See *Harris* v. *Harris*, 31 L. J., Mat. 6.

A husband whilst living apart from his wife, under circumstances which did not constitute desertion, suddenly broke off all communication with her, and formed an adulterous connection with another woman:—Held, that these facts

showed that the husband had resolved to abandon his wife, and therefore constituted desertion. *Gatehouse* v. *Gatehouse*, 36 L. J., Mat. 121 ; L. R. 1 P. 331 ; 16 L. T. 34.

A husband withdrew from cohabitation and refused to return and live with his wife, unless she wrote a letter exonerating a certain lady of whom she had reason to be jealous. The wife, having grounds for believing that her suspicions were well founded, refused to comply with the condition, but was desirous to live with her husband, and pressed him to return to cohabitation. The husband occasionally met and corresponded with her, but persisted in his refusal to live with her :—Held, that the denial of consortium by the husband amounted to desertion, and that the desertion was without reasonable excuse. *Dallas* v. *Dallas*, 43 L. J., Mat. 87 ; 31 L. T. 271.

A husband, having fallen into difficulties, enlisted and went with his regiment to India. He was afterwards discharged, ceased to correspond with his wife in this country, and contributed nothing to her support :—Held, that he had been guilty of desertion. *Henty* v. *Henty*, 33 L. T. 263.

—— **From what Time.**]—The wife petitioned for a divorce on the grounds of desertion coupled with adultery. The marriage took place in April, 1875, and in 1876 or early in 1877 there was a temporary separation, which the petitioner stated to have been on account of the respondent's intemperate habits. In 1877 the respondent, who was a hosier at the date of the marriage, finally left his wife, but they continued to correspond for some years. In or about the year 1884 the wife heard rumours as to her husband's mode of life ; and subsequently, in 1886, she went to Australia, partly with the object of ascertaining the truth of those rumours, and partly with the object of singing at concerts, by which latter means she was supporting herself and child. She found he was living with a woman, and had children by her. The wife made no request to her husband to return to her, or to take her back to live with him. Subsequently she returned to England, and eventually instituted this suit, charging adultery and desertion in and since 1886 :—Held, that, although there was in law no desertion prior to 1886, yet the fact of his taking up with another woman and starting in another home, and not contributing anything to her support, constituted desertion in and since 1886 ; and that the petitioner was entitled to a decree nisi for the dissolution of the marriage upon that ground, coupled with adultery. *Drew* v. *Drew*, 64 L. T. 840.

A husband, in 1880, ceased to reside with his wife on the pretence that his business compelled him to be absent, but he supplied her with necessaries and corresponded with her and visited her occasionally, and a child was born in February, 1884. In January, 1884, the wife discovered that he had for two years been living with another woman :—Held, that his conduct did not amount to desertion for two years. *Farmer* v. *Farmer*, 53 L. J., P. 113 ; 9 P. D. 245 ; 33 W. R. 169.

Semble, that desertion commenced from the time when his wife discovered the adultery, and that after a lapse of two years from that time she would be entitled to a dissolution of her marriage. *Ib.* *And see* col. 753.

—— **Husband willing to return to Cohabitation—Questions for Jury.**]—Where a husband professes to be willing to return to cohabitation, the questions that should be submitted to the jury are whether the conduct of the husband was that of a man honestly intending to resume cohabitation with his wife ; whether he was not misrepresenting his real intentions in the letters he wrote ; and whether the real and only object of those letters was to evade the consequences which might ensue, and to deprive the wife of the remedy which she would be entitled to upon the completion of the two years' absence. *French-Brewster* v. *French-Brewster*, 62 L. T. 609. And see *Harris* v. *Harris*, 15 L. T. 448, col. 748.

Proof insufficient — Adjournment — Supplemental Petition.]—In a suit by the wife for dissolution of the marriage on the ground of adultery coupled with desertion, the adultery was proved, but the evidence of desertion fell short of the required period of two years by several months. The hearing was adjourned, and twelve months afterwards the respondent not having returned to cohabitation, the petitioner filed a supplemental petition charging desertion, on proof of which the court granted a decree nisi. *Wood* v. *Wood*, 57 L. J., P. 48 ; 13 P. D. 22.

Two Years' Desertion not complete at the Time of filing original Petition—Amendment—Fresh Petition.]—A petition presented by a wife for dissolution on the ground of adultery and cruelty was filed in August, 1886. In June, 1886, the respondent deserted his wife, and had never afterwards returned to cohabitation, and in July, 1888, she obtained leave to amend her petition by adding a charge of desertion. The court at the hearing, when the charge of cruelty was abandoned, declined to entertain the charge of desertion on the ground that the cause of action was not complete at the time of filing the petition, and while ready to grant a judicial separation on the ground of adultery :—Held, that further relief could only be obtained by filing a fresh petition. *Lapington* v. *Lapington*, 58 L. J., P. 26 ; 14 P. D. 21 ; 59 L. T. 608 ; 37 W. R. 384 ; 52 J. P. 727.

Wilful Separation—Reasonable Excuse—Ante-nuptial Incontinence.] — The petitioner, an officer of Marines, when only twenty years of age, in December, 1883, married the respondent, relying upon statements made by her as to her having been previously entrapped into a ceremony of marriage with a man whom she afterwards found had a wife then living. The petitioner, soon after his marriage, found that his wife's statements as to the alleged bigamous marriage were false, and that she had, in fact, been guilty of ante-nuptial incontinence, and was in an advanced state of pregnancy. Still believing, however, that her former statements, as to her being possessed of private means, were true, the petitioner told her to go to her friends, and he never contributed to her support, and did not see her again for about seven years, being most of that time on service. During that time the respondent committed adultery :—Held, that the petitioner's conduct did not disentitle him to relief. *Kennedy* v. *Kennedy*, 62 L. T. 705.

Adulteress brought to House by Husband —Wife's Refusal to remain.]—A wife peti-

tioned for the dissolution of her marriage on the grounds of adultery and desertion. The parties were married in 1866, and in 1872 the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her, but the husband insisted. The wife remained a short time in the house, and then told her husband that either she or the woman must leave the house. The husband told her she might do as she liked, but that the woman would remain. The wife thereupon left, and never afterwards cohabited with her husband:—Held, that the husband was guilty of deserting his wife. *Dickinson* v. *Dickinson*, 62 L. T. 330.

Where Husband Lives with a Woman not his Wife.]—A husband left his house in England, with the consent and knowledge of his wife, for Australia, and for some years regularly corresponded with her. The correspondence having suddenly been broken off, and nothing heard of the husband, inquiries were made, when it was found that he had been living with another woman as his wife, who had borne him three children:—Held, that there was evidence of an intention to desert from the time when the intimacy with the woman in Australia commenced, or from the time when the correspondence with the wife at home ceased. *Stickland* v. *Stickland*, 35 L. T. 767; 25 W. R. 114.

The fact of a man leaving his wife to live with another woman does not necessarily constitute desertion. *Ward* v. *Ward*, 1 Sw. & Tr. 185; 27 L. J., Mat. 63; 6 W. R. 867.

A wife reproached her husband with his connection with another woman, upon which he said that he wished to go from her, and would rather be with the other woman. She said, "Go, if you like, and when you are sick of her, come back to me"; but she made him swear that he would return to her. He never did return:—Held, guilty of desertion. *Haviland* v. *Haviland*, 32 L. J., Mat. 65; 11 W. R. 373.

Where the intention of a husband clearly was not to live with his wife (he was, in fact, carrying on an adulterous intercourse before and after marriage), the court held that it amounted to desertion on his part, though the wife actually left the house in which they last resided together, and, after she was aware of the adulterous connection, refused to return unless she was satisfied that such connection was at an end. *Graves* v. *Graves*, 3 Sw. & Tr. 350; 33 L. J., Mat. 66; 10 Jur. (N.S.) 546; 10 L. T. 273; 12 W. R. 1016.

At the trial of a petition by the wife for divorce from her husband on the ground of adultery and desertion, it appeared that they were married in 1866, and that after four years' cohabitation it was agreed between them, on the husband falling into difficulties, that a house and shop should be taken for the wife, and that she should carry on business in a separate name. From this time the parties had never lived together, though the husband occasionally visited his wife, and slept with her, and he made her an allowance. His visits were always as far as possible made in secret, and though his wife remonstrated, he refused to recommence open and avowed cohabitation. In 1885 the wife had reason to suspect that her husband was carrying on adulterous intercourse, and she never afterwards cohabited with him. In 1888 she obtained positive proof of his adultery, and thereupon commenced the present suit:—Held, that in the circumstances there was sufficient evidence of desertion for two years without reasonable cause by the husband. *Garcia* v. *Garcia*, 57 L. J., P. 101; 13 P. D. 216; 59 L. T. 524; 52 J. P. 584. And see *Drew* v. *Drew*, col. 755; and *Wynne* v. *Wynne*, 67 L. J., P. 5; [1898] P. 18.

——Willingness to Return to Cohabitation.]—A husband may be guilty of desertion even though he is willing to return to cohabitation with his wife, if at the time he is so willing he is actually cohabiting with another woman. *Farmer* v. *Farmer* (9 P. D. 245) and *Garcia* v. *Garcia* (13 P. D. 216) followed. *Edwards* v. *Edwards*, 62 L. J., P. 33.

—— Judicial Separation.]—In a wife's suit for dissolution on the ground of adultery coupled with desertion the adultery was proved; and with regard to the desertion, it appeared that after twenty-one years' cohabitation it was, in August, 1886, agreed between the parties, who were then resident abroad, that the wife and the children of the marriage should come to live in England. They accordingly took lodgings at Bournemouth, and the wife pressed her husband to return with them, but he refused. She continued willing to receive him and renew cohabitation until February, 1887, when she was shown a letter which convinced her that her husband had been carrying on an adulterous intercourse. Upon this she resolved that she never would live with him again. He wrote several letters to her offering to return to cohabitation, to which she did not reply; but her solicitors, by her direction, informed him that she would never live with him again:—Held, that there being no proof that the husband's offers to live again with his wife were not bonâ fide, she could not treat the separation on which she insisted as desertion by him, and that she was only entitled, therefore, to a judicial separation on the ground of adultery. *Lodge* v. *Lodge*, 59 L. J., P. 84; 15 P. D. 159; 63 L. T. 467.

A Bar to Divorce.]—A husband lived separately from his wife for many years, without making any provision for her maintenance from his means, which were sufficient:—Held, not to be entitled to a divorce, though the adultery of the wife was clearly proved. *Simmons' Divorce Bill*, 12 Cl. & F. 339.

Separation by Mutual Consent.]—A husband having committed several thefts, separated from his wife with her knowledge and consent, for the purpose of avoiding arrest. He was afterwards arrested and imprisoned, and having committed other thefts after his release, he was on subsequent occasions again imprisoned. Whilst he was in prison, and also in the intervals between his imprisonments, he kept up a correspondence with his wife and made repeated endeavours to induce her to return to cohabitation. She refused, and the cohabitation was never resumed. The wife having presented a petition for dissolution on the ground of adultery coupled with desertion, the court held that there was no desertion, the separation being involuntary on the part of the husband. *Townsend* v. *Townsend*, 42 L. J., Mat. 71; L. R. 3 P. 129; 29 L. T. 254; 21 W. R. 934.

Husband and wife separated by mutual consent at her instance. The husband, six years afterwards, made an offer to return to cohabitation, which the wife believed to be not bonâ fide,

and refused. There was no change in the circumstances which had originally led her to desire a separation:—Held, that there was no desertion. *Cooper* v. *Cooper*, 33 L. T. 264.

A husband, without reasonable excuse, obtained from his wife an agreement that they should live apart from each other, which they accordingly did, and she subsequently committed adultery:—Held, that under the circumstances he had deserted her, and that a petition by him for dissolution of the marriage must be dismissed. *Dagg* v. *Dagg and Speake*, 51 L. J., P. 19; 7 P. D. 17; 47 L. T. 132; 30 W. R. 431.

A husband and wife were cohabiting in Jamaica, where the husband held an appointment, when the wife was obliged to come to England in consequence of ill health. The husband afterwards, in 1851, asked her to return, and provided funds for her passage, but her health was not sufficiently re-established to enable her to accept his offer. She had no further communication with him, but in 1856 he made her an allowance, which he continued to pay until 1860:—Held, that as she had never made any offer to return to him after refusing his offer in 1851, he had not deserted her. *Keech* v. *Keech*, 38 L. J., Mat. 7; L. R. 1 P. 641; 19 L. T. 462.

A husband having left his wife in full possession of the family house, subsequently, and with her assent, visited his children there, but did not remain or return to cohabitation with his wife or hold any communication with her:—Held, that this was not evidence of desertion, but rather of separation by mutual arrangement. *Taylor* v. *Taylor*, 44 L. T. 31.

No one can desert who does not actually and wilfully bring to an end an existing state of cohabitation. If the state of cohabitation has ceased to exist, whether by the adverse act of husband and wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home has been resumed. The refusal by either, at the request of the other, to resume conjugal relations, does not constitute the offence of desertion. A wife having reason to believe that her husband had been guilty of adultery, separated from him, and instituted a suit for divorce, in which she failed. They never afterwards resumed cohabitation, and neither of them took any step for the purpose of bringing about a reconciliation. The conduct of the husband in holding aloof from the wife, and making no demand of cohabitation, was held not to constitute desertion. *Fitzgerald* v. *Fitzgerald*, 38 L. J., Mat. 14; L. R. 1 P. 694; 19 L. T. 575; 17 W. R. 264.

—— **Intermittent Cohabitation.**]—When husband and wife have been living separate and apart by mutual consent, there can be no desertion of the one party by the other, without a prior resumption of cohabitation. There must, in fact, be an active withdrawal from an existing cohabitation. *Fitzgerald* v. *Fitzgerald* (38 L. J., P. 14; L. R. 1 P. 694), and *Reg.* v. *Leresche* (60 L. J., M. C. 153; [1891] 2 Q. B 418) discussed. *Bradshaw* v. *Bradshaw*, 66 L. J., P. 31; [1897] P. 24; 75 L. T. 391; 45 W. R. 142; 61 J. P. 8.

—— **Married Domestic Servants living under Different Roofs.**]—Where a man married a domestic servant and never resided under the same roof with her, but at the same time visited her whenever he was so inclined and had two children by her, the justices held that they were precluded by the decisions in the cases of *Fitzgerald* v. *Fitzgerald* (38 L. J., P. 14; L. R. 1 P. 694), and *Reg.* v. *Leresche* (60 L. J., M. C. 153; [1891] 2 Q. B. 418), from holding that the husband had deserted his wife, within the meaning of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895. The court, after explaining and distinguishing the above two cases, held that the cohabitation was sufficient to give the justices jurisdiction, and remitted the case to them for further consideration. *Ib.*

—— **Temporary Separation for Mutual Convenience—Refusal on Part of Husband to Take back or Maintain his Wife.**]—During a temporary separation between a husband and wife for mutual convenience cohabitation does not cease and the marital relations are not altered. And the husband, who under such circumstances refuses to take his wife back again or to maintain her, may be guilty of desertion under the Married Women (Maintenance in Case of Desertion) Act, 1886, and liable thereunder. *Chudley* v. *Chudley*, 69 L. T. 617; 17 Cox, C. C. 697—C. A. Affirming, 62 L. J., M. C. 97; 57 J. P. 790.

—— **Husband's want of Means — Mutual Separation—Correspondence.**]—A husband and wife agreed to separate owing to the husband's inability to maintain his wife. They continued to correspond, and numerous letters passed between them, in some of which the husband taunted his wife with not getting a divorce, and said it was cruel of her and her friends to "fetter" him. He also made frequent requests for pecuniary assistance. The wife offered to return to her husband when he informed her in one of his letters that he was ill, but he wrote and refused her. The husband's letters ceased in July, 1885. The wife wrote four times in answer to the last letter from him, but received no reply. She subsequently made inquiries and discovered that, while the correspondence had been going on and since it ceased, the respondent had been residing at various places and keeping up an adulterous connection, and that he was living under his mother's roof with a woman who was not his wife:—Held, that this conduct constituted desertion, and, coupled with the adultery, entitled the wife to a decree of divorce. *Smith* v. *Smith*, 58 L. T. 639.

Husband causing Wife to Leave Him.]—A husband charged with desertion traversed the charge. On his examination he admitted that he had insisted that his wife should leave his house, but said that he did so for a good cause, which he stated:—Held, guilty of desertion. *Baker* v. *Baker*, 32 L. J., Mat. 145; 11 W. R. 502.

A. married a woman, and after cohabiting with her at her father's house for some weeks, left her. At his request, she shortly afterwards went to him, and remained with him for two or three days. He then sent her back to her father, saying that he could not support her. After the lapse of eighteen months, during which she did not hear from him, he went to her father's house, and asked to be allowed to see her. Her father refused to allow him to have any communication with her until he should be in a condition to support her. He

then left, and never returned or asked her to return to him :—Quære, whether these facts established a case of desertion. *Harris* v. *Harris*, 31 L. J., Mat. 6. See *Harris* v. *Harris*, 15 L. T. 448.

Husband sentenced to Penal Servitude.]—In a wife's suit for dissolution on the ground of adultery and desertion, it appeared that the respondent when he left his wife stated to her that he was going to Ireland for a week's shooting, but in fact he went to Australia to escape arrest on a charge of embezzlement. Up to the time of his flight he had been carrying on an adulterous intercourse with a woman with whom he had made arrangements to go away, and he was found living in adultery with another woman at Sydney. Subsequently he was brought back to this country in custody, tried, and sentenced to ten years' penal servitude :—Held, that the circumstances under which the respondent left his wife constituted desertion, and that the desertion would continue notwithstanding the fact that he was brought back to this country in custody and prevented by his imprisonment from returning to his wife. *Drew* v. *Drew*, 57 L. J., P. 64 ; 13 P. D. 97 ; 58 L. T. 923 ; 36 W. R. 927. And see *Astrope* v. *Astrope*, 29 L. J., Mat. 27, col. 739 ; and *Wynne* v. *Wynne*, 67 L. J., P. 5 ; [1898] P. 18.

Tyrannical conduct of Husband.] — The appellant sued his wife, the respondent, for a divorce by reason of her desertion. By the Scots Act, 1573, c. 55, it is enacted in effect that it shall be sufficient cause of divorce if either spouse leave the other without reasonable cause and remain maliciously absent for four years. In an action by a husband against his wife for divorce on the ground of desertion for the statutory period, it appeared that she had left him because of conduct on his part causing her mental distress sufficient to interfere with her restoration to health, and because of menaces by him sufficient to create in her a well-founded apprehension of physical restraint, and culminating in an act of violence against her person : —Held, that she had reasonable cause for leaving her husband's house, and for declining to return to it, and that there was a good defence to the action. Whether in an action for adherence by a husband, misconduct on his part short of cruelty or other matrimonial offence may be a ground for refusing relief, quære. *Mackenzie* v. *Mackenzie*, [1895] A. C. 384—H. L. (Sc.)

Ill Temper.]—Mere frailty of temper unless shown in some marked and intolerable excesses is not "reasonable cause" for desertion. *Yeatman* v. *Yeatman*, 37 L. J., Mat. 37 ; L. R. 1 P. 489 ; 18 L. T. 415 ; 16 W. R. 734.

Refusal to Consummate Marriage.]—A husband petitioning for a dissolution of his marriage admitted that he had separated himself from his wife before the adultery complained of, and had not contributed to her support, but alleged that such separation was caused by her persistent refusal to allow him to consummate the marriage, although he was able and willing to do so. The wife did not deny the fact of non-consummation, but alleged that the husband was to blame for it owing to his physical incapacity. The court, without deciding the question of fact whether the non-consummation was the fault of the one or the other, came to the conclusion that he had acted under a bonâ fide belief that she had wronged him, and therefore considered that he had not been guilty of such desertion or wilful separation without reasonable excuse as to deprive him of his right to a decree of dissolution on the ground of her adultery. *Ousey* v. *Ousey and Atkinson*, 43 L. J., Mat. 35 ; L. R. 3 P. 223 ; 30 L. T. 911 ; 22 W. R. 556.

Separation Deed.]—A husband deserted his wife. A year afterwards, through the intervention of a mutual friend, a deed of separation was agreed to by which the husband covenanted to make the wife an allowance, and charged it upon his reversionary interest in a sum of money. The deed was fully executed, but no part of the allowance paid :—Held, that the wife had bargained away her right to relief, and could not establish the charge of desertion without cause for two years. *Parkinson* v. *Parkinson*, 39 L. J., Mat. 14 ; L. R. 2 P. 25 ; 21 L. T. 732.

When the parties have separated voluntarily under a deed of separation, such separation will not be converted into a desertion merely because one of the parties does not fulfil all the terms of the bargain he entered into with the other on parting. *Crabb* v. *Crabb*, 37 L. J., Mat. 42 ; L. R. 1 P. 601 ; 18 L. T. 153 ; 16 W. R. 650.

On a wife's petition for dissolution of marriage, by reason of adultery and desertion, it appeared that subsequently to the desertion a deed of separation was executed by both parties, and that for three months afterwards the wife continued to pay to the husband a small allowance for his support. The court being satisfied that the act of the wife was prompted wholly by affection and humanity, and that she never assented to the desertion, granted a decree nisi. *Nott* v. *Nott*, 36 L. J., Mat. 10 ; L. R. 1 P. 251 ; 15 L. T. 299.

Payment of Allowance to Wife.]—A wife is entitled to the society and protection of her husband, and if, after refusing to live with her, he gives her an allowance, the payment of such allowance to her is no answer to the charge of wilful desertion. *Macdonald* v. *Macdonald*, 4 Sw. & Tr. 242.

A husband, having refused to cohabit with his wife, or to provide a home for her, offered her 100*l.* on condition that she would not molest him in future by insisting on her conjugal rights. She agreed to the condition, and received the money, and they never afterwards cohabited :—Held, that these facts did not constitute desertion on the part of the husband. *Buckmaster* v. *Buckmaster*, 38 L. J., Mat. 73 ; L. R. 1 P. 713 ; 21 L. T. 231 ; 17 W. R. 1114.

A husband who withdraws from cohabitation with his wife may be guilty of the offence of desertion, although he continues to support her. *Yeatman* v. *Yeatman*, 37 L. J., Mat. 37 ; L. R. 1 P. 489 ; 18 L. T. 415 ; 16 W. R. 734.

Reasonable Cause.]—A husband may have "reasonable cause" for desertion, though the cause be not such as would entitle him to a decree for a judicial separation. *Ib.*

Desertion without cause means without reasonable cause. Such reasonable cause is not necessarily a distinct matrimonial offence on which a decree of judicial separation or dissolution could

be founded ; but it must be grave and weighty. *Ib.*

Mere frailty of temper and habits which are distasteful to a husband are not reasonable grounds for depriving a wife of the protection of his home and society. *Ib.*

Decree for Restitution of Conjugal Rights —Refusal to Obey—Adultery revived.]—In a petition by a wife for divorce on the ground of adultery and desertion it appeared that the husband had failed to comply with a decree for restitution of conjugal rights, and that he had also been guilty of adultery before the date of the decree :—Held, that sufficient proof of adultery and desertion had been given to satisfy s. 5 of the Matrimonial Causes Act, 1884, and that the wife was entitled to a decree for divorce. *Bigwood* v. *Bigwood*, 57 L. J., P. 80 ; 13 P. D. 89 ; 58 L. T. 642 ; 36 W. R. 928.

See also *Harding* v. *Harding*, 57 L. J., P. 80 ; 11 P. D. 89 ; 58 L. T. 642 ; 36 W. R. 928.

As to alleging desertion in petition. *See* col. 863.

5. BARS TO.

a. Generally.

Discretion of Court under 20 & 21 Vict. c. 85, s. 31.]—The discretion to be exercised under 20 & 21 Vict. c. 85, s. 31, must be a regulated discretion, and not a free option subordinated to no rules. *Morgan* v. *Morgan and Porter*, 38 L. J., Mat. 41 ; L. R. 1 P. 644 ; 20 L. T. 588 ; 17 W. R. 688.

The court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable or capable of excuse. *Ib.*

There must be some special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner. *Ib.*

On the trial of a husband's petition for dissolution of marriage by reason of his wife's adultery, the jury found that he had also been guilty of adultery. The adultery was long antecedent to her misconduct, and it did not appear that it was known to her until after the filing of the petition. The court held, that mere lapse of time would not justify the exercise of the discretion vested in it, and refused a decree. *Ib.*

In a husband's suit for dissolution, the wife's adultery was proved, and the husband confessed to an act of adultery in the year 1874, which he alleged had been committed under the influence of liquor, and which had been condoned by the wife :—Held, that the petition must be dismissed. *Grosvenor* v. *Grosvenor*, 34 W. R. 140.

Where a general verdict of adultery was found against the husband, the petitioner, the issues raised by the counter-charges of adultery in the wife's answer being specific, and the petitioner declined the offer of a new trial, the court, accepting the verdict of the jury as conclusive of his adultery, refused to exercise its discretionary power, and condemned him in the wife's full costs. *Barnes* v. *Barnes and Beaumont*, 38 L. J., Mat. 10 ; L. R. 1 P. 572 ; 19 L. T. 526.

The court in the exercise of the discretion conferred on it by 20 & 21 Vict. c. 85, s. 31, granted a decree nisi, notwithstanding the judgment against the petitioner in the former suit, the act of adultery, if committed, being an isolated one, and unconnected with the respondent's adultery, and the finding of the jury in the second suit, acquitting the petitioner, having thrown doubt upon his guilt. *Conradi* v. *Conradi, Worrall and Way*, 37 L. J., Mat. 55 ; L. R. 1 P. 514 ; 18 L. T. 659 ; 16 W. R. 1023.

Discretion Notwithstanding Condonation.] —On the petition of a husband, the wife's adultery and his cruelty being in issue, the jury, by their verdict, affirmed both the adultery and cruelty ; but as the wife's drunken habits were the probable cause of the husband's violence, the court exercised the discretion given it by 20 & 21 Vict. c. 85, s. 31, by dissolving the marriage. The drunken violence of the wife would only justify such force on the part of the husband as might be necessary for her restraint. *Pearman* v. *Pearman*, 1 Sw. & Tr. 601 ; 29 L. J., Mat. 54 ; 8 W. R. 274.

Where a petitioner has been guilty of adultery or cruelty, the court may, in the exercise of its discretionary power, refuse to decree a dissolution of the marriage, although such adultery or cruelty may have been condoned. *Goode* v. *Goode and Hamson*, 2 Sw. & Tr. 253 ; 30 L. J., Mat. 105 ; 7 Jur. (N.S.) 317 ; 4 L. T. 122 ; 9 W. R. 552.

Both Parties found Guilty — Cross Petitions.]—In cross petitions by the husband and wife for dissolution of marriage the jury found that the wife had committed adultery, and that the husband had committed adultery with the wife's sister and with another woman, and that the wife had condoned his adultery. The court in the circumstances refused to make any decree, and dismissed both petitions. *Stoker* v. *Stoker*, 58 L. J., P. 40 ; 14 P. D. 60 ; 60 L. T. 400 ; 37 W. R. 576.

Agreement for New Marriage — Ignorance of Law.]—A husband and wife signed a paper to the effect that they agreed to separate, and that each was at liberty to marry again. The husband, who was in humble rank, believed this document to be legal and binding, and went through the form of marriage with another person, from whom he separated on learning that the second marriage was not legal. He subsequently petitioned for a divorce :—Held, that as the petitioner acted in ignorance of the law, and in the bonâ fide belief that the second marriage was legal, it was a proper case for the court to exercise its discretion under s. 31 of the Matrimonial Causes Act, 1857, to excuse the adultery of the petitioner. *Whitworth* v. *Whitworth*, 62 L. J., P. 71 ; [1893] P. 85 ; 1 R. 509 ; 68 L. T. 467 ; 41 W. R. 592.

Aggravated Assault by Petitioning Husband —Separation and Allowance to Wife.]—Decree dissolving the marriage pronounced in favour of a husband who had been convicted by justices of an aggravated assault upon his wife, and against whom a separation order and an order for an allowance had been thereupon made. *Sergent* v. *Sergent*, 64 L. T. 236.

Rape and Cruelty of Husband—Adultery of Wife.]—A husband obtained a decree nisi by reason of his wife's adultery, but the decree

was rescinded, and his petition dismissed by reason of his cruelty and adultery. The parties lived together again, and he committed other acts of cruelty, and was also guilty of rape, when the wife filed a petition for dissolution of the marriage. The court under the circumstances granted the wife a decree nisi. *Collins* v. *Collins*, 53 L. J., P. 116; 9 P. D. 231; 33 W. R. 170.

Desertion by Petitioner.]—The discretion vested in the court by 20 & 21 Vict. c. 85, s. 31, will almost invariably be exercised by refusing to dissolve a marriage on the ground of the wife's adultery, if she has been deserted by the petitioner. *Yeatman* v. *Yeatman and Rummell*, 39 L. J., Mat. 77; L. R. 2 P. 187; 23 L. T. 283; 18 W. R. 1088. *And see* col. 747.

Adultery by Petitioner.]—On one occasion subsequent to his marriage a husband had connection with a female with whom he had cohabited before marriage. The fact became known to the wife shortly afterwards, and was by her forgiven, and her cohabitation with her husband was continued for some considerable time:—Held, that the condonation by her was not a fact to justify the court in exercising its discretion in favour of the husband, and therefore it dismissed his petition. *McCord* v. *McCord and Coxon*, 44 L. J., Mat. 38; L. R. 3 P. 237; 33 L. T. 264; 23 W. R. 684.

Eighteen months after the marriage a husband, the petitioner, committed adultery on one occasion with a woman by whom he had had a child previously to his marriage. He confessed the fact to his wife, who condoned his misconduct. Subsequently the wife herself was guilty of adultery. The court was of opinion that there was no special circumstance in the case to justify the exercise of its discretion under 20 & 21 Vict. c. 85, s. 31, in favour of the petitioner, and declined to pronounce a decree. *Ib.*

When the petitioner had obtained a decree nisi, with costs against two co-respondents, and the Queen's proctor having intervened and filed pleas, the jury on a second trial found that the petitioner had committed adultery with several females, and infected his wife with a venereal disease; the court reversed the decree, including that part of it by which the co-respondents were condemned in costs. *Yonell* v. *Yonell, Terrass and Burleigh*, 33 L. T. 578; 24 W. R. 59.

At the hearing of a suit by a husband for dissolution of marriage, he, after his case had been proved, tendered himself for examination and confessed that on one occasion, during a temporary separation from his wife, he had been guilty of an act of adultery. The court refused a decree. *Clarke* v. *Clarke and Clarke*, 34 L. J., Mat. 94; 13 W. R. 848.

The court will not exercise its discretion in favour of a petitioner who has been guilty of adultery, unless it can be shown that, but for the one lapse proved, he has been a good and faithful husband. *Hutchinson* v. *Hutchinson and Barker*, 12 Jur. (N.S.) 491; 14 L. T. 338.

A petitioner satisfied the court that she had been terrified by the threats and ill-treatment of her husband into leading a life of immorality, contrary to her own will and desire:—Held, that it was a fit case for the court to exercise their discretion, and to pronounce for a dissolution of the marriage, the adultery and cruelty of the husband having been proved, notwithstanding the admitted prostitution of the petitioner during the marriage. *Coleman* v. *Coleman*, 35 L. J., Mat. 37; L. R. 1 P. 81; 13 L. T. 684.

Bigamy of Petitioner.]—A husband believing that his wife was dead married again, and subsequently discovered that his wife was alive and had committed adultery:—Held, that, notwithstanding the bigamy, he was entitled to a dissolution of his marriage. *Freegard* v. *Freegard*, 52 L. J., P. 100; 8 P. D. 186; 32 W. R. 95.

A husband, whose wife had eloped and was living in adultery, contracted a marriage with another woman, under the belief that she was dead, and cohabited with that woman as his wife. The court being satisfied that at the time the second marriage was contracted he really supposed the respondent was dead, granted a decree of dissolution, notwithstanding his adultery. *Joseph* v. *Joseph and Wentzel*, 34 L. J., Mat. 96; 13 W. R. 872.

—— **Belief in Husband's Death.**]—A wife had been deserted by her husband; sixteen years afterwards she, believing him to be dead, went through a form of marriage with another man, and subsequently discovered that her husband was alive and had committed adultery:—Held, that, notwithstanding the bigamy, she was entitled to a decree for dissolution of the marriage. *Potter* v. *Potter*, 1 R. 499; 67 L. T. 721.

—— **Bona Fides.**]—Where a petitioner acts purely in ignorance of the law, and has no intention to commit adultery, being in fact unaware that what he is doing amounts to adultery, the discretion conferred upon the court by s. 31 of the Divorce Act should be exercised in his favour. *Snook* v. *Snook*, 67 L. T. 389.

Matrimonial Misconduct by Petitioner.]——Although in a suit for dissolution of marriage the court may grant a judicial separation where the evidence is sufficient to warrant such a decree only, yet it will not do so, but will dismiss the petition if the petitioner has been guilty of misconduct for which the court, acting under 20 & 21 Vict. c. 85, s. 31, is of opinion that the petition should be dismissed. *Boreham* v. *Boreham*, 35 L. J., Mat. 49; L. R. 1 P. 77; 14 W. R. 317.

When the case of a petitioner, in a suit for dissolution of marriage on the ground of adultery, has been proved, and the court does not find that he has been accessory to or conniving at the adultery, or that there has been condonation or connivance, the court is bound to pronounce a decree dissolving the marriage, unless it is established affirmatively that the petitioner has been guilty of one of the acts which, under the proviso to 20 & 21 Vict. c. 85, s. 31, gives the court a discretionary power to refuse to dissolve the marriage. *Haswell* v. *Haswell and Sanderson*, 1 Sw. & Tr. 502; 29 L. J., Mat. 21; 1 L. T. 69; 8 W. R. 76.

Suppression of Material Facts.]—The court will not refuse a petitioner his decree because of the suppression of material facts, if upon the whole case he should appear entitled to relief. *Alexandre* v. *Alexandre*, 39 L. J., Mat. 84; L. R. 2 P. 164; 23 L. T. 268; 18 W. R. 1087.

Delay in Presenting Petition.]—The peti-

tioner, after having been separated from her husband for twenty years, presented her petition for dissolution of marriage on the ground of adultery and cruelty. The adultery was proved to have taken place recently. The alleged cruelty was before the separation. The only explanation for the delay suggested by the petitioner was that at first she thought her husband would repent, and latterly she wished to wait until her son, the only child of the marriage, was grown up :—Held, that the delay was so unreasonable as to disentitle her to a decree. *Beauclerk* v. *Beauclerk*, 60 L. J., P. 20 ; [1891] P. 189 ; 64 L. T. 35—C. A.

—— **Justification—Order for Restitution of Conjugal Rights—Non-compliance—Petition for Dissolution—Adultery and Desertion.**]—Where a respondent who had entered into a voluntary deed of separation failed to comply with a decree for restitution of conjugal rights, and the petitioner presented a petition for dissolution of the marriage under s. 5 of the Matrimonial Causes Act, 1884, on the grounds of his adultery and desertion, the court granted a decree nisi, being of opinion that, inasmuch as the separation was at first voluntary, the petitioner could not before instituting the suit for restitution of conjugal rights have proved desertion, there had not been such unreasonable delay as would induce the court in the exercise of its discretion to refuse relief :—Query, whether a petitioner can avoid the consequences of delay in presenting a petition for dissolution by obtaining an order for restitution of conjugal rights. Query, whether the fact that there has been delay in applying for restitution of conjugal rights (although such delay is insufficient to refuse that order) is a ground for the court refusing a subsequent petition for dissolution. *Beauclerk* v. *Beauclerk*, 64 L. J., P. 102 ; [1895] P. 220 ; 11 R. 654 ; 43 W. R. 655.

—— **Wife's Confession—Husband's Separation thereupon—Want of Means.**]—A bonâ fide confession of adultery by a wife to her husband, believed in by him, is sufficient excuse for his leaving her. The husband, in 1881, found a letter in his wife's possession, and taxed her with adultery with a certain man. She admitted it, and he (the husband) left her. He was a journeyman jeweller, and had no means at that time to commence proceedings. He, about 1890, found that she was living with another man as his wife, by whom she had four children. The court, finding that he was justified in leaving his wife upon her confession of adultery in 1881, and that his explanation of want of means was sufficient to explain the delay in taking proceedings to have his marriage dissolved, granted him a decree nisi. *Faulkes* v. *Faulkes*, 64 L. T. 834. *And see* col. 888.

Lunacy of Respondent—Whether a Defence.]—At the time of the filing of a husband's petition for dissolution of marriage the respondent was undoubtedly insane. There was evidence that at the time of the commission of the acts of adultery alleged in the petition she was under the delusion that her husband was trying to poison her, and wanted to drive him to get a divorce :—Held, that though a person guilty of adultery may at the time such adultery was committed have been subject to delusions on certain points, yet, if such person was nevertheless capable of understanding the nature of the act he or she had committed and its probable consequences, his or her insanity would be no answer to a petition for dissolution. Semble, that such insanity as would be a defence to a criminal charge would not constitute a defence to a petition for dissolution of marriage. *Yarrow* v. *Yarrow*, 61 L. J., P. 69 ; [1892] P. 92 ; 66 L. T. 383.

Assuming that insanity can in any case afford a defence to proceedings for divorce, it is necessary, in order to make insanity a good plea to a petition for divorce, that the plea should state that the insanity is lasting and abiding, and that there is no hope of recovery or amelioration, and not that it is a mere recurrent or intermittent insanity. And where it appears that a husband who returns to the conjugal home after a period of confinement in an asylum is subject to recurring fits of mania, which, though they may assume the form of hereditary disease, endanger the safety of the wife, she is entitled to the protection of the court by the grant of a judicial separation. *Hanbury* v. *Hanbury*, 61 L. J., P. 115 ; [1892] P. 222. *And see* cols. 873-4.

b. Agreement for Separation.

Injunction against Proceedings in Divorce Court.]—By deed a husband covenanted with the trustee of the deed to make an allowance to his wife, and the trustee covenanted, on behalf of the wife, neither to sue for restitution of conjugal rights, alimony, nor to molest, trouble, or disturb the husband. Shortly after the execution of the deed the wife, who had duly received her allowance, commenced proceedings in the divorce court for a judicial separation and for alimony. Thereupon the husband filed a bill in equity against his wife, praying that she might be restrained from continuing the proceedings, and from doing any act to molest, trouble, or disturb him :—Held, that he was entitled to a perpetual injunction of the extent (only) of restraining the proceedings in the divorce court. *Flower* v. *Flower*, 25 L. T. 902 ; 20 W. R. 231.

Injunction not granted.]—Upon motion by a wife for an injunction to restrain her husband from proceeding in the divorce court to obtain a dissolution of marriage, on the ground of a contract by the husband (in a separation deed) to condone all former causes of complaint, and not to take legal proceedings in respect thereof :—Held, that as the contract might be set up by way of defence in the divorce court, and as it was executed by the husband in ignorance of the fact that his wife had committed adultery, and on her positive assertion of innocence, a court of equity would not interfere to stay proceedings in the divorce court. *Brown* v. *Brown*, 38 L. J., Ch. 153 ; L. R. 7 Eq., 185 ; 19 L. T. 594 ; 17 W. R. 98.

In a separation deed the husband covenanted with the trustee to allow to his wife 50*l.* a year for her support, he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf that she would not in any way endeavour to compel the husband again to live with her, or to allow her "any further or greater or other support, maintenance, or alimony" than the annuity of 50*l.* :—Held, that in the absence of any act showing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it

against her husband, a court of equity would not, upon an interlocutory motion, restrain her from proceeding in the divorce court to obtain an allowance for alimony, as incident to her petition for a judicial separation on the ground of cruelty, but the court put her under an undertaking to deal with the alimony as the court should direct. *Williams* v. *Baily*, L. R. 2 Eq., 731; *Besant* v. *Wood*, 12 Ch. D. 605; 40 L. T. 445. *And see also* col. 717.

c. Condonation.

What is.]—Condonation, being a conclusion of fact and not of law, means a full and absolute forgiveness of a conjugal offence, with knowledge of all that is forgiven: it is not affected by the existence of, and does not operate as a forgiveness of, other unknown adulteries. Condonation being proved, the claim for damages is ancillary to and dependent on the petition, and must be dismissed if the petition is also dismissed. *Pomero* v. *Pomero and Hadley* (10 P. D. 174) overruled; *Story* v. *Story and O'Connor* (12 P. D. 196) approved. *Bernstein* v. *Bernstein*, 63 L. J., P. 3; [1893] P. 292; 6 R. 609; 69 L. T. 513—C. A.

Must be Voluntary.]—Condonation, to be perfect, must be voluntary and unconditional. A forced return to cohabitation is no proof of condonation. *Cooke* v. *Cooke*, 3 Sw. & Tr. 26; 32 L. J., Mat. 154; 9 Jur. (N.S.) 754; 8 L. T. 644; 11 W. R. 957. Affirmed on appeal, 3 Sw. & Tr. 246.

Much less is sufficient to destroy condonation than to found an original suit. *Ib.*

Not Pleaded—Noticed by Court.]—Condonation proved at the hearing will be noticed by the court, although it has not been pleaded. *Curtis* v. *Curtis*, 4 Sw. & Tr. 234.

Must be Strictly Proved.]—Condonation on the renewal of conjugal intercourse requires strict proof. In matrimonial causes there are few reasons for delay. *Campbell* v. *Campbell*, 5 W. R. 519.

Of Adultery.]—B. received back his wife after adultery by her committed in May, 1856. In June, 1857, he left England for Australia, to ascertain his prospects in settling, leaving his wife in business in Devonshire, close to her own mother. The wife, during his absence, committed adultery with the co-respondent, and sold off the stock-in-trade. The court dissolved the marriage, and condemned the co-respondent in the costs. *Wilton* v. *Wilton and Chamberlain*, 1 Sw. & Tr. 563; 1 L. T. 243; 8 W. R. 160.

Condonation of adultery, committed by a wife, with A., is a bar to any proceedings by the husband against A. If such condoned adultery is revived by the wife's subsequent misconduct, so as to entitle the husband to a decree of dissolution of marriage, A., though made a co-respondent, cannot be condemned in costs. *Norris* v. *Norris*, 30 L. J., Mat. 111.

Before the court can come to the conclusion of condonation by a husband, it must be satisfied that he continued to live with his wife with full knowledge of the acts of adultery alleged to be condoned. *Ellis* v. *Ellis and Smith*, 4 Sw. & Tr. 154; 34 L. J., Mat. 100; 11 Jur. (N.S.) 610; 13 L. T. 211; 13 W. R. 964.

Where, to an action for maintenance, the husband alleged the wife's adultery, but failed to prove it, and afterwards lived with her, the court refused to come to the conclusion of condonation. *Ib.*

The adultery of a wife, if it has been condoned by her husband, is no bar to a suit by her for judicial separation on the ground of adultery subsequently committed by him. *Seller* v. *Seller*, 1 Sw. & Tr. 482; 28 L. J., Mat. 99; 5 Jur. 686; 8 W. R. 5.

Cohabitation after Knowledge of Adultery.]—The fact that a husband continues to sleep in the same bed with his wife after knowledge of her adultery affords a strong presumption of condonation, but such presumption is capable of being rebutted by evidence. *Hall* v. *Hall*, 60 L. J., P. 73—C. A. Affirming, 64 L. T. 837.

Discretionary Bar.]—In a suit by the husband for divorce on the ground of his wife's adultery with the co-respondent, the jury found that the wife and the co-respondent had committed adultery, and assessed the damages at 300*l.* The wife in her answer made a counter-charge of adultery committed by her husband, in the house in which he resided with his wife, with a domestic servant in their employment five years before. The husband admitted the charge, but pleaded and proved that his wife had condoned the offence and continued to live with him:—Held, that under the circumstances the husband's adultery disentitled him to a decree, and his petition being accordingly dismissed, that he was not entitled to the damages. *Story* v. *Story*, 57 L. J., P. 15; 12 P. D. 196; 57 L. T. 536; 36 W. R. 190; 51 J. P. 680.

Where a petitioner has committed adultery, condonation of the offence by the respondent is not a special circumstance to justify the court in exercising its discretion in the petitioner's favour under s. 31 of 20 & 21 Vict. c. 85. *McCord* v. *McCord* (L. R. 3 P. 237) followed. *Boucher* v. *Boucher*, 1 R. 494; 67 L. T. 720.

—— **Delay—Former Suit Abandoned—Fresh Adultery.**]—The petitioner married her husband in 1876, and lived with him till 1880, when he left her, and went to live with another woman. Upon the advice of respondent's brother she instituted a suit for judicial separation on the ground of adultery, but abandoned it at his request, and entered into a deed, the respondent's brother allowing her 1*l.* a week. In 1883 he returned to the petitioner, and she forgave him, and lived with him for a short time, when he again left her, without notice, and had contributed nothing to the support of herself and their four children. She knew that he went back to the woman he had previously been living with, but, having no means, she was unable to take proceedings till now, when her mother lent her the money to do so:—Held, that she had not been guilty of any misconduct disentitling her to a divorce upon the grounds of adultery and desertion. *Binney* v. *Binney*, 69 L. T. 498. *And see* cols. 760, 888.

—— **Cruelty.**]—To a suit by a wife for a dissolution of marriage on the ground of adultery, coupled with cruelty, condonation of the cruelty is no bar. *Dempster* v. *Dempster*, 2 Sw. & Tr. 438; 31 L. J., Mat. 20; 8 Jur. (N.S.) 44; 5 L. T. 433.

All condonation is conditional on no offence of which the court can take cognizance being in future perpetrated. Cruelty once condoned may be so revived by subsequent adultery as to form, coupled with that adultery, ground for a sentence of dissolution. *Palmer* v. *Palmer*, 2 Sw. & Tr. 61 ; 29 L. J., Mat. 124 ; 2 L. T. 363 ; 8 W. R. 504.

—— **Subsequent Adultery.**]—Whether adultery by a husband which has been condoned is a bar to his obtaining a dissolution on the ground of subsequent adultery of the wife, quære. *Rose* v. *Rose*, 52 L. J., P. 25 ; 8 P. D. 98 ; 48 L. T. 378 ; 31 W. R. 573—C. A.

Subsequent to Decree Nisi.]—It would seem that condonation subsequent to a decree nisi is not a ground on which, under 23 & 24 Vict. c. 144, s. 7, the court may reverse such a decree when properly obtained. *Lewis* v. *Lewis*, 2 Sw. & Tr. 394 ; 30 L. J., Mat. 199 ; 7 Jur. (N.S.) 831 ; 4 L. T. 772.

Revival of Condoned Adultery.]—The word "condonation" has the same meaning in the 20 & 21 Vict. c. 85, s. 30, as it had in the ecclesiastical courts ; and the doctrine of revival is equally applicable to it. *Dent* v. *Dent*, 4 Sw. & Tr. 105 ; 34 L. J., Mat. 118 ; 13 L. T. 252.

Therefore, although the adultery complained of by the petitioner in a suit for dissolution of marriage may have been condoned, the petitioner is entitled to a decree if it has been revived by subsequent cruelty. *Ib.*

Semble, that condoned adultery may be revived, so as to found a sentence of dissolution, by subsequent misconduct and improprieties, short of, but tending to, adultery. *Winscom* v. *Winscom and Plowden*, 3 Sw. & Tr. 380 ; 33 L. J., Mat. 45 ; 10 Jur. (N.S.) 321 ; 10 L. T. 100 ; 12 W. R. 535.

—— **Incestuous Adultery Revived by Adultery.**]—A wife, knowing that her husband had been guilty of incestuous adultery with her sister, signed an agreement that she would forgive him, and would not take proceedings against him on account of such incestuous adultery, in consideration of his retirement from a then subsisting partnership in business with her father and brother. It was further agreed that they should not live together, but that they should see each other from time to time. The agreement also contained this clause :—"The agreement or contract binds me (the wife) only so long as you remain true to me in love and duty." After the date of the agreement the husband was guilty of adultery, but not of incestuous adultery. The court held that this subsequent adultery restored to the wife her right to have the marriage dissolved on the ground of the previous incestuous adultery. *Newsome* v. *Newsome*, 40 L. J., Mat. 71 ; L. R. 2 P. 306 ; 25 L. T. 204 ; 19 W. R. 1039.

Condoned incestuous adultery is revived by subsequent adultery not incestuous. *Ib.*

—— **Effect on Costs.**]—When a husband has condoned adultery committed with a co-respondent, which has been revived by adultery committed by another person, costs will not be given against the co-respondent whose adultery was condoned. *Norris* v. *Norris, Lawson and Mason*, 4 Sw. & Tr. 237.

—— **Of Adultery and Cruelty by Misconduct short of Adultery.**]—Condonation is only conditional forgiveness, and condoned adultery and cruelty may be revived by misconduct which falls short of adultery. A husband was guilty of adultery and cruelty, which were condoned by his wife. He afterwards made improper overtures to, and attempted to take liberties with, a female servant in his house :—Held, that the husband's misconduct had revived his condoned adultery, and that the wife was entitled to a decree for dissolution of the marriage. *Ridgway* v. *Ridgway*, 29 W. R. 612.

—— **Of Adultery and Desertion.**]—A husband having been guilty of desertion and adultery the wife forgave him and they returned to cohabitation. He subsequently committed adultery :—Held, that the subsequent adultery revived the desertion, and that the wife was entitled to a dissolution of the marriage. *Blandford* v. *Blandford*, 52 L. J., P. 17 ; 8 P. D. 19 ; 48 L. T. 238 ; 31 W. R. 508.

—— **Scotch Law.**]—By the law of Scotland full condonation of adultery (remission expressly or by implication in full knowledge of the acts forgiven), followed by cohabitation as man and wife, is a remissio injuriæ absolute and unconditional, and affords an absolute bar to any action of divorce founded on the condoned acts of adultery. Nor can condonation of adultery—cohabitation following—be made conditional by any arrangement between the spouses. Although the condoned adultery cannot be founded on, condonation does not extinguish the guilty acts entirely, and they may be proved so far as they tend to throw light upon charges of adultery posterior to the condonation. The doctrine laid down in *Durant* v. *Durant* (1 Hagg. Ecc. Rep. at p. 761) not approved without qualification. *Dent* v. *Dent* (4 Sw. & Tr. 106), direction of Lord Penzance to the jury, questioned on principle, and distinguished from *Blandford* v. *Blandford* (8 P. D. 19). *Collins* v. *Collins*, 9 App. Cas. 205 ; 32 W. R. 500—H. L. (Sc.)

A wife confessed to several acts of adultery with E. Her husband forgave her and resumed cohabitation on the alleged condition that she should not speak or hold any communication with E. again. Subsequently she met E. by appointment several times under suspicious circumstances ; but, admittedly, no act of adultery could be proved. The husband sued for a dissolution of the marriage on the ground that the condoned adultery was revived by the wife's subsequent conduct :—Held, that to obtain a divorce he must prove adultery subsequent to the condonation, and no less. *Ib.*

See Lord Watson's opinion, for the terms of a remission of adultery which would not constitute plena condonatio in the law of Scotland. *Ib.*

—— **Doctrine of Revival.**]—Per Lord Blackburn :—The doctrine of revival of adultery as a ground on which a divorce has been granted is to be strongly objected to as varying the status of married persons. On principle, a reconciliation being entered into with full knowledge of the guilt and with free and deliberate intention to forgive it, where that reconciliation is followed by living together as man and wife, the status of the couple ought to be the same and not more precarious than if there was a new marriage. *Ib.*

Per Lord Blackburn :—Assuming it to be now established English law that any matrimonial offence, though forgiven, may be revived by any other matrimonial offence of which the courts take cognizance, it is very modern law and not so obviously just and expedient that this house ought to infer that it either was or ought to have been introduced into the law of Scotland. *Ib.* See *Bigwood* v. *Bigwood*, col. 757.

As to claim for damages after condonation, see col. 783.

Of Cruelty.]—Condonation is not absolute forgiveness, but forgiveness on the implied condition that the misconduct condoned shall not be repeated. Harsh and insulting treatment, though unaccompanied by personal violence, constitutes a breach of such implied condition in a case of cruelty. *Curtis* v. *Curtis*, 1 Sw. & Tr. 192 ; 27 L. J., Mat. 73. Affirmed, on appeal, 28 L. J., Mat. 55.

Cruelty generally consists in a series of acts, therefore condonation is not lightly to be presumed from a continuance of cohabitation after the commission of one or even of several acts of cruelty. *Ib.*

Continuance of cohabitation does not necessarily constitute condonation ; it may be caused by the apprehension of some evil which is considered greater than personal injury, e.g. the privation of children. *Ib.*

Where, on an issue before a jury of cruelty or not cruelty, condonation by cohabitation continued after the last act of cruelty laid, appears, the court would probably refuse to pronounce a decree on a verdict finding cruelty. But if under such circumstances it would notice condonation, though not pleaded, it would also admit evidence of acts of cruelty subsequently to the condonation, though not pleaded. *Suggate* v. *Suggate*, 1 Sw. & Tr. 492 ; 29 L. J., Mat. 167 ; 8 W. R. 20.

—— **By Wife.**]—Condonation is forgiveness of a conjugal offence, with full knowledge of the facts, and in each particular case it is a question to be decided by the jury. *Peacock* v. *Peacock*, 1 Sw. & Tr. 183 ; 27 L. J., Mat. 71 ; 6 W. R. 866. S. P., *Campbell* v. *Campbell*, 3 Jur. (N.S.) 845 ; 5 W. R. 519.

Condonation will not be pressed against a wife where a probable motive of continuing cohabitation after certain acts of violence was the fear of being deprived of her children, and of leaving them to the sole control of a harsh and an excitable father. *Curtis* v. *Curtis*, 1 Sw. & Tr. 192.

Condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position which he or she occupied before the offence was committed. *Keats* v. *Keats and Montezuma*, 1 Sw. & Tr. 334 ; 28 L. J., Mat. 57 ; 5 Jur. (N.S.) 176 ; 7 W. R. 377.

Words, however strong, can at the highest only be regarded as imperfect forgiveness, and unless followed up by something which amounts to reconciliation, and to a reinstatement of the offender in the condition in which he or she was before the transgression, such forgiveness must remain incomplete. *Ib.*

There can be no condonation which is not followed by conjugal cohabitation. *Ib.*

—— **Revival by Subsequent Misconduct.**] —Past cruelty condoned is subject to be revived by subsequent misconduct, such as acts of violence and threats calculated to revive a sense of insecurity and apprehension of danger. *M'Keever* v. *M'Keever*, Ir. R. 11 Eq. 26.

All condonation is conditional, and assuming certain acts of personal violence to have been condoned by continued cohabitation : — Held, that subsequent harsh and degrading treatment, short of personal violence, would cause a reasonable apprehension of further violence, and revive the former acts. *Curtis* v. *Curtis*, 1 Sw. & Tr. 192.

Acts of violence and cruelty which have been condoned may be revived without actual violence, by threats of such a nature, and so expressed, as to satisfy the court that further cohabitation would be attended with danger to the party threatened. *Bostock* v. *Bostock*, 1 Sw. & Tr. 221 ; 27 L. J., Mat. 86 ; 6 W. R. 868.

Cruelty once condoned may be so revived by subsequent adultery as to form, coupled with that adultery, ground for a sentence of dissolution. *Palmer* v. *Palmer*, 2 Sw. & Tr. 61 ; 29 L. J., Mat. 124 ; 2 L. T. 363 ; 8 W. R. 504.

Husband and wife separated by mutual consent, in consequence of the conduct of the husband towards the wife, which in itself amounted to legal cruelty : the wife afterwards sued in the Arches Court for restitution of conjugal rights, and by virtue of a decree of that court the parties again cohabited, when the husband renewed his acts of cruelty towards the wife, who continued to cohabit with him notwithstanding for six months. Upon a suit brought by the wife for a divorce, by reason of cruelty, such divorce decreed, the Judicial Committee, in affirming the sentence of the Arches Court, holding that the former cruelty was revived by the subsequent acts, and was not condoned by the cohabitation enjoined by the sentence for restitution of conjugal rights. *Wilson* v. *Wilson*, 6 Moore, P. C. 484.

Habitual unkindness may revive prior cruelty condoned. *Mytton* v. *Mytton*, 11 P. D. 141 ; 57 L. T. 92 ; 35 W. R. 368 ; 50 J. P. 488.

—— **Wife's Petition—Decree Nisi not made Absolute — Petitioner Married again — Resumption of Cohabitation with Respondent.**] —In a petition by the wife for a divorce on the ground of adultery and cruelty, a decree nisi was pronounced ; but no steps were taken to make it absolute. The petitioner believing that the marriage was dissolved at the end of six months, went through a form of marriage with a man with whom she cohabited for some years until he died. She then resumed cohabitation with the respondent ; but he was guilty of cruelty towards her, and she left him after living with him a year and nine months :— Held, upon an application by the petitioner to make the decree nisi absolute, the Queen's Proctor intervening, that there was nothing in the circumstances to prevent the cruelty of which the respondent had been guilty during the second cohabitation from reviving the matrimonial offences on the ground of which the decree nisi had been pronounced, and that inasmuch as it must be taken that she went through the form of marriage with another person in the honest belief that her marriage with the respondent was dissolved, the court was entitled to make the decree nisi absolute. *Moore* v. *Moore*, 62 L. J., P. 10 ; [1892] P. 382 ; 67 L. T. 539. *And see* col. 764.

d. Connivance and Collusion.

Connivance—On Part of Husband.]—In order to establish connivance by a husband at his wife's adultery, it must be shown that he gave a willing consent to it; that he was an accessory before the fact; mere negligence, inattention, dulness of apprehension, or indifference, will not suffice; but there must be an intention on his part that she should commit adultery. *Allen* v. *Allen and D'Arey*, 30 L. J., Mat. 2.

To establish connivance, it is not necessary to show that the husband was an accessory before the fact, or that he took active measures to bring about the result of adultery; but it must appear that he was cognisant that such a result would follow from transactions of which he approved and to which he consented. *Glennie* v. *Glennie and Bowles*, 32 L. J., Mat. 17; 8 Jur. (N.S.) 1158; 11 W. R. 28.

A husband who gives a willing assent to an act of adultery by his wife, desiring that it shall be committed, is guilty of connivance, although he may take no active steps towards procuring it to be committed, and may not be an accessory before the fact. *Marris* v. *Marris and Burke*, 2 Sw. & Tr. 530; 31 L. J., Mat. 69; 5 L. T. 768.

The word "conniving" in 20 & 21 Vict. c. 85, s. 29, means not merely refusing to see an act of adultery, but also wilfully abstaining from taking any step to prevent adulterous intercourse, which, from what passes before the husband's eyes, he must reasonably expect will occur. *Gipps* v. *Gipps*, 11 H. L. Cas. 1; 4 N. R. 303; 33 L. J., Mat. 161; 10 Jur. (N.S.) 641; 10 L. T. 735; 12 W. R. 937.

A husband agreed to withdraw his suit for dissolution of marriage in consideration of a sum of money to be paid him by the co-respondent, in lieu of costs and damages, but made no stipulation as to his wife's future conduct. The co-respondent did not fulfil his part of the agreement, and there being a further case of adultery between the same parties, the petitioner filed a second petition. At the hearing, the adultery was proved:—Held, that the petitioner's conduct amounted to connivance at or consent to the wife's intercourse with the co-respondent. *Ib.*

Connivance is a knowledge of, and acquiescence in, the misconduct complained of. *Boulting* v. *Boulting*, 3 Sw. & Tr. 329; 33 L. J., Mat. 33; 10 Jur. (N.S.) 182; 9 L. T. 779; 12 W. R. 389.

A decree of dissolution of marriage on the ground of a wife's adultery, will not be granted when the adultery has been brought about by persons acting on behalf of the petitioner, although without his knowledge. *Picken* v. *Picken and Simmonds*, 34 L. J., Mat. 22.

If a person employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery, brings about an act of adultery, the husband cannot obtain a decree of dissolution on the ground of such adultery, although he may not have directed or authorised his agent to bring it about. *Gower* v. *Gower, Pearson, Hill and Bann*, 41 L. J., Mat. 49; L. R. 2 P. 428; 27 L. T. 43; 20 W. R. 889.

In a husband's suit for dissolution on the ground of adultery, the respondent pleaded connivance, wilful neglect, and conduct conducing to adultery. In support of these pleas it was proved that the petitioner had permitted the co-respondent to visit frequently at his house in his absence, to send provisions into his house, and to make his wife an allowance of 1*l.* a week, and that he had sent his wife to borrow money from the co-respondent, also that he had allowed him to escort her to London; the jury found the issue of adultery in favour of the petitioner, and acquitted him of connivance, but found that he had been guilty of wilful neglect and conduct conducing to the adultery; the court refused to grant a decree nisi, and dismissed the petition. It also condemned him in his wife's costs, but made no order as to the co-respondent's costs. *Brown* v. *Brown and Robey*, 21 L. T. 181.

If a husband, whose wife is leading a life of prostitution, pays money, or causes money to be paid, to a person to commit an act of adultery with her, in order that he may obtain evidence to enable him to institute a suit for a dissolution of his marriage, the court will not grant a decree in consequence of the act of adultery so committed with his concurrence. *Sugg* v. *Sugg and Moore*, 31 L. J., Mat. 41.

—— **On Part of Wife.**]—A deed of separation, securing an allowance to a wife, does not prove the wife's connivance at the husband's adultery, in the absence of evidence that, at the time when it was entered into, she was aware of the adulterous intercourse which the husband had then established with another woman, and that she consented to its being continued. *Ross* v. *Ross*, 38 L. J., Mat. 49; L. R. 1 P. 734; 20 L. T. 853.

If a wife, although unwilling to consent that her husband should live in adultery, ultimately gives her consent for the sake of obtaining an allowance from him, she is guilty of connivance. *Ib.*

To constitute connivance on the part of the wife, it is not necessary that there should be a willing consent to the adultery of the husband. She may be unwilling to consent to his living with another woman; but if under pressure of circumstances, short of force in the nature of duress, she should withdraw her scruples, that would amount to connivance. *Ib.*

A husband and wife executed a deed of separation in 1854, which recited that the husband had for some months been living with a Miss H., and referred to certain articles of agreement concerning certain trust moneys and other property to which Miss H. as well as the husband and wife had been parties. In 1860 the wife petitioned for a judicial separation on the ground of the husband's adultery with H. in 1858-1859:—Held, that the execution of the deed of separation by the wife, knowing at the time that the husband was cohabiting with H., was virtually a consent to the continuance of such cohabitation, and the court dismissed the petition. *Thomas* v. *Thomas*, 2 Sw. & Tr. 113; 3 L. T. 180.

A domiciled Englishman, in 1850, left his wife in England and went to America. In 1852 his wife joined him there. In 1856, at her suit, an American court dissolved the marriage on the ground of her husband's adultery, giving both parties liberty to marry again. The husband subsequently married A., and remained in America, but whether he had abandoned his English domicil did not appear. In a suit by the wife for a dissolution of marriage on the ground of adultery and cruelty, the only evidence of adultery was the husband's cohabitation with A. after the American sentence of divorce:—Held, that the cohabitation with A. would not support the charge of adultery; for if the sentence of the

American court was valid the husband was at liberty to marry again; and if invalid, inasmuch as it was obtained at the wife's instance, she could not complain of the probable consequences, but might be considered to have connived at the adultery. *Palmer* v. *Palmer*, 1 Sw. & Tr. 551; 29 L. J., Mat. 26; 2 L. T. 88.

Collusion.]—Collusion may exist when, both being guilty, the husband and wife agree to present before the court the guilt of one only of the parties, in order to obtain a divorce which they both desire. *Gray* v. *Gray*, 2 Sw. & Tr. 559.

Collusion may consist in keeping back evidence of what would be a good answer, or by agreeing to set up a false case. *Jessop* v. *Jessop*, 2 Sw. & Tr. 302; 30 L. J., Mat. 193; 7 Jur. (N.S.) 609; 4 L. T. 308; 9 W. R. 640.

In an undefended suit for dissolution of marriage, on the ground of the adultery of the wife, it appeared at the hearing that the wife had given the petitioner's solicitor a photograph of herself, and attended in court at the hearing to aid in her identification, and for so doing received money from the solicitor. The court, notwithstanding, being satisfied upon the evidence that there was no collusion between the petitioner and respondent, pronounced a decree nisi. *Harris* v. *Harris and Lambert*, 31 L. J., Mat. 160.

In order to establish collusion against a petitioner and the respondent in a suit for a dissolution of marriage, it is necessary to prove that there was some understanding or agreement between them. *Gethin* v. *Gethin*, 31 L. J., Mat. 43.

Though the court may be satisfied that the adultery is proved, and that the petitioner was neither accessory to nor conniving at it, it will dismiss the petition, if it appears that the parties, or their agents with their knowledge, were acting in concert with each other as to the conduct and prosecution of the suit. *Lloyd* v. *Lloyd and Chichester*, 1 Sw. & Tr. 567; 30 L. J., Mat. 97.

If it is shown that a husband has promised his wife to commit adultery, in order that she may obtain a divorce, and that the wife follows a course the husband has indicated, to watch him, and that adultery takes place subject to that understanding, and that evidence is obtained accordingly, the court will hold that the parties are acting collusively, and will dismiss the petition. *Todd* v. *Todd*, 35 L. J., Mat. 34; L. R. 1 P. 121; 12 Jur. (N.S.) 237; 13 L. T. 759; 14 W. R. 350.

An agreement between the parties to a divorce suit to withhold any relevant evidence from the court amounts to collusion. *Bacon* v. *Bacon and Ashby*, 25 W. R. 560.

A husband, before commencing a suit for dissolution of marriage, agreed with his wife that, if no opposition was offered to his petition, he would pay the costs of all parties. The respondent and co-respondent did not appear. After a decree nisi the queen's proctor intervened, and the respondent gave evidence of the husband's promise as to the costs, and also alleged that he had been guilty of cruelty and had connived at her cohabitation with the co-respondent. The court held that the parties had been guilty of collusion, and rescinded the decree nisi. *Ib.*

If, by agreement between the parties to a divorce suit, pertinent and material facts which might be adduced in evidence in support of a counter-charge against the petitioner by the respondent or co-respondent, be withheld from the court, such agreement will amount to collusion, even though the suppressed facts might not have been sufficient to establish the counter-charge. *Hunt* v. *Hunt and Wright*, 47 L. J., P. 22; 39 L. T. 45.

—— **Husband Paying Wife Money during Progress of Suit.**]—The fact that a husband makes his wife an allowance in lieu of alimony whilst a divorce suit is pending is not of itself proof of collusion. But evidence that a husband had several interviews with his wife both before and after he presented a petition for dissolution, and at these interviews gave her money, and urged her not to oppose the petition, and promised that if she did not he would do no harm to the co-respondent, and would be a friend to her when the decree was obtained, proves collusion, the respondent and co-respondent not having appeared at the hearing, and material facts showing that the petitioner had by his conduct conduced to the respondent's adultery having been withheld from the court. *Barnes* v. *Barnes and Grimwade*, 37 L. J., Mat. 4; L. R. 1 P. 505; 17 L. T. 268; 16 W. R. 281.

—— **Suppression of Facts material to, though not sufficient to Establish, Counter-charge—Right to Decree Absolute.**]—A wife having petitioned for a divorce from her husband on the ground of his cruelty and adultery with several women, the husband presented a counter-petition on the ground of his wife's adultery. During the trial of the petitions, the husband and wife, by their respective solicitors, entered into an agreement that the wife should give evidence of cruelty to the satisfaction of the court, and of the husband's adultery with W., one of the women charged, and that if the court was satisfied on that evidence the decree should go, the wife should withdraw the other charges, and the husband should withdraw his petition. The wife's counsel proceeded with the trial as if the agreement had not been entered into; but the husband's counsel acted in accordance with instructions based on the agreement, and did not cross-examine the wife. The jury found that the husband had committed adultery with W. only, that he had been guilty of cruelty, and that the wife had not committed adultery. On these findings a decree nisi was granted. The queen's proctor intervened, and after a hearing at which further evidence was adduced, the judge left to the jury the questions (1) Were material facts withheld from the knowledge of the court? (2) Was there collusion? (3) Did the wife commit adultery? The jury answered the two first questions in the affirmative, but were unable to agree as to the third:—Held, first, that under the Matrimonial Causes Act, 1857, a wife was deprived of her right to a decree, not only if she had been guilty of a matrimonial offence, but also if her petition had been presented or prosecuted in collusion with the respondent; and secondly, that an agreement between the parties to a divorce suit to withhold from the court pertinent and material facts, which might have been adduced on the trial in support of a counter-charge, amounted to collusion, even though the facts suppressed might not have been sufficient to establish such counter-charge. *Alexandre* v. *Alexandre* (L. R. 2 P. 164) considered. *Butler* v. *Butler*, 59 L. J., P.

25; 15 P. D. 66; 62 L. T. 344; 38 W. R. 390—C. A.

As to Costs.]—A petitioner having been found guilty of collusion, and the suppression of material facts, the decree nisi which he had obtained was rescinded, and the petition was dismissed; but, having incurred expense in preparing to meet a charge of adultery, which was withdrawn, he was not condemned in the costs of the intervention. *Ib.*

Scotch Divorce obtained by Collusion.]—B., an Englishman, married in England H., an Englishwoman, but they separated, and he lived apart, in adultery with another woman. S. wished to marry H., and he induced B. to go to and reside in Scotland for forty days in order to give the Scotch court jurisdiction to entertain a suit to be brought against him by H. for a divorce; and there was an agreement between S. and B. that S. should pay B. a sum of money, but only in case B. gave no information which should be prejudicial to the divorce. The suit was instituted, and a decree of divorce obtained:—Held, that the Scotch divorce was null and void quoad its operation in England, because the divorce was obtained by collusion. *Shaw* v. *Gould*, 37 L. J., Ch. 433; L. R. 3 H. L. 55; 18 L. T. 833.

An agreement by which the former and guilty husband should receive a sum of money for bringing himself within the reach of the Scotch court, so as to enable his wife to institute a suit for divorce, to be determined on its merits, would not be objectionable on the ground of collusion. But an agreement that he should forfeit a sum of money if he, or any one through him, gave information which should be prejudicial to the divorce, would be such a collusion as would have the effect of invalidating the decree of divorce. *Ib.*

Agreement—Wife to facilitate Proceedings for Divorce.]—Where an Englishman married a Frenchwoman and they resided in France, where their children were born, and suits were instituted between them in both countries, and were compromised by an agreement, of which part was that the wife would facilitate proceedings for a divorce, and another part was, that one of the children should remain with his mother, and a third part related to the payment of an allowance to the wife:—Held, that even supposing the parties to be domiciled in France, and the agreement to be governed by French law, and to be valid according to that law, and to have been performed as to the parts which were invalid according to English law, it could not be enforced here as to any part of it. *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L. J., Ch. 417; 3 Jur. (N.S.) 454; 5 W. R. 387.

Agreement between Husband and Adulterer.]—On the termination of an adulterous intercourse, an agreement was entered into between the husband and the adulterer, officers in the same regiment stationed in India, that the latter should pay the expenses of the wife's return to England, and should allow her 100*l.* a year, and should exchange into another regiment, the husband undertaking that the adulterer should be put to no expense by any proceedings to be taken for the purpose of obtaining a divorce. The adulterer fulfilled the agreement with the exception of his promise to exchange into another regiment:—Held, first, that as the agreement was made, not with a view to the continuation of the adulterous intercourse, but for the purpose of restoring the wife to her friends, it was no bar to a divorce. *Ratcliffe* v. *Ratcliffe and Anderson*, 1 Sw. & Tr. 467; 29 L. J., Mat. 171; 5 Jur. (N.S.) 714; 7 W. R. 726.

Held, secondly, that the adulterer, as he had not fulfilled his promise, ought to be condemned in costs. *Ib.*

A wife having carried on an adulterous intercourse with the co-respondent from 1852 till January, 1855, then left her home, and went to reside in the house of the co-respondent, and subsequently lived with him as his wife. In February, 1855, a deed of separation was entered into between the husband, his wife, and the co-respondent, by which the husband covenanted with the co-respondent to permit his wife to live separate from him, as if she were unmarried, and to allow her a certain sum for her maintenance; and the co-respondent covenanted that the wife should not molest her husband, that she should maintain a child to which she had given birth in 1853, and that he should indemnify the husband against her debts. The husband was aware of the adulterous intercourse, and he admitted, on being examined by the court, that he had always believed that the co-respondent was the father of the child born in 1853. He had nevertheless allowed the co-respondent subsequently to its birth to visit at his house. A petition being presented by the husband for a dissolution of marriage, was dismissed on the ground that the husband knew of the adulterous intercourse, and that the deed of separation was virtually an assignment by him of his wife to the co-respondent. *Walton* v. *Walton*, 28 L. J., Mat. 97. *Cooke* v. *Cooke*, 11 W. R. 957; *Matthews* v. *Matthews*, 8 W. R. 51.

When Collusion will not be Inferred.]—A husband and wife, after a cohabitation of three years, separated, having first both signed an agreement which concluded in these words:—"Mrs. S. promises that if she does not fulfil her part of the agreement, Major S. shall have the full power of a husband over her, whatever his way of living may be":—Held, that a sufficient meaning is given to these last words if they are construed to apply to the place where, and the mode, as regards his establishment, in which, the husband may choose to live, and that it is not necessary to infer from them that the wife intended to give leave to her husband to commit adultery for the future. *Studdy* v. *Studdy*, 1 Sw. & Tr. 321; 28 L. J., Mat. 44; 5 Jur. (N.S.) 22; 7 W. R. 144. Affirmed on appeal, 28 L. J., Mat. 105.

e. Conduct conducing to Adultery.

Discretion of Court.]—The court may, if it thinks the circumstances of the case warrant it in so doing, exercise the discretion given it by s. 31 of the Matrimonial Causes Act, 1857, and pronounce a decree nisi in favour of a husband who has been found guilty of "wilful neglect or misconduct conducing to" the adultery of his wife. But no general rule can be laid down for the exercise of such discretion, which must depend upon the circumstances of each particular case. *Parry* v. *Parry*, 65 L. J., P. 35; [1896] P. 37; 73 L. T. 759.

Semble, that where such discretion is so exercised it ought to be upon the terms of the husband making provision for his wife's maintenance to such amount and in such manner as the court shall think right. *Ib.*

Neglect or Misconduct conducing to Adultery.]—The petitioner, who was an engine-driver, earning 24*s.* a week, married the respondent in 1876, and in 1878 separated from her because she had run him into debt. She went into domestic service, and subsequently formed an adulterous intercourse with the co-respondent, and continued to cohabit with him as his wife up to the date of the petition, the husband meantime having not in any way contributed to her support or concerned himself about her in any way:—Held, that he had been guilty of such "wilful neglect and misconduct" as justified the court in exercising the discretion vested in it by s. 31 of the Matrimonial Causes Act, 1857, and refused to dissolve the marriage. *Starbuck* v. *Starbuck*, 59 L. J., P. 20; 61 L. T. 876.

Neglect of Husband must be Considerable.]—The misconduct conducing to adultery intended by 20 & 21 Vict. c. 85, s. 31, is not mere carelessness. Before a husband is found guilty of such misconduct, it must be proved that there was an intimacy between the respondent and the co-respondent of such a character as to be distinctly dangerous, that he actually knew so much of the intimacy as to perceive the danger, and that he either purposely or recklessly disregarded it, and forebore to interfere. *Dering* v. *Dering and Blakeley*, 37 L. J., Mat. 52; L. R. 1 P. 531; 19 L. T. 48.

The "wilful neglect or misconduct" which, by 20 & 21 Vict. c. 85, s. 31, is made a bar to the husband's right to a decree is not that neglect or misconduct which may have led to any particular act of adultery after the wife's lapse from virtue, but the neglect or misconduct which has directly conduced to her fall. *St. Paul* v. *St. Paul and Farquhar*, L. R. 1 P. 739; 21 L. T. 108; 17 W. R. 1111.

The cases are few in which the court would be justified in visiting with the penalty of adultery a guilty wife whose husband has also been found guilty of adultery. *Barnes* v. *Barnes and Beaumont*, 38 L. J., Mat. 10; L. R. 1 P. 572; 19 L. T. 526.

The misconduct intended by 20 & 21 Vict. c. 85, s. 31, which, in a suit for dissolution of marriage, gives the court an option as to dissolving the marriage, although the case of the petitioner may have been proved, if he has been guilty of such wilful neglect or misconduct as has conduced to the adultery, is misconduct amounting to a breach of marital duty. *Cunnington* v. *Cunnington and Noble*, 1 Sw. & Tr. 475; 28 L. J., Mat. 101; 8 W. R. 3. See also *Brown* v. *Brown and Robey*, 21 L. T. 181.

Adultery procured by Agent.]—The wife, who was living apart from her husband, employed her solicitors to watch him. Unknown to her, and without her authority, the solicitor's clerk induced the respondent to commit adultery. A decree nisi for the dissolution of the marriage was granted on his evidence and the wife's as to acts of cruelty. The queen's proctor intervened on the ground that the petitioner was not entitled to a decree on the ground of such adultery;—Held, that the decree nisi must be rescinded; but, as the intervention of the queen's proctor did not touch the wife's charge of cruelty, the petition would not be dismissed, so as to give her an opportunity of applying for a judicial separation. *Gower* v. *Gower* (41 L. J., P. 49) and *Picken* v. *Picken* (34 L. J., P. 22) followed. *Bell* v. *Bell*, 58 L. J., P. 54.

Refusal by Wife to Consummate—Bigamy and Adultery—Unreasonable Delay—Judicial Separation.]—A husband and wife married in 1872, the marriage was never consummated owing to the wife's refusal to submit to marital intercourse; the parties shortly afterwards separated. In 1874 the husband contracted a bigamous marriage with another woman. In 1886 the wife made inquiries as to her husband's conduct and in 1889 obtained full knowledge of the facts, but did not institute proceedings till 1891, when she prayed for a divorce on the ground of bigamy and adultery:—Held, that the delay was unreasonable, that her conduct was misconduct conducing to her husband's adultery, and therefore a divorce was not granted but only a judicial separation to which latter case neither wilful misconduct nor unreasonable delay constitute any bar. *Dixon* v. *Dixon*, 67 L. T. 394.

Pregnancy Dangerous to Wife—Separation—Adultery of Wife.]—The petitioner married the respondent in 1873, and they lived together very happily till the birth of the only child, early in 1874, shortly after which event the respondent's mind became temporarily unhinged, and she was removed to an asylum, from which, towards the end of the same year, she was discharged as cured. The petitioner was, however, advised by his wife's medical attendant that further cohabitation, if it resulted in pregnancy, would probably prove dangerous to the respondent and any future offspring. By the consent of the families of both parties, it was arranged that they should live apart, the wife having the child with her, and the husband making her an allowance. The petitioner corresponded with his wife until 1880, when he refused all further direct communication, but continued the allowance through his solicitor; and throughout the separation he declined all private interviews with his wife, although urgently and repeatedly requested and begged for by her. In 1879 he wrote that she was not to inquire into his mode of life, and he would not interfere with hers:—Held, that he was not disentitled to a divorce, on the ground of his wife's subsequent adultery. *Lander* v. *Lander*, 63 L. T. 257.

Conviction of Husband under Criminal Law Amendment Act—Wilful Neglect and Misconduct by Respondent conducing to such Adultery—Discretion of Court.]—The parties to a suit for dissolution of marriage were married in 1863. During the next five years the husband was frequently guilty of adultery and cruelty. In 1868 he left his wife, and finally deserted her in 1870. She did not know where he was, or whether he was alive or dead, and took no trouble to find out. In 1879 she ascertained he was alive, and living at Burton-on-Trent. In 1877, being in distressed circumstances, she made the acquaintance of C., and went to cohabit with him as his wife, and continued to do so till 1892.

In 1895 the husband was sentenced to fifteen months' imprisonment, under the Criminal Law Amendment Act, for an assault on a young girl. In June, 1896, she obtained a decree nisi for the dissolution of her marriage, on the grounds of her husband's adultery and desertion. The queen's proctor intervened, alleging the petitioner's adultery with C.:—Held, that the respondent had been guilty of wilful neglect and misconduct conducing to the petitioner's adultery, and that, taking all the circumstances into consideration, the case was one in which the court was justified in exercising its discretion under s. 31 of the Matrimonial Causes Act, 1857. Decree made absolute. No order as to costs, the queen's proctor's intervention being thoroughly justifiable. *Symons* v. *Symons*, 66 L. J., P. 81; [1897] P. 167; 77 L. T. 142.

Leaving Wife without Means.]—In a suit for a dissolution of marriage, on the ground of a wife's adultery, it appeared that the husband, a draper's assistant, then twenty-one, married a woman whom he well knew to be a prostitute. A month after the marriage they removed from the lodgings to the house of his father, from which, after a stay of a few weeks, they were compelled to remove in consequence of the wife exhibiting bad temper and making herself disagreeable to the family. Ten days afterwards the husband went to America, not on business, but because he lived unhappily with his wife, leaving her without any means of subsistence, and supplying her with none during an absence of four years. After he left, his family had given the wife a small pittance on one occasion, and had promised to give her further assistance, but in consequence of her annoying them all intercourse with her was broken off. The wife after her husband left, returned to her former way of life:—Held, that there was a wilful separation of the husband from the wife before the adultery complained of, and that it was without reasonable excuse, and, in the exercise of the discretion given by 20 & 21 Vict. c. 85, s. 31, the court refused to decree a dissolution of the marriage. *Coulthart* v. *Coulthart and Gouthwaite*, 28 L. J., Mat. 21.

A husband was proved to have left his wife, with an expressed intention not to return to cohabitation with her; and for many years he had not provided her with a maintenance or a home. On two or three occasions on which he saw her during this period his sole object was to obtain her money:—Held, that the separation could not be taken to be by mutual consent, because the wife in her letters, written after the desertion, made use of casual expressions, wrung from her by his misconduct, purporting that she did not desire to see him or that he should visit her. *Meara* v. *Meara*, 35 L. J., Mat. 33; 14 W. R. 349.

Drunkenness of Wife—Delay.]—In a suit by the husband for divorce on the ground of adultery, which was not defended, the husband admitted that on his wife becoming addicted to habits of intoxication he left her, after eleven years of cohabitation, broke up his home and sold his furniture with the intention of getting rid of her. He made her no allowance and never saw her until eight years after the separation, when he met her by accident. Five years after that meeting he filed the petition. The adultery was proved:—Held, that the conduct of the husband disentitled him to a divorce, and that the petition must be dismissed. *Heyes* v. *Heyes*, 36 W. R. 527. Affirming, 57 L. J., P. 22; 13 P. D. 11; 57 L. T. 815; 51 J. P. 775.

Leaving Wife with Small Allowance.]—The parties to a marriage separated by mutual consent after a few days' cohabitation, and lived apart for sixteen years. The petitioner allowed his wife a small sum monthly, but never saw her. Subsequently he ascertained that she was living in adultery, and instituted a suit for dissolution; but the court held that he had been guilty of conduct conducing to the adultery, and dismissed the petition. *Hawkins* v. *Hawkins*, 54 L. J., P. 94; 10 P. D. 177; 34 W. R. 47.

Husband Living Apart with Reasonable Cause.]—A husband and wife were in service, in the same family, at the time of their marriage. Shortly after the husband, to improve his position, went into service elsewhere, leaving the wife in the same service. The wife committed adultery with a fellow-servant:—Held, that the husband had not been guilty of desertion or wilful separation without reasonable excuse, and the court dissolved the marriage. *Davies* v. *Davies and Hughes*, 3 Sw. & Tr. 221; 32 L. J., Mat. 111; 9 Jur. (N.S.) 828; 8 L. T. 703; 11 W. R. 402.

A young man who had just taken his degree at Cambridge married a prostitute, and never afterwards cohabited with her. He had no means of providing a home for her, or of contributing to her support, and the day after the marriage he separated from her, and went to live with his father, who, on being informed of the marriage some months afterwards, caused a deed of separation to be executed, by which an allowance of 1*l.* a week was secured to her. This allowance was paid by the husband's father. After the execution of the deed the wife was guilty of adultery. In a suit by the husband for dissolution of marriage:—Held, that the separation, if wilful, was not without reasonable excuse, and that the petitioner was entitled to a decree. *Proctor* v. *Proctor, Smith and Pitman*, 4 Sw. & Tr. 140; 34 L. J., Mat. 99; 11 Jur. (N.S.) 531; 12 L. T. 505; 13 W. R. 963.

A ward in chancery who had no means of his own, at sixteen, married clandestinely a prostitute of about the age of thirty-five. The Master of the Rolls, a month after the marriage, ordered that the husband should be delivered into the custody of his guardian, with liberty for the guardian to send him abroad, and that the wife should be restrained from holding any communication with him. In pursuance of this order, he was sent abroad against his will. The wife being left without means of support, she applied to her husband's guardian for money, but it was refused. For some months after the marriage she conducted herself properly, and then relapsed into her former course of life. In a suit by the husband for dissolution of marriage:—Held, that as the separation was on the husband's part, involuntary, and he had no means wherewith to contribute to his wife's support, he had not wilfully separated himself from her, nor been guilty of such neglect or misconduct as had conduced to the adultery so as to give the court a discretionary power to refuse to dissolve the marriage. *Beavan* v. *Beavan*, 2 Sw. & Tr. 652; 32 L. J., Mat. 36; 8 Jur. (N.S.) 1110; 7 L. T. 435; 11 W. R. 155.

Wife Living Apart with Reasonable Cause.]—A girl, aged sixteen, left her home one morning and without the consent or knowledge of any of her friends married a man aged thirty-six, with whom they were unacquainted. Immediately after the ceremony she returned home and informed her mother of the marriage. Inquiries having been made as to the character of the husband, it was found that he was not a suitable husband for her. Her friends accordingly immediately removed her to the continent, where she remained for some years. She never cohabited with her husband, and never saw him after the marriage, nor did he make any attempts to get her to live with him. The husband having subsequently been guilty of bigamy with adultery, the court dissolved the marriage at the suit of the wife, being of opinion, that, under the circumstances, there was reasonable excuse for the separation. *Du Terreaux* v. *Du Terreaux*, 1 Sw. & Tr. 555; 28 L. J., Mat. 95.

Imprisonment of Husband.] — A husband, shortly after his marriage, was convicted of felony, and sentenced to transportation. Whilst he was undergoing penal servitude, his wife committed adultery with a man who resided in the house where she went to board. She had been previously much attached to her husband, and from the circumstances of the case there was no reason to doubt that, but for her husband's absence, caused by his own misconduct, she would have remained faithful to him:—Held, in a suit by the husband for a dissolution of marriage, that the felony committed by him, not being a violation of marital duty, was not misconduct within the meaning of s. 31, and, therefore, that the case of the husband having been proved, the court was bound to dissolve the marriage. *Cunnington* v. *Cunnington and Noble*, 1 Sw. & Tr. 475; 28 L. J., Mat. 101; 8 W. R. 3.

Held, also, that the felony did not conduce to the adultery as though a sine quâ non, it was not directly or indirectly a causa causans. *Ib.* See also *Astrope* v. *Astrope*, 29 L. J., Mat. 27, ante, col. 739, and col. 755.

—— Of Wife.]—Semble, that the conviction of a wife for an offence against the criminal law is no justification for refusing further cohabitation with her, and that, if such refusal conduces to her adultery, the court will not grant her husband a dissolution of his marriage. *Williamson* v. *Williamson and Bates*, 51 L. J., P. 54; 7 P. D. 76; 46 L. T. 920; 30 W. R. 616.

Husband not giving Protection to Wife.]—A husband is bound to give his wife the security and comfort of his home and society so far as his position and business will admit, and if the court is satisfied that the husband has failed in this duty, it will, in the exercise of its discretion, refuse to dissolve the marriage by reason of the wife's adultery. *Jeffreys* v. *Jeffreys and Smith*, 3 Sw. & Tr. 493; 33 L. J., Mat. 84; 10 Jur. (N.S.) 572; 10 L. T. 309; 12 W. R. 809.

A man having married a woman of loose character, with whom he had previously cohabited, separated from her against her will shortly after the marriage, and sent her to live by herself in a place where she could be accessible to temptation, and where she was guilty of adultery. There was no evidence that there was any reasonable cause for the separation. The court was of opinion that this was conduct conducing to her adultery, and dismissed his petition for dissolution of marriage. *Baylis* v. *Baylis, Trevan and Cooper*, 36 L. J., Mat. 89; L. R. 1 P. 395; 16 L. T. 613; 15 W. R. 1092.

A husband shortly after his marriage was, with his wife, residing in the house of his mother. The wife, in consequence of some disagreement with her mother-in-law, insisted on leaving the house, and on her husband declining to do so, she, with his consent, left, and took lodgings elsewhere, where she remained three months; during this time her husband continued to reside apart from her, allowing her a small sum weekly for her maintenance, and visiting her occasionally, but only passed the night with her three times. On calling at her lodgings he frequently found her absent as late as eleven and twelve o'clock at night, she having no occupation which necessitated her absence from home. The wife committed adultery whilst living apart from her husband. The court refused to dissolve the marriage at the suit of the husband, although his case was proved, on the ground that he had been guilty of wilful neglect, which had conduced to the adultery. *Groves* v. *Groves and Thompson*, 28 L. J., Mat. 108.

In a suit for dissolution of marriage, on the ground of a wife's adultery, it appeared that the husband had wilfully separated himself from his wife shortly after the marriage; but it was doubtful whether or not he did so without reasonable excuse; the only evidence as to the cause of the separation being a statement by the wife, that "her husband had left her because he had caught her with a young man." The court thinking that the husband might not have had reasonable excuse for leaving her, examined him; when it appeared that he had found her submitting to indecent liberties, and had immediately broken off all intercourse with her:—Held, that as it did not appear affirmatively that there was not reasonable excuse for the separation, the court had no discretionary power, but was bound to dissolve the marriage. *Haswell* v. *Haswell and Sanderson*, 1 Sw. & Tr. 502; 29 L. J., Mat. 21; 1 L. T. 69; 8 W. R. 76.

6. Damages.

a. In Action for Criminal Conversation.

Action generally.]—To a declaration, for that the defendant debauched and carnally knew the plaintiff's wife, the defendant pleaded not guilty:—Held, that under this issue it was not necessary for the plaintiff to prove that the female, alleged to have been debauched, was his wife. *Kenrick* v. *Horder*, 7 El. & Bl. 628; 26 L. J., Q. B. 214; 3 Jur. (N.S.) 441; 5 W. R. 530.

In order to support an action for crim. con. the plaintiff was bound to prove a marriage in fact, i.e. an actual marriage, either valid or voidable, and not yet avoided. *Catherwood* v. *Caslon*, 13 M. & W. 261; Car. & M. 431; 13 L. J., Ex. 334; 8 Jur. 1076.

A deed of separation did not preclude the action. *Chambers* v. *Caulfield*, 6 East, 244.

If the husband was himself privy to the intercourse, he could not maintain the action. *Wasley* v. *Bissett*, 2 Term Rep. 168, n. S. P., *Winter* v. *Henn*, 4 Car. & P. 494.

Amount of Defendant's Property not Relevant.]—Evidence on the part of the plaintiff to show the amount of the defendant's property was not admissible. *James* v. *Briddington*, 6 Car. & P. 589.

Death of Wife after Action.]—If it appeared that the wife had died since the commencement of the action, the jury was to give damages for the loss of the society of the wife from the time of the discovery of the adultery to the time of her death; and also for the shock to the feelings of the husband; and this was so, although it appeared there was no suspicion of her infidelity till she was on her death-bed, and though the husband continued to treat her kindly up to the time of her death. *Wilton* v. *Webster*, 7 Car. & P. 198.

Clandestine Marriage with Actress.]—It was not matter of defence, but only in mitigation of damages, that the plaintiff married an actress, concealed the marriage from her mother, and very seldom saw his wife, but suffered his wife to remain living with her mother, as if a single woman, and allowed her to continue her theatrical performances in her maiden name. *Calcraft* v. *Harborough* (*Earl*), 4 Car. & P. 499.

Complaints of Ill-treatment by Wife.]—Evidence might be given in reduction of damages that the wife, before the criminal intercourse, had complained of her husband's treatment of her. *Winter* v. *Wroot*, 1 M. & Rob. 404.

b. Co-respondent to Divorce Petition, against.

Petition—Amount to be stated in.]—Where damages are claimed against a co-respondent, the petition should specify the amount claimed. *Spedding* v. *Spedding*, 31 L. J., Mat. 96.

Jurisdiction.]—Per Lindley, L.J.: Claims for damages are placed wholly under the jurisdiction of the Divorce Court, and can only be made by petition, and the damages recovered are placed under the control of the court. The petition must be served on the wife, unless the court dispenses with such service. The petition must be dismissed, if the petitioner has been accessory to or conniving at the adultery complained of, or has condoned the same. The claim for damages is subject to all these overriding provisions. *Bernstein* v. *Bernstein*, 63 L. J., P. 3; [1893] P. 292; 69 L. T. 513.

Co-Respondent not Appearing.]—Where a co-respondent, against whom damages are claimed, does not appear, the jury is bound to assume that he is guilty of the adultery charged, and to assess damages against him. *Stone* v. *Stone and Appleton*, 3 Sw. & Tr. 608; 34 L. J., Mat. 33; 11 L. T. 515; 13 W. R. 414.

Reinstatement of Claim after Withdrawal.]—A claim for damages having been formally withdrawn, the court refused to allow it to be reinstated in the petition, the petitioner having failed to show that it was withdrawn in error, or that an altered state of circumstances had arisen which would justify its reinsertion. *Sykes* v. *Sykes and Smith*, 38 L. J., Mat. 12; 19 L. T. 611.

Principle of Assessment.] — In assessing damages against a co-respondent the jury is not to seek to punish him, but is only to give compensation for the loss which the husband has sustained, and is to consider whether this loss has been caused by the action of the co-respondent. In a case where the wife has not been seduced away from the husband by the co-respondent, the jury must take into consideration the conduct of the husband and the protection or assistance which he may have afforded to her after the separation. The means of the co-respondent are not in any way to be considered as a measure of damages. *Keyes* v. *Keyes*, 55 L. J., P. 54; 11 P. D. 100; 34 W. R. 791.

Measure of Damages.] — The measure of damages is, the value of the wife of whom the husband has been deprived. *Cowing* v. *Cowing and Wollen*, 33 L. J., Mat. 149.

A claim for damages in a divorce case is founded upon the hypothesis that the husband has suffered injury by being deprived of his wife's society through the wrongful act of the co-respondent. In order to award any damages it is necessary to find (1) that the husband has in fact been damnified, (2) that such damage has been brought about by the wrongful act of the co-respondent, without any fault on the part of the husband. It is no part of the functions of the jury to punish the adulterer for his immorality. Their sole duty is to compensate the husband for the injury (if any) which he has suffered through the wrongful act of the co-respondent. If a husband has a virtuous wife taken from him by the contrivance of another man, he is entitled to damages commensurate with the loss of such a wife; but if she has led a loose life before marriage, her value is not the same as that of a virtuous woman. In estimating the amount of damages to be awarded, the fact that the wife was earning money, of a portion of which the petitioner had the advantage, may properly be taken into account; but the co-respondent's means must be left entirely out of the question. *Darbishire* v. *Darbishire*, 62 L. T. 664; 54 J. P. 408.

When a petitioner claims damages against the co-respondent, if the adultery of the respondent and co-respondent is proved, the jury is bound to assess the damages at a specific sum, however small. The jury cannot find a verdict that the petitioner has sustained no damage. *Anon.*, 31 L. J., Mat. 96, n.

The jury is to take into consideration the same circumstances as would have been considered by a jury in an action for criminal conversation. *Comyn* v. *Comyn and Humphreys*, 32 L. J., Mat. 210.

—— **Means of Co-Respondent.**]—On the hearing of a husband's petition for dissolution of marriage, in assessing damages against a co-respondent his means are irrelevant; the measure of damages is the injury to the petitioner. *Bikker* v. *Bikker and Whitewood*, 1 R. 496; 67 L. T. 721.

As a general rule evidence of a co-respondent's means is inadmissible. *Cowing* v. *Cowing and Wollen*, 33 L. J., Mat. 149.

Semble, the jury may take a co-respondent's wealth into consideration if he has used it as a means of seducing the wife. *Ib.*

On an issue of adultery raised between husband and wife, to be tried by a jury who has also to assess damages against a co-respondent who has not appeared, no evidence which is not admissible against the respondent can be given to show that the co-respondent has been guilty of adultery; but evidence in aggravation of damages is admissible. The jury found a verdict for the respondent, and assessed the damages at one farthing. *Stone* v. *Stone and Appleton*, supra.

—— **Connivance of Petitioner.**]—Where the jury found adultery, connivance on behalf of a petitioner, and assessed the damages at 50*l.*, the court refused to grant a rule nisi for a new trial, holding that there could be no doubt of the substantial meaning of the jury in their verdict of connivance, and that it was sufficiently founded on the evidence. *Ellyatt* v. *Ellyatt, Taylor and Halse*, 3 Sw. & Tr. 504; 33 L. J., Mat. 137; 10 Jur. (N.S.) 1035; 11 L. T. 44.

—— **Marriage Settlements.**]—Semble, that the position of a husband as regards the marriage settlements, may properly be submitted to the jury for their consideration in the assessment of damages against the co-respondent. *Bell* v. *Bell and Anglesey (Earl)*, 1 Sw. & Tr. 565; 29 L. J., Mat. 159; 1 L. T. 243; 8 W. R. 178.

—— **Letters of Wife.**]—The letters of the wife to her husband and others before the adulterous intercourse were admissible to show the state of her feelings, although they might also state a fact which would not strictly be evidence. *Willis* v. *Bernard*, 8 Bing. 376; 1 M. & Scott, 584; 5 Car. & P. 342; 1 L. J., C. P. 118.

Letters written by a wife to her husband (while living apart from each other), proved to have been written at the time they bore date, and when there was no reason to suspect collusion, were admissible without showing distinctly the cause of their living apart. *Trelawney* v. *Coleman*, 1 B. & Ald. 90; 2 Stark. 191; 18 R. R. 438.

If, to rebut the presumption that a wife left her husband's house from his cruel treatment of her, letters written by her to her husband in affectionate terms, were offered in evidence, it must have been proved at what time they were written, or, they were not admissible; and the dates of them were not sufficient proof of the times at which they were written. *Woolston* v. *Smith*, 2 Car. & P. 24; 3 Bing. 127; 10 Moore, 482; 3 L. J. (O.S.) C. P. 200; 28 R. R. 609.

—— **Effect of Separation Deed on Amount.**]—In a petition by the husband for dissolution of marriage claiming damages, it appeared that the petitioner and his wife had entered into a separation deed in consequence of her intimacy with the co-respondent, and that she committed adultery with him after the date of the deed:—Held, that the petitioner was entitled to the same amount of damages as he would have been had no separation deed been executed. *Izard* v. *Izard*, 58 L. J., P. 83; 14 P. D. 45; 60 L. T. 399; 37 W. R. 496.

—— **Condonation—Claim for Damages after Condonation.**]—At the trial of a petition by a husband for divorce, on the ground of the adultery of his wife with two co-respondents, and claiming damages against one of such co-respondents, the jury found that the respondent had been guilty of adultery with both co-respondents, but that the petitioner had condoned the adultery with the one against whom damages were claimed, and that no damages were payable by such co-respondent in respect of the adultery committed by him. It appeared that the condonation was subsequent to the adultery with both co-respondents, and that at the time of the condonation the petitioner did not know of the adultery with the other co-respondent:—Held, that a decree was rightly granted; for that a condonation by a husband of adultery with one person is not avoided by the fact that the wife had previously to the condonation committed acts of adultery with another person of which he was not aware; and that, although at common law condonation by the husband of an act of adultery was no bar to an action for criminal conversation against the adulterer, but only went in mitigation of damages, the case is different under the Divorce and Matrimonial Causes Act, 1857; and where, on a petition for divorce and for damages against the co-respondent, a divorce is refused on the ground that the adultery has been condoned, the petitioner is not entitled to a judgment, even for nominal damages, against the co-respondent; but the petition will be dismissed, and the petitioner may be ordered to pay the co-respondent's costs. *Story* v. *Story* (12 P. D. 196) approved. *Pomero* v. *Pomero* (10 P. D. 174) overruled. *Bernstein* v. *Bernstein*, 63 L. J., P. 3; [1893] P. 292; 69 L. T. 513—C. A. And see *Norris* v. *Norris*, 4 Sw. & Tr. 237.

Petition dismissed.]—If the petition is dismissed the petitioner can get no damages. *Story* v. *Story*, 57 L. J., P. 15; 12 P. D. 196; 57 L. T. 536; 36 W. R. 190; 51 J. P. 680. But see *Long* v. *Long*, 60 L. J., P. 27; 15 P. D. 218.

Co-Respondent not Answering—No Right to Address Jury.]—A co-respondent who puts in no answer, and yet appears, is not entitled to address the jury in mitigation of damages, or to cross-examine with that view. *Lyne* v. *Lyne and Blackney*, 37 L. J., Mat. 9; L. R. 1 P. 508; 17 L. T. 29; 16 W. R. 159. *And see* col. 872.

Apportionment of.]—A husband obtained a decree nisi for dissolution of marriage, and damages were assessed at 250*l.* On motion to make the decree nisi absolute, and to direct application of damages, the court directed all the husband's interest in the damages to be assigned by him to a trustee for the use of the only child of the marriage, and in case of the child's death under twenty-one and unmarried, for the use of the husband, and suspended the decree till such assignment should be made. *Clark* v. *Clark and Bouch*, 2 Sw. & Tr. 520; 31 L. J., Mat. 61; 6 L. T. 639; 10 W. R. 810.

The jury having assessed the damages against a co-respondent at 1,000*l.*, and condemned him in costs, the court ordered the damages to be paid to the husband in trust to pay thereout such costs as should not be recovered against the co-respondent, and as to the residue for the children of the marriage in equal shares, to be paid to them on attaining twenty-one. *Spedding* v. *Spedding*, 32 L. J., Mat. 31.

The court directed 5,000*l.* damages to be paid to the husband's solicitor; 1,000*l.* to be paid by him to the husband; out of the residue an annuity of 120*l.* to be purchased for the respondent's life, to be paid to her dum casta vixerit, with remainder to two of her daughters; and the remainder to be invested in an annuity for these two daughters. *Forster* v. *Forster and Berridge*, 3 Sw. & Tr. 158; 9 L. T. 150.

Upon pronouncing a decree of dissolution of marriage on the ground of a wife's adultery, the court ordered that the damages assessed by the jury should be applied, in the first instances, to the payment of so much of the petitioner's costs out of pocket as should not be taxed against the co-respondent, and that the residue should be settled upon the respondent for life dum casta

vixerit; and after her death, or on breach of that condition, upon the issue of the marriage. *Narracott* v. *Narracott and Hesketh*, 3 Sw. & Tr. 408; 33 L. J., Mat. 132; 10 Jur. (N.S.) 640; 10 L. T. 389; 12 W. R. 1064.

Where it was proved on the hearing of a petition that there had been no issue of the marriage, and that at the time of the hearing the respondent was living with the co-respondent, the court made the order for the payment to the petitioner of the damages assessed against the co-respondent part of the decree nisi, instead of postponing it until the decree absolute. *Evans* v. *Evans and Bird*, L. R. 1 P. 39.

A jury found that the respondent and co-respondent had committed adultery, and assessed the damages, which they recommended should be entirely settled on the children of the marriage. The court ordered that the petitioner's surplus costs, having been taxed, should be first paid out of the fund, and that the residue should be invested in the name of a trustee, the income to be expended for the maintenance and education of the children until they were of age, when the principal would be divided between them. *Billingay* v. *Billingay and Thomas*, 35 L. J., Mat. 84.

A sum of 5,000*l.* damages was apportioned by the court as follows:—1,500*l.* was settled on the youngest child of the marriage, aged five years, the only one remaining in the husband's custody; 1,500*l.* was given to him and also his costs of the suit in addition to those which had been taxed against the co-respondent; the balance was invested in the purchase of a life annuity for the wife, to be paid to her as long as she lived chastely and did not become the wife of the co-respondent; and in the event of her breaking either of these conditions, to be paid to the husband. *Meyern* v. *Meyern and Myers*, 46 L. J., P. 5; 2 P. D. 254; 35 L. T. 909; 25 W. R. 115.

In a suit by a husband for dissolution of marriage, the court refused to order any part of the damages assessed to be settled on the wife, but directed them to be applied, first, to the payment of such part of the petitioner's costs as he should not recover from the co-respondent, and subject thereto, to be settled upon the issue of the marriage. *Taylor* v. *Taylor and Wolters*, 39 L. J., Mat. 23; 22 L. T. 140.

Not a Voluntary Settlement—Settling.]—It is competent to the court to make an order for the settlement of damages after the decree nisi has been made absolute. *Billingay* v. *Billingay and Thomas*, 35 L. J., P. 84; L. R. 1 P. 168.

Damages not "Property" on Bankruptcy.]—Money recovered as damages in a suit by a husband for dissolution of his marriage is not his "property" within the meaning of s. 47 of the Bankruptcy Act, 1883. *Stephenson, In re, Brown, Ex parte*, 66 L. J., Q. B. 423; [1897] 1 Q. B. 638; 76 L. T. 328; 45 W. R. 416; 4 Manson, 13.

Agreement between Petitioner and Co-Respondent as to.]—The court is not at liberty to recognise an agreement made between the counsel of the petitioner and co-respondent in respect of the amount of damages to be paid, but is bound by the assessment of the jury. *Callwell* v. *Callwell and Kennedy*, 3 Sw. & Tr. 259.

If an order is made that the damages be paid to the petitioner in the suit, there is nothing to prevent him from coming to terms with the co-respondent, and accepting a less sum than that assessed. *Dale* v. *Dale and Macdonell*, 15 L. T. 595.

Where there was reason to apprehend that little or nothing would be recovered if the co-respondent was pressed for the full amount of the assessed damages, the court on receiving an assurance that no application would be made on behalf of the petitioner (who declared his ability and willingness to maintain the only child of the marriage) to alter the settlement, ordered the damages to be paid to him, with the view of enabling him to come to terms in respect of them with the co-respondent, who was willing to pay part but unable to pay all. *Ib.*

But when an order had been made as to the manner in which the damages should be applied, the court refused to sanction an agreement between the petitioner and co-respondent, by which the children were deprived of the benefit conferred upon them by such order; but as the petitioner had been put to further expense by appeals, the court varied the original order so as to give him a larger share of the damages, on the ground that the intent of the original order was to reimburse the petitioner all the expenses he had incurred. *Forster* v. *Forster and Berridge*, 4 S. & T. 131; 34 L. J., Mat. 88; 11 Jur. (N.S.) 512; 12 L. T. 504.

Motion to insert "Dum Sola" after Decree Absolute.]—After a decree was made absolute for payment of the income of the invested damages to the wife:—Held, that it was too late to apply to the court to amend the order by inserting in it, after the words "dum casta," the words "et sola." *Narracott* v. *Narracott and Hesketh*, 4 Sw. & Tr. 76; 34 L. J., Mat. 54; 11 L. T. 750; 13 W. R. 506.

Enforcing Payment.]—The court has no power to order immediate execution for recovery of damages awarded against a co-respondent, and ordered to be paid to the petitioner. *Pounsford* v. *Pounsford and Bulpin*, 2 Sw. & Tr. 389; 30 L. J., Mat. 188; 5 L. T. 139.

Or to order him to pay into court the amount of the damages. *Ib.* S. P., *Forster* v. *Forster and Berridge*, 32 L. J., Mat. 133.

But when damages had been ordered to be paid to a petitioner, and it appeared that he was in danger of losing them, the court made an order on the co-respondent to pay the amount within ten days after the service of the order. *Bent* v. *Bent and Footman*, 2 Sw. & Tr. 392; 30 L. J., Mat. 189; 5 L. T. 120; 10 W. R. 448.

And when damages and costs are not paid pursuant to an order of the court, leave will be granted to issue a fieri facias. *Reed* v. *Reed*, 29 L. J., Mat. 158.

In a suit by a husband for dissolution of marriage on the ground of the wife's adultery, damages to the amount of 500*l.* were assessed against the co-respondent. The court granted a decree nisi, and condemned him in costs. On affidavits showing that the co-respondent was removing his effects and evading service of a peremptory order for payment of the damages, the court allowed a fi. fa. to issue forthwith, without requiring personal service of the order. *Pritchard* v. *Pritchard and Bean*, 39 L. J., Mat. 46; L. R. 2 P. 53; 22 L. T. 629.

—— **Order to Pay into Court—Attachment.**]—A co-respondent disobeyed the order of the court to pay into the registry the damages which had been found against him, and as there was no one to institute proceedings against him under the Debtors Act, 1869, the court ordered the damages to be paid to the petitioner, he undertaking to pay them into court. *Gyte* v. *Gyte*, 10 P. D. 185; 34 W. R. 47.

—— **Receiving Order—"Judgment Creditor"—Order for Payment to Husband.**]—In a divorce suit by a husband a decree for dissolution of the marriage was made whereby F., the co-respondent, was ordered to pay into court the amount of damages assessed by the jury. A further order was made that F. should pay the money to the husband for the purposes of settlement upon the children of the marriage. F. failed to pay, whereupon the husband applied to the judge in bankruptcy for a committal order under s. 5 of the Debtors Act, 1869. F. had means sufficient to pay part only of the money. The judge, acting under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, made a receiving order in lieu of an order for committal:—Held, that the judge had no jurisdiction to make the order, inasmuch as the husband, being a mere receiver or collector for the court of money not to be applied for his own benefit, was not a "judgment creditor" within the meaning of s. 103, sub-s. 5, of the Bankruptcy Act, 1883; but that an order should be made against F., under s. 5 of the Debtors Act, 1869, for payment of the money by instalments. *Fryer, Ex parte, Fryer, In re*, 55 L. J., Q. B. 478; 17 Q. B. D. 718; 55 L. T. 276; 34 W. R. 766; 3 Morrell, 231—C. A.

Execution of Deed by Person nominated by the Court.]—The jurisdiction given by the Judicature Act, 1884, s. 14, where any person neglects or refuses to comply with an order directing him to execute any instrument, to order the execution of the instrument by some person, nominated by the court to do so, may be exercised by the probate division of the high court of justice; and the order may be made upon a motion for attachment for non-compliance without formal service of a fresh notice of motion, provided the person to be affected by the order has by himself or his solicitor received notice that the application to the court will be made in the alternative form. *Howarth* v. *Howarth*, 55 L. J., P. 49; 11 P. D. 95; 55 L. T. 303; 34 W. R. 633—C. A. Affirming, 50 J. P. 376.

Attachment—Substituted Service.]—In the probate division when personal service of notice of motion to attach for non-compliance with an order cannot be effected, and the original order has been duly served, substituted service by analogy to the practice in the other divisions of the high court, is sufficient. *Ib.*

Bankruptcy of Co-Respondent.]—Damages having been given against a co-respondent, an order was made that the amount should be paid into the registry within a certain time. Before such order had been made, the co-respondent became a bankrupt, and a trustee of his property was appointed. The damages were not paid into the registry, nor could they be proved under the bankruptcy. In order to facilitate the latter step the court rescinded its former order and directed that the damages should be paid to the petitioner himself. *Patterson* v. *Patterson and Graham*, 40 L. J., Mat. 5; L. R. 2 P. 129; 23 L. T. 568; 19 W. R. 232.

Quære, whether the Divorce Court has power to make such an order instead of the usual order for payment into the registry of the court, and if so, whether the person to whom the payment is ordered to be made can prove for the amount under the bankruptcy of the co-respondent, notwithstanding. *Ib.*

In a suit for dissolution of marriage the co-respondent was ordered to pay into court the damages which had been recovered against him by the petitioner, and also to pay the petitioner's costs. After service of the orders, but before the costs were taxed, the co-respondent was adjudicated a bankrupt on his own petition, and afterwards obtained an order of discharge. Upon an application for an attachment for disobedience to these orders:—Held, that the petitioner, being entitled to enforce payment against the co-respondent by process of contempt, was a creditor within s. 149 of the Bankruptcy Act, 1861, both as to the damages and costs. That such damages and costs were debts, provable under the bankruptcy, and therefore that the order of discharge covered them, and the co-respondent could not be attached for non-payment. *Wood* v. *Wood and Stanger*, 37 L. J., Mat. 25; L. R. 1 P. 467; 18 L. T. 110; 16 W. R. 568.

Damages awarded by a jury in a divorce suit against the co-respondent, and ordered by the court to be paid to the husband, he undertaking to pay the same immediately into court, will not constitute a good petitioning creditor's debt on which to found an adjudication in bankruptcy. *Muirhead, Ex parte, Muirhead, In re*, 45 L. J., Bk. 65; 2 Ch. D. 22; 34 L. T. 303; 24 W. R. 351—C. A. And see *Clayton, In re, Clayton, Ex parte*, L. R. 5 Ch. 13; 21 L. T. 342; 18 W. R. 55.

7. Custody of, and Access to, Children.

a. Jurisdiction of Divorce Court.

Prayer for.]—If the permanent custody of the children is claimed a prayer to that effect should be inserted in the petition. *Seymour* v. *Seymour*, 1 Sw. & Tr. 332.

20 & 21 Vict. c. 85, s. 35.]—Under this statute, the court, after a final decree, had no power to vary or alter an order as to the custody of children. *Curtis* v. *Curtis*, 1 Sw. & Tr. 192; 27 L. J., Mat. 16.

Over Children under Sixteen.]—The court has jurisdiction by its order to regulate the custody of children until they attain the age of sixteen. *Mallinson* v. *Mallinson*, 35 L. J., Mat. 84; L. R. 1 P. 221; 14 L. T. 636; 14 W. R. 973.

But the court has no jurisdiction to make any order as to the custody of children upwards of sixteen years of age. *Ryder* v. *Ryder*, 2 Sw. & Tr. 225; 30 L. J., Mat. 44; 3 L. T. 678; 9 W. R. 440.

Security.]—Upon a decree for judicial separation when the court has ordered a provision to be made for the children it has no power to order also that the respondent shall secure the payment. *Hunt* v. *Hunt*, 52 L. J., P. 98; 8 P. D. 161; 31 W. R. 724.

Scotland.]—The 24 & 25 Vict. c. 86, s. 9, has given the court the widest discretion to weigh the comparative advantages or disadvantages of

giving the custody of all, or of any of the children, to the one parent or to the other, and no general rule can be laid down. It is the duty of the court to consider all the circumstances of the particular case. *Symington* v. *Symington*, L. R. 2 H. L. (Sc.) 415.

Jurisdiction of Justices.]—See *Grove* v. *Grove*, 39 L. T. 546; 27 W. R. 324.

b. Interim Orders.

Common Law Rule.]—In making an interim order as to the custody of the children, the court will adhere to, or depart from, the common law rule, according to its discretion. *Spratt* v. *Spratt*, 1 Sw. & Tr. 215; 6 W. R. 860. And see *Curtis* v. *Curtis*, 1 Sw. & Tr. 75; 27 L. J., P. 16; 6 W. R. 409.

The court has no power to make an order as to the custody of children pending a suit for restitution of conjugal rights. *Chambers* v. *Chambers*, 39 L. J., Mat. 56; 22 L. T. 727; 18 W. R. 528.

A father is entitled at common law to the custody of the child at its mother's breast, and the court, in making an order as to the custody pendente lite, will not, unless some good cause is shown, take away this right. *Cartledge* v. *Cartledge*, 2 Sw. & Tr. 567; 31 L. J., Mat. 85; 8 Jur. (N.S.) 493; 6 L. T. 397; 10 W. R. 672.

In the interval between a decree nisi for dissolution of marriage being pronounced and its being made absolute, the only order the court can make as to the custody of children, is an interim order. *Cubley* v. *Cubley and Smith*, 30 L. J., Mat. 161.

Pendente lite—Child over Sixteen—Application by Father.]—Upon a summons by a father that the mother should be deprived of the custody of their eldest child, a girl over sixteen years of age, the judge (in chambers) refused the father's application, and directed that the mother should retain the custody of the child pending suit. *B.* v. *B.*, 72 L. T. 268.

Wife Taking Possession of Child.]—A wife left her husband's house, with a view of instituting a suit for dissolution of marriage by reason of cruelty and adultery, taking with her their boy, between seven and eight years of age, whom she placed in a school kept by an intimate friend of her own. On an application for an interim order to prevent the father removing him from the school:—Held, that the wife's intimate friend could not be considered an indifferent person between the parties, and the court ordered the child to be given up to the husband's mother, who, from the letters, appeared to be on good terms with the daughter-in-law, and attached to the boy. *Boynon* v. *Boynon*, 1 Sw. & Tr. 324.

Pending a suit for dissolution of marriage by a husband by reason of the wife's adultery, she, in an improper manner, obtained possession of an infant child of the marriage, then living with the husband. On the husband again taking the child from her, she endeavoured by violence to get it from him, but failing, applied to the court for an order that it might be restored to her. The court rejected the application, on account of the impropriety of her conduct, and condemned her in the costs of the motion. *Allen* v. *Allen and D'Arcy*, 29 L. J., Mat. 166.

Ex parte Application to restrain Removal.]—The court, upon affidavit that the petitioner believed her husband intended to remove the only child out of the jurisdiction of the court, made an order, ad interim, upon the petitioner's ex parte application, restraining the respondent from removing the child. *Harris* v. *Harris*, 63 L. T. 262.

c. Access.

Pending Suit—Interests of Children to be Considered.]—In exercising its discretion in the matter of access to children by their parents, pending suit, the court is mainly influenced by considerations for the interests of the children. *Philip* v. *Philip*, 41 L. J., P. 89; 27 L. T. 592.

Therefore, when it was satisfied that the visits of the mother to the child, who was in a very sickly state, might retard the child's recovery, it refused the mother an order for access pending suit, though there was reason to apprehend that the separation of the mother from the child would exercise a prejudicial effect on the mother's health. *Ib.*

—— **To whom.**]—The court has power to make an order for access merely of one of the parties to a suit to the children pendente lite. *Thompson* v. *Thompson and Sturmfells*, 2 Sw. & Tr. 402; 31 L. J., Mat. 213; 7 Jur. (N.S.) 1207; 5 L. T. 325; 10 W. R. 96.

—— **Motive for.**]—On an application for an order of access to children pending a suit on behalf of the mother, the court will require to be satisfied that the motive is natural love and affection for the children, and that the mother has no indirect objects in view, as to which lapse of time in making the application may be material. *Codrington* v. *Codrington and Anderson*, 3 Sw. & Tr. 496; 10 L. T. 387.

Application for.]—After a decree of judicial separation has been pronounced, the court will not order that the wife have access to children of the marriage, unless application is made by petition. *Anthony* v. *Anthony*, 30 L. J., Mat. 208.

Dismissal of Petition for Dissolution.]—Where a petition for dissolution of marriage is dismissed, the court has no power to make an order as to the custody of, or access to, the children of the marriage. *Seddon* v. *Seddon*, 2 Sw. & Tr. 640; 31 L. J., Mat. 101; 7 L. T. 253.

Costs of Motion.]—The costs of an unsuccessful motion by a wife for access to the children of the marriage will not be allowed. *Hepworth* v. *Hepworth*, 30 L. J., Mat. 253.

Where the court decrees a judicial separation in favour of the husband on the ground of cruelty, and the wife afterwards applies on motion for access to some of the children of the marriage, and an order for access is made, the wife is not entitled to have the costs of the motion taxed against her husband, as he has not refused her access to the children since the date of the decree. *Bacon* v. *Bacon*, L. R. 1 P. 167.

Respondent Disobeying Order of Court.]—The court, having granted a decree dissolving the marriage between the parties, on the petition of the wife, further ordered that, on certain conditions, and after due notice, she should have access to her children. The respondent for a time removed himself and one child beyond the

jurisdiction of the court, and on his return denied to the petitioner access to the child on the terms laid down by the court. On the suggestion that he was again about to leave this country, and in consideration of the approaching vacation, the court ordered that the child should be delivered up to its mother forthwith, and that she should have the custody of it until the fifth day of the following term. *Portugal* v. *Portugal*, 35 L. J., Mat. 103 ; 15 W. R. 9. See also *Allen* v. *Allen*, 54 L. J., P. 77 ; 10 P. D. 187 ; 33 W. R. 826 ; and *Hyde* v. *Hyde*, 57 L. J., P. 89 ; 13 P. D. 166 ; 59 L. T. 529 ; 36 W. R. 708.

d. Final Decree.

Both Parties to be Before the Court.]—The court is not in a position to deal with a petition for custody of children under 22 & 23 Vict. c. 61, s. 4, until both parties are before the court. *Stacey* v. *Stacey*, 29 L. J., Mat. 63 ; 8 W. R. 341.

When Made.]—The court will grant the custody of children on the motion for making a decree nisi absolute without petition, notice having been given previously to the other side of the intention to apply for such custody. *Davies* v. *Davies*, 15 W. R. 344.

Innocent Party—Primâ facie Right.]—The innocent party has a primâ facie right to the custody of the children ; when, however, under peculiar circumstances, there had been no acts of violence towards the children, the court gave up one of them to the father, the party complained of. *Martin* v. *Martin*, 29 L. J., Mat. 106 ; 2 L. T. 118 ; 8 W. R. 367.

Where there appears to be no continuance of immorality, and the husband is affectionately attached to his children, and has always been so, and engaged in a profitable business, an order which should take from him the custody of his sons would not be conducive to their future welfare. It is a very different matter with regard to the daughters. Their mother, against whom nothing has been proved, is the natural person to have their custody. *Lymington* v. *Lymington*, L. R. 2 H. L. (Sc.) 415.

The court, in a decree for a judicial separation, on the ground of adultery of the husband, on proof that he continued to live in adultery, and that the child of the marriage, a boy of thirteen, resided with him, there being no imputation on the wife, ordered that she should have the custody of the child until the age of fourteen, provision being made for the husband having access to him. *Hyde* v. *Hyde*, 29 L. J., Mat. 150.

The court, in its decree for a judicial separation, on the ground of the husband's adultery, ordered that the wife should have the custody of the children under fourteen, until they should attain that age, on proof that the husband continued the adulterous intercourse. *Duggan* v. *Duggan*, 29 L. J., Mat. 159.

Where the court decrees a judicial separation at the suit of a wife, by reason of cruelty, it will, in making an order as to the custody of the children, according to the circumstances of the case, exercise a discretionary power, exceeding that which is exercised by courts of law and equity respecting the custody of infants. *Marsh* v. *Marsh*, 1 Sw. & Tr. 312 ; 28 L. J., Mat. 13 ; 5 Jur. (N.S.) 46 ; 7 W. R. 129.

In a case, when there was no suggestion that the children had been cruelly or improperly treated by the husband, the court directed the children to remain in the custody of the mother so long as she maintained and properly educated them, without expense to her husband (he to have proper access to them), till they should respectively attain the age of fourteen. *Ib.*

When a wife succeeds in her suit against her husband, she will generally be entitled to the custody of the children. *Boynton* v. *Boynton*, 2 Sw. & Tr. 275 ; 30 L. J., Mat. 156 ; 4 L. T. 258 ; 9 W. R. 620.

Where a husband, by reason of whose misconduct the marriage was dissolved, was living in America, and the children remained in the custody of the mother in this country, the court refused to make any order as to their custody ; for any such order must have been final, and the circumstances and relative positions of the parties might be materially altered in the lapse of years. *Robotham* v. *Robotham*, 1 Sw. & Tr. 190 ; 27 L. J., Mat. 61 ; 6 W. R. 736.

A wife having obtained a decree of judicial separation on the ground of cruelty, the court being satisfied that the children of the marriage would not be brought up as carefully and morally by their father as by their mother, as an act of justice to her, and for the advantage of the children, ordered that she should have the custody of them until they should attain fourteen, with provision for their father having access to them. *Suggate* v. *Suggate*, 1 Sw. & Tr. 489 ; 29 L. J., Mat. 167 ; 8 W. R. 20.

In determining the custody of children, the interests of the children are paramount with the court. In committing them to the charge of the mother when the innocent party, the court acts upon the principle that a wife ought not to be deprived of the comfort and society of her children by reason of the wrongful act of the husband, but it will depart from the rule when it is for the interest of the children that their education should be free from her control. *D'Alton* v. *D'Alton*, 47 L. J., P. 59 ; 4 P. D. 87.

Guilty Wife—Discretion of Court.]—Where a decree for dissolution of marriage has been made on the ground of the adultery of the wife, and the infant children of the marriage have been given into the custody of the husband, the court is not precluded from making an order giving the divorced wife access to them, but as a general rule such an order will not be made. *Handley* v. *Handley*, [1891] P. 124 ; 63 L. T. 535 ; 39 W. R. 97 ; 55 J. P. 293—C. A.

When a marriage is dissolved on the ground of a wife's adultery, the court will not order that she have the custody of, or access to, the children of the marriage. *Bent* v. *Bent and Footman*, 2 Sw. & Tr. 392 ; 30 L. J., Mat. 175 ; 5 L. T. 139. S. P., *Clout* v. *Clout and Hollebone*, 2 Sw. & Tr. 391 ; 30 L. J., Mat. 176 ; 5 L. T. 139.

—— **Giving Custody to Husband.**]—On a sentence of dissolution of marriage by reason of a wife's adultery, the court will make an order on her to deliver up the custody of the children, rather than leave the husband to the delay and expense of establishing his right as father at common law. *Boyd* v. *Boyd and Collins*, 1 Sw. & Tr. 562 ; 29 L. J., Mat. 79 ; 6 Jur. (N.S.) 56 ; 1 L. T. 243 ; 8 W. R. 160.

Variation of Order—Custody of Child.]—Where a decree for dissolution of marriage had been pronounced on the wife's petition, on the

ground of the husband's adultery and cruelty, and the custody of the children of the marriage had been given to her, the court, two years afterwards, being satisfied on affidavit that the wife was unfit to be entrusted with the custody of a little girl, a child of eleven years old, one of two children of the marriage, and that the husband had since the decree was made absolute married again, and had been and was then leading a reputable and moral life, gave him the custody of such little girl, in spite of the fact that he had formerly been found guilty of adultery and cruelty. The other child, a boy, had always remained with the husband. *Witt* v. *Witt*, 60 L. J., P. 63; [1891] P. 163; 64 L. T. 121; 39 W. R. 432; 55 J. P. 184.

Payment for Maintenance of Children.]—A wife having obtained a judicial separation from her husband by reason of his adultery, and also the custody of their two children until the court should otherwise direct, presented a further petition praying the court to order the husband to pay to her a sum or sums of money for the past and future maintenance of the children. In answer, he asked the court to order the children to be delivered up to his father and sister, who were quite prepared at their own costs to provide for the maintenance and education of them. The court refused to take the children out of the custody of their mother, and made an order upon the father to contribute in a moderate extent to their maintenance. *Milford* v. *Milford*, 38 L. J., Mat. 63; L. R. 1 P. 715; 21 L. T. 155; 17 W. R. 1063.

—— **Amount.**]—The registrar having reported the income of the husband at 150*l.* a year, the court made an order for payment to the wife, who had obtained a decree for dissolution of the marriage, of 1*l.* per week, and further directed that out of 90*l.* per year, placed in the hands of trustees by the husband and to be applied by them to the maintenance and education of the four children of the marriage in such manner as he should direct, one-third should be paid to the wife for the maintenance and education of the two younger children who were committed to her custody. *Prescott* v. *Prescott*, 18 L. T. 35.

In Father's Absence.]—The court decreed the custody of the children, in a suit for dissolution by the husband, who was in India, to the father or his agent, with a view that, in the father's absence, the grandfather should have charge of them. *Ling* v. *Ling and Prior*, 13 L. T. 683.

Where Queen's Proctor has Intervened.]—In a suit for dissolution, the petitioner obtained a decree nisi, and before the decree absolute the queen's proctor intervened and charged the petitioner with connivance, and conduct conducing to the respondent's adultery. On an application by her for an order for the custody of the children, and the payment of an allowance for their maintenance, the court refused to treat it on the same principles as an interim order, and, on the ground that the suit had gone far enough to convict the respondent of adultery, refused to make the order. *Shewell* v. *Shewell and Fox*, 20 L. T. 404.

Who may Intervene.]—When a petition for the custody of children after a final decree of dissolution is before the court, persons other than the parents may intervene, and bring before the court such facts as in their opinion the interests of the children may require. The form of such intervention is by petition, and the interveners act at their own risk as to costs. *Chetwynd* v. *Chetwynd*, 4 Sw. & Tr. 151; 34 L. J., Mat. 130; 11 Jur. (N.S.) 958; 13 L. T. 197; 14 W. R. 184.

After a decree of judicial separation in favour of the party in whose custody children of the marriage have been placed, the court may allow the intervention of any person in their behalf to question the propriety of the continuance of such custody. *Godrich* v. *Godrich*, 43 L. J., Mat. 2; L. R. 3 P. 134; 29 L. T. 465; 22 W. R. 71.

When relations intervene in an application for the custody of a child, they do so at the peril of being condemned in costs, if their intervention is unsuccessful. *March* v. *March and Palumbo*, L. R. 1 P. 437.

Both Parties Unfit to have Custody.]—When a marriage has been dissolved on the ground of the misconduct of the husband, the court, although it may deem him unfit to have the care of the children of the marriage, will not deprive him of his legal right to their custody in favour of the wife if she also is unfit to be entrusted with them. In such a case it will give the custody of the children to some third person. *Chetwynd* v. *Chetwynd*, 35 L. J., Mat. 21; 13 L. T. 474.

Society of Children Necessary for Wife's Health or Solace.]—The court made an order, giving the custody of two infant children—the one being of the age of between three and four years and the other of eighteen months—to the mother, the respondent in a suit for dissolution of marriage, on the ground that the mother's health was suffering from being deprived of their society, and that they were living with a stranger, and not with the father. *Barnes* v. *Barnes and Beaumont*, L. R. 1 P. 463; 16 W. R. 283.

Where a wife had obtained a decree for judicial separation by reason of her husband's misconduct, the court refused to give her the custody of one of the children of the marriage, who was an idiot and of the age of twelve, on the ground that the court would only deprive the father of the custody of his child in favour of the innocent wife, when it was for her solace that she should have such custody. *Cooke* v. *Cooke*, 3 Sw. & Tr. 248; 32 L. J., Mat. 180; 11 W. R. 957.

Husband Leading Dissolute Life—Espionage.]—When a father, after a decree dissolving his marriage, is shown to be leading a notoriously dissolute life, the court will hold him disqualified to have the custody of his child. *March* v. *March and Palumbo*, L. R. 1 P. 437.

The court views with disfavour an attempt to get up a charge of adultery against a husband, who has obtained a decree dissolving his marriage, by tracking him from place to place, with a view to obtain an order depriving him of the custody of his children. *Ib.*

Delivery — Personal Service of Order — Writ of Sequestration — Discovery in aid of Execution.]—On the application by a husband, who had obtained a decree nisi for divorce against his wife, an order was made that the wife should

deliver up into the custody of the husband the children of the marriage. The wife knew of the order, but evaded service of it, and disobeyed it. On the application of the husband an order was then made declaring the wife contumacious and in contempt, and directing that a writ of sequestration should issue against the estate and effects of the wife, and that her mother, sister, and brother-in-law should attend the court to be examined as to her whereabout:—Held, on appeal—first, that as the wife knew of the order for delivery up of the children, and evaded service of it, personal service of the order upon her was not necessary to give the court jurisdiction to issue the writ of sequestration; secondly, that the general form of the writ of sequestration against "the estate and effects" of the wife, without any express limitation therein to separate property of the wife not subject to a restraint on anticipation, was right, but that the writ would only operate on her separate property which was not so subject; thirdly, that the court had no jurisdiction to order the attendance of third parties for examination. *Scott* v. *Morley* (20 Q. B. D. 120), distinguished. *Miller* v. *Miller* (L. R. 2 P. 54), explained. *Hyde* v. *Hyde*, 57 L. J., P. 89; 13 P. D. 166; 59 L. T. 529; 36 W. R. 708—C. A. See also *Allen* v. *Allen*, 54 L. J., P. 77; 10 P. D. 187; 33 W. R. 826.

—— **Disobedience—Attachment—Knowledge of Contents of Order.**]—An order was made in a divorce suit that "the child, issue of the marriage between the petitioner and respondent, be forthwith delivered up to and remain in the custody of the petitioner until further order of the court, but . . . that such child be not removed out of the jurisdiction of the court without its sanction." This order was brought to the knowledge of the respondent, who took the child out of the jurisdiction and retained its custody. Legal service was not effected upon him. The court, upon ex parte application by the petitioner, ordered a writ of attachment to issue against the respondent. *Favard* v. *Favard*, 75 L. T. 664.

Wife Unable to Support Children.]—A wife living separately from her husband, and who has obtained the custody of their child under 2 & 3 Vict. c. 54, but is herself unable to support it, may pledge her husband's credit for reasonable expenses incurred by her in providing for the child. *Baseley* v. *Forder*, 9 B. & S. 599: 37 L. J., Q. B. 237; L. R. 3 Q. B. 559; 18 L. T. 756. *And see* INFANT.

Restitution of Conjugal Rights—Power of Court.]—The court has no power, in suits for restitution of conjugal rights, to make any order as to the custody of the children of the marriage. *Chambers* v. *Chambers*, 39 L. J., Mat. 56; 22 L. T. 727; 18 W. R. 528.

e. Practice.

Affidavits.]—The court will not allow affidavits to be read as to the truth or falsehood of charges brought by the parties to the petition against each other. *Ryder* v. *Ryder*, 2 Sw. & Tr. 225; 30 L. J., Mat. 44; 3 L. T. 678; 9 W. R. 440.

Upon an application by a husband for the custody of the child, pendente lite, the wife asked for time to answer the affidavit upon which the application was founded. The court granted time, upon an undertaking being given by her that the child should not be removed out of the jurisdiction of the court until further order. *Carter* v. *Carter*, 29 L. J., Mat. 167.

Upon what Evidence Court will Act.]—The court will not, at the hearing of a cause, entertain an application for the custody of children if it is founded upon evidence not admissible in the cause. It should be made on a motion day. But at the hearing the court may direct that the petitioner have the custody of children until further order, if the facts proved would warrant such an order, e.g. if the adultery of the respondent be proved. *Wallace* v. *Wallace*, 32 L. J., Mat. 34; 8 Jur. (N.S.) 1082; 11 W. R. 30.

Postponement of Decree Absolute.]—A decree nisi having been pronounced on petition of the wife, to whom was entrusted the custody of the only child of the marriage, the court was moved to declare the respondent to be "a person unfit to have the custody" of such child within s. 6 of 49 & 50 Vict. c. 27. The court postponed making the decree absolute and adjourned the application for further materials. *Robinson* v. *Robinson*, 57 L. T. 118; 51 J. P. 39.

Petition.]—The court will not, at the hearing of a suit for dissolution of marriage by reason of the wife's adultery, order the petitioner to have the custody of the children of the marriage, unless the petitioner prays for such custody. *Boddy* v. *Boddy and Grover*, 30 L. J., Mat. 163.

Non-Appearance of Respondent.]—A respondent who is served with a copy of a petition for dissolution of marriage, containing also a prayer for the custody of the children of the marriage, if he does not appear, is not entitled to notice of the application. *Wilkinson* v. *Wilkinson*, 30 L. J., Mat. 200, n.

Sanity of Wife.]—An application of a wife for the custody of the children was opposed on the ground that she was not of sound mind. The evidence of medical men adduced by the parties was conflicting, and it appeared that they were not much conversant with affections of the brain; the court, therefore, directed a personal examination of the wife by an eminent physician, and upon his certificate gave her the custody of the children. *Duggan* v. *Duggan*, 29 L. J., Mat. 159.

Order as to Access—Refusal to Vary.]—After the verdict in a petition for dissolution the court refused to vary the order as to access to children and to prohibit the guilty wife from seeing her children, until the time for moving for a new trial had expired. The controversy between the parties is not ended until the period in which a new trial can be moved is exhausted. *Godrich* v. *Godrich, Lara, Forder and Kelsey*, 19 L. T. 611.

Maintenance of Child in Custody of Mother.]—Where alimony had been allotted to the wife and the only child of the marriage left in her custody, pendente lite, the court refused to order the husband to contribute to its maintenance. *Cranwell* v. *Cranwell*, 19 L. T. 611.

Judicial Separation, in Case of.]—*See* col. 798.

Under Guardianship of Infants Act.]—*See* INFANT.

8. JUDICIAL SEPARATION.

a. When Granted or Refused.

By the Matrimonial Causes Act, 1859 (20 & 21 Vict. c. 85, s. 16), *a sentence of judicial separation (which is to have the effect of a divorce a mensâ et thoro under the old law, and such other legal effect as therein mentioned), may be obtained either by the husband or the wife on the ground of adultery, or cruelty, or desertion, without cause for two years and upwards.*

Adultery by Husband without Cruelty—Desertion by Wife—No Bar to Judicial Separation.]—A wife petitioned for a dissolution of her marriage on the ground of her husband's adultery and cruelty. The husband in his answer charged her with adultery, and also with having deserted him without reasonable cause. The jury found that the wife had not committed adultery, that the husband had been guilty of adultery, but not of cruelty, and that the wife had left her husband without reasonable excuse before he had committed adultery:—Held, that the wife was entitled to a decree of judicial separation, and that the desertion of her by her husband was not a bar to her obtaining a judicial separation on the ground of his adultery. *Duplany* v. *Duplany*, 61 L. J., P. 49; [1892] P. 53; 66 L. T. 267. See col. 735.

Cruelty by Husband—Misconduct of Wife—Right to Relief.]—A wife who has been guilty of adultery since the commencement of the suit is not entitled to a decree of judicial separation on the ground of cruelty. *Drummond* v. *Drummond*, 30 L. J., P. 177; 7 Jur. (N.S.) 762; 4 L. T. 416.

A judicial separation can only be granted where the petitioner comes to the court with a pure character, and is free from all matrimonial misconduct. Accordingly, where a husband and wife had both been found guilty of adultery, and the husband had also been found guilty of cruelty:—Held, that the court had no jurisdiction to make a decree of judicial separation on the ground of such cruelty, however aggravated its character might be. *Drummond* v. *Drummond* (30 L. J., P. 177), approved. *Otway* v. *Otway*, 57 L. J., P. 81; 13 P. D. 141; 59 L. T. 153—C. A.

—— **Lapse of Time.**]—Lapse of time is not an absolute bar to a suit for judicial separation for cruelty. *Matthews* v. *Matthews*, 8 W. R. 51.

—— **Counter-Petitions—Verdict of Cruelty and Adultery — Decree Nisi Rescinded — Judicial Separation on Ground of Cruelty.**]—The court refused to pronounce a decree for a judicial separation upon the application of a wife, who had obtained a verdict of cruelty and adultery against her husband, but who had subsequently, upon the intervention of the queen's proctor, been found guilty of colluding with her husband. *Butler* v. *Butler*, 63 L. T. 256.

—— **Condonation—Revival.**]—A wife, who had suffered such acts of cruelty from her husband as would probably have been sufficient to enable her to have then obtained a decree for judicial separation, returned to his house and lived with him for five years, during which time he treated her with continual unkindness, though he never struck her. His wife was eventually so terrified by his conduct that she finally left her husband:—Held, that even if these later acts did not amount to legal cruelty, they did nevertheless constitute such a revival of the earlier cruelty as to warrant the court in pronouncing a decree for judicial separation. *Mytton* v. *Mytton*, 11 P. D. 141; 57 L. T. 92; 35 W. R. 368; 50 J. P. 488.

And see supra, cols. 740—747.

Desertion, As to.]—*See* cols. 747—757.

Molestation after Decree for Judicial Separation—Contempt of Court.]—Where a husband had obtained a decree for judicial separation against his wife, and, after such decree, the wife molested her husband, there is no jurisdiction to attach her for contempt for such molestation. *Smith* v. *Smith*, 59 L. J., P. 15.

Children—Custody—Death of Parent obtaining Order—Application by Third Person.]—By 22 & 23 Vict. c. 61, s. 4, the court, after a final decree of judicial separation, &c., may, upon application for this purpose, make from time to time orders with respect to the custody of the children the marriage of whose parents was the subject of the decree, as might have been made by final decree:—Held, that upon the death of the parent of a child who was entitled to the custody of it under a decree for judicial separation, the court had no jurisdiction under s. 4 to entertain an application by a stranger for the custody of the child. *Davis* v. *Davis*, 58 L. J., P. 88; 14 P. D. 162.

—— **Guardianship of Infants Act, 1886—Declaration annexed to Decree.**]—The court, while declining to lay down any general principles which should guide the court in making, or refusing to make, at the suit of a successful petitioner, a declaration under s. 7 of the Guardianship of Infants Act, 1886, to the effect that the respondent is a person unfit to have the custody of the child or children of the marriage, made such a declaration in a suit by the wife for a judicial separation on the ground of cruelty, where the misconduct proved included the taking of the only child of the marriage, an infant at the time under a year old, out of the house in its night-dress, and of threats culminating in a murderous assault upon the petitioner and her mother, for which the respondent was sentenced to a term of penal servitude. *Handford* v. *Handford*, 63 L. T. 256. *And see* col. 788.

—— **Maintenance till Twenty-one.**]—Maintenance of children may be ordered up to the age of twenty-one. See *Thomasset* v. *Thomasset*, 63 L. J., P. 140; [1894] P. 295; 71 L. T. 148; 42 W. R. 658—C. A.

Variation of Settlements.]—In proceedings for a judicial separation only the court has no power to alter settlements. *Gundy* v. *Gundy*, 51 L. J., P. 41; 7 P. D. 168; 46 L. T. 607; 30 W. R. 673. See col. 806.

Summary Order for, by Justices.]—*See* infra, Protection Orders, col. 816.

9. EFFECT OF ADULTERY AND DIVORCE.

a. On Property.

Statute.]—By 20 & 21 Vict. c. 85, s. 25, *in every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a feme sole with respect to property of every*

description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead:

Provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

On Property in Reversion.]—The 20 & 21 Vict. c. 85, s. 25, applies to property to which a wife is entitled in reversion at the date of the decree, and which subsequently falls into possession. *Insole, In re*, 35 Beav. 92; 35 L. J., Ch. 177; L. R. 1 Eq. 470; 11 Jur. (N.S.) 1011; 13 L. T. 455; 14 W. R. 160.

A wife, having obtained a decree for judicial separation, may avoid a mortgage made by her and her husband of a reversion in personalty which falls in during the joint lives. *Ib.*

A wife's reversionary chose in action had, by a settlement entered into during coverture, been assigned upon trust (in the events which happened) for the survivor of the husband and wife. A divorce having taken place under the Divorce Act of 1857, the reversion then fell in, and the husband survived his divorced wife:—Held, that since the marriage contract had been dissolved before the property fell into possession, the husband acquired no interest in it, and that the post-nuptial settlement was an absolute nullity so far as the wife was concerned. *Wilkinson* v. *Gibson*, 36 L. J., Ch. 646; L. R. 4 Eq. 162; 16 L. T. 733; 15 W. R. 983. And see *Codrington* v. *Lindsay*, 42 L. J., Ch. 526; L. R. 8 Ch. 578; 28 L. T. 177; 21 W. R. 182.

On Choses in Action not Reduced into Possession by Husband.]—By a decree of judicial separation the wife's choses in action not reduced into possession at the date of the decree become, under 20 & 21 Vict. c. 85, s. 25, her absolute property as if she were a feme sole. *Johnson* v. *Landor*, 38 L. J., Ch. 229; L. R. 7 Eq. 228; 19 L. T. 592. *Wells* v. *Malbon*, 31 Beav. 48; 31 L. J., Ch. 344; 8 Jur. (N.S.) 249; 6 L. T. 39; 10 W. R. 364.

Where a wife instituted a suit to enforce her equity to a settlement of a trust fund, and while the suit was pending obtained a decree of judicial separation from her husband on the ground of cruelty, the Court of Chancery ordered the fund to be paid to her, and refused the husband his costs. *Johnson* v. *Landor*, supra.

—— **Annuity—Desertion by Husband—Appropriation of Accumulations.**]—A husband deserted his wife immediately after her marriage, in 1846, and she was supported by her sister. In 1848 an annuity was bequeathed to her for her life, which the trustee accumulated until 1862, when the wife obtained a decree for a judicial separation. In 1863 the court, on the petition of the wife and her sister, ordered the accumulations to be paid over to the sister, to the exclusion altogether of the husband. *Ford, In re*, 32 Beav. 621; 33 L. J., Ch. 180; 9 Jur. (N.S.) 740; 8 L. T. 625; 11 W. R. 845; 2 N. R. 349.

Property subsequently Acquired.]—A wife who has obtained a decree for judicial separation is to be considered as a feme sole with respect to such property only as she may acquire or which may come to or devolve upon her after the decree: s. 25 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), not applying to property to which the wife was entitled in possession at the date of the decree. *Cooke* v. *Fuller* (26 Beav. 99) distinguished. *Waite* v. *Morland*, 57 L. J., Ch. 655; 38 Ch. D. 135; 59 L. T. 185; 36 W. R. 484—C. A.

—— **Covenant to Settle After-acquired Property.**]—Where a marriage settlement contained a covenant to settle all property (except jewellery and money up to 200*l.*) which the wife, or her husband in her right, might acquire "during the intended coverture," and after a decree for judicial separation the wife became entitled to certain stocks:—Held, that by virtue of s. 25 of the Divorce Act, 1857, the stocks belonged to her as a feme sole, and that the covenant to settle "during the coverture" had become inoperative. *Dawes* v. *Creyke*, 54 L. J., Ch. 1096; 30 Ch. D. 500; 53 L. T. 292; 33 W. R. 869.

Appointment of Fund—Wife a Feme Sole.]—An appointment by a married woman, under a general power created after a decree for judicial separation, makes the fund assets for her creditors. *Hughes, In re, Brandon* v. *Hughes*, 67 L. J., Ch. 279; [1898] 1 Ch. 529—C. A.

Adultery not a Cause of Forfeiture.]—The husband does not forfeit his estate by the curtsey, nor the wife her jointure, by adultery. *Walker, In re*, Ll. & G. temp. Sugd. 326.

Mrs. D. being entitled to 3,000*l.* in reversion expectant on her aunt's death, the aunt consented, at the request of Mr. and Mrs. D., to relinquish her life interest in 2,000*l.*, part of the 3,000*l.*, in consideration of Mr. D. agreeing that the remainder of the 3,000*l.*, when payable, should be paid to trustees for his wife's separate use, and that he would immediately settle 2,000*l.* out of his own funds, and also the first-mentioned 2,000*l.*, so as to provide for the maintenance of himself and his wife, and the survivor of them. The agreement was carried into effect by a deed which directed the trustees to pay the interest of the two sums of 2,000*l.* to Mr. and Mrs. D. during their joint lives, and to stand possessed of the principal for the survivor of them. Mr. D. afterwards separated from his wife, in consequence of her having committed adultery:—Held, that he was entitled to receive the whole of the interest of the trust fund, and was not bound to maintain his wife out of it, notwithstanding she was destitute of the means of support. *Duncan* v. *Campbell*, 12 Sim. 616; 6 Jur. 667. And see *Buchanan* v. *Buchanan*, 1 Ball & B. 203; 12 R. R. 16; *Moore* v. *Moore*, 1 Atk. 272.

Nor Dissolution of Marriage.]—The trusts of a marriage settlement as regarded real and personal estate brought into it by the wife and her father, were for the wife for her life for her separate use, and after her death for the husband for his life, and after the death of both wife and husband for the children of the marriage (subject to a joint power of appointment to them by the husband and wife), who, being sons, should attain twenty-one years, or, being daughters, should attain that age or marry under it, and, if there should be no child of the marriage who should attain a vested interest in the

trust fund, for the wife if she should survive the husband, and if she should die in his lifetime for such persons as she should by will appoint, and in default of her appointment for her father absolutely. There were two children of the marriage; one only was born alive, and it died without any appointment having been made in its favour by the husband and wife. The wife petitioned against the husband for a divorce, and obtained a decree on the ground of adultery and desertion. Then she filed a bill asking for a declaration that she was entitled to the trust funds brought into settlement on her part without regard to the husband's life interest:—Held, that the husband's rights were not forfeited by the dissolution of the marriage, and that the bill must be dismissed with costs. *Fitzgerald* v. *Chapman*, 45 L. J., Ch. 23; 1 Ch. D. 563; 33 L. T. 587; 24 W. R. 130.

A dissolution of marriage creates no forfeiture of the interest of the guilty party under a marriage settlement of the other's property. *Burton* v. *Sturgeon*, 45 L. J., Ch. 633; 2 Ch. D. 318; 34 L. T. 706; 24 W. R. 772—C. A. And see *Careth* v. *Prince*, 35 L. J., Ex. 162.

Jurisdiction of Court of Equity.]—A court of equity has no jurisdiction to relieve a husband from the stipulations in his marriage settlement, upon a decree of dissolution of marriage being pronounced by the court for divorce and matrimonial causes. *Evans* v. *Carrington*, 29 L. J., Ch. 330; 6 Jur. (N.S.) 268; 1 L. T. 229; 8 W. R. 113. *See* VARIATION OF SETTLEMENTS, infra, col. 806.

But where a married woman, having become absolutely entitled during her coverture to shares in property for her separate use, had, by a post-nuptial settlement to which the husband was not a party, assigned the property to trustees in trust, during the joint lives of herself and her husband, to pay the proceeds to herself for her sole and separate use, with remainder to herself absolutely or as she should appoint, and the marriage was dissolved at the wife's suit, the court being of opinion that the settlement had in the events which had happened become inoperative, held the wife absolutely entitled. *Jessop* v. *Blake*, 8 Jur. (N.S.) 537; 6 L. T. 454; 10 W. R. 643.

Election.]—Where a post-nuptial settlement had been made before 20 & 21 Vict. c. 57, and the marriage having been dissolved, the divorced wife instituted a suit to set aside the settlement so far as it affected certain reversionary interests of hers which had fallen into possession, the court held her bound to elect between the relief and the benefits given her by the settlement. *Codrington* v. *Lindsay*, 45 L. J., Ch. 650; L. R. 7 H. L. 854; 34 L. T. 221; 24 W. R. 648.

Law of Scotland—Adultery of Wife—Forfeiture.]—By the law of Scotland a married woman divorced for her adultery forfeits all the provisions made for her by her husband or his relations by marriage contract, and she is considered, with regard to such provisions, as if she were naturally dead. *Drummond*, *In re*, 12 L. T. 172.

Custom of London — Forfeiture.] — A wife divorced a mensâ et thoro forfeits her right to her widow's chamber under the custom of London. *Pettifer* v. *James*, Bunb. 16.

Protection of Property.]—Where the divorce court has made an absolute order for the dissolution of marriage, and an order for permanent alimony, and the late husband is dissipating his property, or putting it out of his power, a court of equity will grant an injunction and receiver to protect it for the benefit of the former wife. *Sidney* v. *Sidney*, 17 L. T. 9.

—— **Attempted Mortgage by Husband.**]—A fund in court belonging to a married woman residing with her husband at the Cape of Good Hope was, whilst he was temporarily in this country, assigned by him by way of mortgage. Afterwards the husband and wife were divorced by the proper tribunal at the Cape. The fund was never reduced into possession by the husband during the coverture. On a petition by the wife as feme sole:—Held, that the attempted mortgage was inoperative, and that she was absolutely entitled to the fund. *Heath* v. *Lewis*, *Johnston*, *Ex parte*, 10 Jur. (N.S.) 1093; 11 L. T. 333; 13 W. R. 129.

Maintenance of Children of Eloping Wife out of Separate Property.]—A ward of court, entitled in her own right to large real and personal property, was married under age, and without the consent of the court, which marriage was subsequently annulled. Upon her coming of age, the husband petitioned to be at liberty to make proposals for a settlement of the ward's property, and to have a legal marriage celebrated, undertaking to execute such settlement as the court should direct. Proposals having been laid before the master, he approved of a draft settlement, whereby all her property was limited to her for life, for her sole and separate use, and afterwards to her children; but the chancellor declined making any order as to the execution of this settlement, the amount of the property then in litigation not being ascertained. A second marriage having been celebrated by direction of the court, there was issue thereof two children. The wife subsequently eloped:—Held, that the children had no right, during the life of their mother, to be maintained out of her separate estate:—Held, also, that the proposed settlement, though not executed, having been acted upon by the court by different orders, could not be varied. *Hodgens* v. *Hodgens*, 4 Cl. & F. 323; 11 Bli. (N.S.) 62; Ll. & G. t. Plunk. 533. See *Wade* v. *Scruton* (nom. *Wade* v. *Broughton*), 2 Ves. & B. 172. *Baseley* v. *Baseley*, 4 Cl. & F. 378, n.

Settlement, on marriage, of stock belonging to the wife in trust, after the death of the wife, if the husband survived, for him for life; if no issue the whole to revest in the wife, with power of appointment; if none, to her next of kin. The wife eloped, and lived in adultery. On the bill of the husband to have the dividends paid to him during their joint lives, evidence of such intent, or that they should be to the separate use of the wife, refused; but held to belong to the husband for the mutual support of both. *Ball* v. *Montgomery*, 2 Ves. Jun. 191; 4 Bro. C. C. 339; 2 R. R. 197.

Bequests in Wills — "Wife."] — A testator left shares in his residuary estate in trust for his sons for life, and from and after the decease of each son, in trust to permit any wife of such son to receive the income of his share during her life. One of the sons married, was

divorced from his wife and died :—Held, that the divorced wife was not entitled to the life interest in his share. *Bullmore* v. *Wynter* (22 Ch. D. 619) disapproved. *Hitchins* v. *Morrieson*, 58 L. J., Ch. 80 ; 40 Ch. D. 30 ; 59 L. T. 847 ; 37 W. R. 91.

—— **"Sole and Unmarried."**]—A testatrix, by her will made in 1860, bequeathed a fund to trustees, on trust to pay the income to her husband for his life, and on his death to divide the fund into four equal parts, and, as to one of the parts, "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but, if she be then married," the testatrix directed her trustees to pay the income of the fourth part to J. H., for her life, for her separate use, and after her death to hold it in trust for her children. In June, 1878, the testatrix died, and her husband died in April, 1883. In April, 1861, J. H. married, and in November, 1878, a decree absolute was made for the dissolution of her marriage. There were three children of the marriage. J. H. did not marry again :—Held, that the words "then sole and unmarried" meant "not having a husband" at the time of the death of the tenant for life, and that in the events which had happened, J. H. was absolutely entitled to the one-fourth share. *Lesingham's Trusts, In re*, 53 L. J., Ch. 333 ; 24 Ch. D. 703 ; 49 L. T. 235 ; 32 W. R. 116.

Legacy to Guilty Wife.]—A testator by a will which was made before the Divorce Act of 1857, devised property to trustees, to pay out of the rents to his son and to his wife the annual sum of 150*l.*, jointly, and to accumulate the rest for his family ; and also, out of the rents of "the property so left in trust for his son," to pay to the wife, surviving, 50*l.* a year ; but if his son survived, he gave him 100*l.* annually. The son and his wife were, after the death of the testator, divorced by reason of her adultery, and the son subsequently assigned the annuity, by way of mortgage. Upon a claim by the wife for a moiety of the payments of the annuity from the time of separation :—Held, that the rights of the husband and of the mortgagee remained unaffected by the divorce, and that the wife was not entitled to any share in the annuity. *Knox* v. *Wells*, 10 Jur. (N.S.) 1252 ; 13 W. R. 228.

On Fund paid out of Court to Husband and Wife jointly.]—A woman being entitled to a fund in court, applied shortly before her marriage for a loan on the security of the fund. Before the transaction was completed she married, and the money was then advanced to her husband, who joined with his wife in assigning the fund by way of mortgage. The fund was then carried over to the joint account of the husband and wife, and a stop order put upon it in favour of the mortgagee. In June, 1867, a decree nisi for dissolution of marriage was pronounced by the Divorce Court, which became absolute in January, 1868. In the interval the mortgagee presented a petition, on which an order was made by a court of equity in November, 1867, for payment of his debt out of the fund in court : Held, first, that the mortgage by the husband and wife did not bind the wife's right by survivorship, and that the pre-nuptial negotiation by the wife made no difference. *Prole* v. *Soady*, 37 L. J., Ch. 246 ; L. R. 3 Ch. 220 ; 16 W. R. 445.

Held, secondly, that the carrying over the fund to the account of the husband and wife was not a reduction into possession by the husband. *Ib.*

Held, thirdly, that on the decree for dissolution of marriage becoming absolute, it took effect from the date of the decree nisi, and consequently the order made in the interval on the petition was of no avail to reduce the fund into possession. *Ib.*

On Property in Settlement over which Wife has Power of Appointment.]—By a marriage settlement property of the wife was settled upon her for life for her separate use, and after her death, in case there should be no issue of the marriage and her husband should survive, upon trust for her next of kin, with power for her to appoint by will part of the property, and in case she should survive, then for her absolutely. The marriage having been dissolved on the petition of the wife, and there being no issue of the marriage, a bill was filed in equity by her in her maiden name against her former husband and the trustees of the settlement :—Held, that she was absolutely entitled to the property. *Fussell* v. *Dowding*, 41 L. J., Ch. 716 ; L. R. 14 Eq. 421 ; 27 L. T. 406 ; 20 W. R. 881.

Reversionary Interest in Stock.]—By a decree of the court of divorce, a marriage between a husband and wife was declared to be dissolved. At the date of the decree the wife was entitled to a reversionary interest in stock which was not settled before her marriage, and had been the subject of a post-nuptial settlement. After the decree the fund fell into possession, and the divorced wife took steps to realise the fund, but before it was recovered she died :—Held, that the same consequences as to property must follow the declaration of dissolution by the divorce court, as if the marriage contract had been annihilated and the marriage tie broken on that date ; that those rights of the divorced husband which depended upon the contract ceased at the same date ; and that the executors of the divorced wife were entitled to the fund. *Wilkinson* v. *Gibson*, 36 L. J., Ch. 646 ; L. R. 4 Eq. 162 ; 16 L. T. 733 ; 15 W. R. 983.

Joint Tenancy—Tenancy by Entireties—Effect of Divorce.]—Where land has been conveyed to husband and wife before the Married Women's Property Act, 1882, in such a way as, apart from the marriage, would constitute them joint tenants, a decree absolute for divorce makes their holding a joint tenancy. *Thornley* v. *Thornley*, 62 L. J., Ch. 370 ; [1893] 2 Ch. 229 ; 3 R. 311 ; 68 L. T. 199 ; 41 W. R. 541.

Where land has been conveyed to husband and wife jointly after the Married Women's Property Act, 1882, the wife after a divorce takes a joint tenancy for her separate use, and is entitled to an account from the date of her ceasing to live with her husband. *Ib.*

Appointment by Wife to Herself.]—A marriage settlement vested funds in trustees for the children of the marriage, and in default as the wife should appoint. The wife was divorced a vinculo, and there being no children, appointed to herself :—Held, a good appointment. *Bond* v. *Taylor*, 2 John. & H. 473 ; 31 L. J., Ch. 784 ; 8 Jur. (N.S.) 1090 ; 5 L. T. 445 ; 10 W. R. 169.

Children of a second marriage of the wife and divorced husband would not be children

of "the marriage" contemplated by the settlement. *Ib.*

Adultery a Defence to Restitution.]—Adultery by the wife may be pleaded by way of defence to a suit by her for restitution of conjugal rights. *Moore* v. *Moore*, 3 Moore, P. C. 84.

No Bar to Specific Performance of Marriage Articles.]—Where the wife sues the husband for a specific performance of her marriage articles, and that he may settle such and such lands upon her in jointure, it is no bar to her to demand that she has eloped with an adulterer, much less if this be not put in issue in the cause by the husband. *Sidney* v. *Sidney*, 3 P. W. 269.

In the case of a divorce a mensâ et thoro, baron and feme live separately, and the wife has a child; this is a bastard, for the court will intend obedience has been paid to the sentence during this time: but if in the case of a voluntary separation a child is born, this is legitimate: secus, where the jury find the husband has had no access to the wife. If the party charges his adversary with anything criminal, it ought to be shown with great plainness and certainty. Articles to settle lands in jointure are in nature of an actual jointure, which is not forfeited by an elopement, like dower. *Id.* 275.

Chancery will not Aid Eloping Wife.]—If wife elope, chancery will not assist her in recovering property settled to her separate use. *Lee* v. *Lee*, Dick. 321.

Supplicavit no Justification of Elopement.]—The obtaining a supplicavit does not justify a wife's elopement. *Head* v. *Head*, 3 Atk. 550.

Husband, possessed of term in right of wife, was divorced a mensâ et thoro, and he being about to sell term, injunction was granted to prevent him. *Anon.*, 9 Mod. 43. See *Shute* v. *Shute*, Pre. Ch. 111.

Expenditure by Husband on Wife's Property.]—A husband having laid out money in repairs and improvements upon his wife's property is not entitled after a divorce by reason of her adultery to any charge upon the estate for the money so laid out. *Hamer* v. *Tilsey*, 1 Johns. 486; 29 L. J., Ch. 32; 5 Jur. (N.S.) 1344; 1 L. T. 54; 8 W. R. 20.

Release by Divorced Husband—Resettlement by Wife.]—A settlement was made of the choses in action of a female infant, on her marriage, in trust for her husband for life; and after his decease in trust for her for life; and after the death of the survivor, and in default of children, in trust for such persons as she should by will appoint, with ultimate trust for her next of kin. The marriage, of which there was no issue, was dissolved by act of parliament, and the husband executed a release of his rights in her property under the settlement:—Held, that the property of the wife was not bound by the settlement, and that she was at liberty to resettle it on her second marriage. *Hastings* v. *Orde*, 11 Sim. 205.

Bankruptcy of Husband.]—Divorce obtained by wife after husband's bankruptcy does not entitle her to whole of fund bequeathed to her which came into possession after bankruptcy, though no settlement was made on her at her marriage, and her husband at that time received 1,500*l.* stock with her. *Green* v. *Otte*, 1 Sim. & S. 250; 1 L. J. (O.S.) Ch. 87.

Petition for Settlement to Separate Use by Guilty Wife.]—Husband and wife living separate under a divorce a mensâ et thoro obtained against the wife for adultery, she petitioned that a sum of money belonging to her might be settled to her separate use; he petitioned that it might be paid to him, the court refused to make any order. *Carr* v. *Eastabrooke*, 4 Ves. 146.

Infant Wife Absolutely entitled after Death of Husband.]—A woman, married during her infancy, was deserted by her husband and obtained a dissolution of the marriage. Under articles of settlement executed prior to the marriage, there being no issue of the marriage, personal estate belonging to her was held on trust for her absolutely after the death of her husband in her lifetime. She never assented to the settlement:—Held, that she was entitled to have the whole fund paid or transferred to her. *Swift* v. *Wenman*, 39 L. J., Ch. 336; L. R. 10 Eq. 15; 21 L. T. 194; 18 W. R. 480.

b. Name.

Marriage confers a name upon a woman. The name so conferred becomes her actual name, and continues to be so even after a decree of divorce, until she has acquired by repute some other name which, so to speak, obliterates it. *Fendall*, otherwise *Goldsmid* v. *Goldsmid*, 46 L. J., P. 70; 2 P. D. 263.

Separation, Effect of.]—*See* SEPARATION DEED, col. 992.

10. Variation of Settlements and Deeds.

Jurisdiction—Settlement in Scotch Form.]—A decree for dissolution of marriage having been granted on the husband's petition, it appeared that the respondent, a Scotchwoman, was married in Scotland to the petitioner, an Englishman, and that in contemplation of the marriage there had been a settlement of her property according to the Scotch law:—Held, that under 22 & 23 Vict. c. 61, s. 5, the court had power to order a variation of the settlement. *Nunneley* v. *Nunneley*, 15 P. D. 186; 63 L. T. 113.

—— **Parties domiciled in Scotland at Time of Marriage—Parties domiciled in England at Time of Divorce.**]—The powers of the court to vary settlements after dissolution of marriage under s. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), are not affected by the fact that the parties were domiciled in Scotland at the time of the marriage. *Nunneley* v. *Nunneley*, supra, explained and followed. *Forsyth* v. *Forsyth*, 61 L. J., P. 13; [1891] P. 363; 65 L. T. 556.

—— **Infant Children.**]—The court cannot vary settlements to the detriment of infant children. *Ib.*

—— **Nullity of Marriage—Decree of Foreign Court—Jurisdiction.**]—The power to vary settlements conferred upon the court by 20 & 21 Vict. c. 85, s. 45, and 22 & 23 Vict. c. 61, s. 5, can only be exercised where the decree upon which the

application to vary the marriage settlement is founded has been pronounced by the court. Therefore, where a decree of nullity has been pronounced by the colonial court, and the parties afterwards returned to this country and applied for leave to file a petition for the variation of their marriage settlement:—Held, that the court had no jurisdiction to entertain such application. *Moore* (f. c. *Bull*) v. *Moore* or *Bull*, 60 L. J., P. 76; [1891] P. 279.

—— **Concurrent Jurisdiction of Chancery Division.**]—The chancery division has the same jurisdiction as the judge of the probate division to modify settlements, but where the matter has already been gone into in that division, a judge of the chancery division will not interfere. After dissolution of marriage on the husband's petition, an order was made that trustees of the marriage settlement should pay an annual sum out of settled real property of the wife to the husband for the maintenance of the infant child of the marriage. The husband having died, the widow became absolutely entitled to the property, and a further order directed that the trustees of the settlement should pay the annuity to the guardians of the infant. There were, in fact, no trustees at that time. The annuity was subsequently declared to be perpetual. On the application by the child of the marriage, the court ordered execution of a deed securing the annuity on the settled property, but allowed no costs of the application, as the order might have been obtained by summary process in the probate division. *Blackett* v. *Blackett*, 51 L. T. 427.

—— **Husband's Petition for—Inquiry before Final Decree—Security for Costs.**]—The court has jurisdiction before pronouncing a final decree for dissolution of marriage, or judicial separation, against a wife for adultery, to direct an inquiry as to her property, so that it may be enabled to order a settlement to be made of such property as soon as the final decree is pronounced; and in making such an order, the court will direct the husband to give security for the costs of the inquiry, in case no final decree should be made. *Midwinter* v. *Midwinter*, 61 L. J., P. 1; [1892] P. 28; 65 L. T. 438; 40 W. R. 33—C. A.

—— **Power to alter Order.**]—The power given to the court by 22 & 23 Vict. c. 61, s. 5, of varying settlements after a final decree for dissolution of marriage, is a power to be exercised once for all, and an order made under it is not liable to be varied on the ground of a change of circumstances since the date of the order. *Benyon* v. *Benyon*, 59 L. J., P. 39; 15 P. D. 54; 62 L. T. 381—C. A.

—— **Maintenance of Children.**]—The court has power to make provision for the maintenance of children above the age of sixteen years. *Thomasset* v. *Thomasset*, 63 L. J., P. 140; [1894] P. 295; 71 L. T. 148; 42 W. R. 658. Overruling *Blandford* v. *Blandford*, 61 L. J., P. 97; [1892] P. 148; 67 L. T. 392.

—— **Death of Petitioner.**] — The court has no power under s. 5 of the Matrimonial Causes Act, 1859, to order the executor of a deceased petitioner (the husband) to be made a party for the purpose of continuing proceedings to vary a settlement where the petitioner is dead, there are no children, and the proposed variation would not be for the benefit of the wife. Section 5 is applicable for the benefit of living persons only. *Thomson* v. *Thomson*, 65 L. J., P. 80; [1896] P. 263; 74 L. T. 801: 45 W. R. 134—C. A.

Acceleration of Infant's Interest by Divorce of Parents—Powers of Petitioner.]—Upon a petition to vary two post-nuptial settlements after decree absolute for divorce, it appeared that the whole property was in land, and that, if the respondent's interests were extinguished, the petitioner would, by virtue of a clause in one of the settlements, have power to call upon the trustees to raise forthwith a sum which, at the present time, would exceed the sale value of the whole of the settled property, and which would, therefore, if exercised by the petitioner, absolutely blot out all interests of the infant child of the parties under the settlements. The registrar, notwithstanding this, recommended that the respondent's interests should be extinguished as if he were dead:—Held, that, inasmuch as the child's interest was accelerated by the extinguishment of the respondent's interests, the child was thereby obtaining a certain gain against an uncertain loss if the petitioner should now exercise the power conferred upon her by the settlement. Report of the registrar confirmed. *Creagh* v. *Creagh*, 74 L. T. 430.

No Means, except Income from Settled Property—Costs out of Corpus.]—The petitioner, a widow with one child by her first husband, settled, upon her second marriage, certain property, producing an annual income of about 750*l.*, upon trust to pay the income to herself for her life, then to her husband, the respondent, for his life, and, in the events which happened, with remainder to her said only child, if he should attain twenty-one, with ultimate remainder to the petitioner. The petitioner obtained a decree absolute dissolving her marriage, and, in her petition to vary the settlement, she prayed that the respondent's life interest in the trust funds should be extinguished; and, further, that the trustees should be ordered to pay to her a sum of 1,000*l.*, or such other sum as the court should direct, to cover the costs and other incidental and additional expenses of the petitioner arising out of the respondent's misconduct. The registrar reported in favour of the first, but submitted in regard to the second part of the prayer, that, as it would be to some extent prejudicial to the child's interests, no order ought to be made directing any payment out of the corpus of the fund until the infant was represented. Upon motion to vary the registrar's report, the court ordered an adjournment, so that the infant might be represented, and thereupon made an order extinguishing the respondent's interest and directing the trustees to raise and pay to the petitioner a sum of 450*l.* to cover costs, including the costs of this application. *Douglas* v. *Douglas*, 74 L. T. 384.

Mistake — Declaration — Terms.] — A post-nuptial settlement had been varied by the probate and divorce division on the mistaken supposition that it included certain property. An action was brought in the chancery division for a declaration that the settlement was void in respect of this property:—Held, that the plaintiff ought only to be granted relief upon the terms of her undertaking not to dispute the jurisdiction of the probate and divorce division further to deal with the property. *Allcard* v.

Walker, 65 L. J., Ch. 660 ; [1896] 2 Ch. 369 ; 74 L. T. 487 ; 44 W. R. 661.

Service of Petition—Respondent and Surviving Trustee both uncertificated Bankrupts—Notice to Official Receiver.]—The court dispensed with service of a petition to vary a marriage settlement in a case where the respondent and the surviving trustee of the settlement were both uncertificated bankrupts, and where notice of the application to dispense with service had been given to the chief official receiver in bankruptcy. *Snelling* v. *Snelling*, 63 L. T. 263.

Interests of Parties affected—Notice—Three Trustees—Two appearing—Costs.]—A wife had obtained a decree dissolving her marriage, and petitioned for variation of the settlement whereby she had settled a fund in trust for herself for life, then on her intended husband for his life if he survived her, and at the death of the survivor on trust for such one or more of the children of a former marriage (of which there were five living), and of the then intended marriage in such manner as she should appoint, and in default of appointment then among all her present or future children in equal shares. The settlement further provided that in case she should survive her husband and there should be at his death no children of this marriage, then the trustees should hold the said trust fund for her absolutely. There were no children of the marriage. Upon application to extinguish the husband's interests in the said fund and for an order that the settlement should be varied by directing the trustees to hold the fund in trust for the wife absolutely :—Held, that such an order could be made, and the court, being satisfied that notice had been given to four of the children of the former marriage, and that they did not object, and that the fifth child had no notice of the proceedings owing to his whereabouts being unknown, made the order as prayed, and ordered that as two only of the three trustees had appeared, their costs should be paid as if the third trustee were party to the order. *Storer* v. *Storer*, 6 R. 635 ; 71 L. T. 704.

Service of Notice on Trustee resident in Australia.]—The court, while refusing to allow substituted service of a petition for variation of settlement upon a trustee resident in Australia, dispensed with service upon him, it appearing that his co-trustee in England had been duly served, and that neither of the trustees was entitled to any beneficial interest in the settled property. *Taylor* v. *Taylor*, 66 L. T. 267.

Post-nuptial Settlement — Amount reduced —Dum sola et casta Clause inserted.]—The husband and wife were married in 1884, and separated in 1889 under a deed, by which the husband paid his wife 200*l.* a year, without any dum casta clause. He afterwards found that she was living with the co-respondent under the petitioner's name. He thereupon petitioned to have the marriage dissolved, and a decree nisi was pronounced, which was in due course made absolute. Upon petition to vary the post-nuptial deed :—Held, that the allowance to the respondent should be reduced to 100*l.* per annum, and that this should be payable to the respondent only dum sola et casta vixerit. *Saunders* v. *Saunders*, 69 L. T. 498. *See* col. 857.

Inclusion of Post-nuptial Settlement of Respondent's Property—Second Marriage of Respondent—Settlement on Second Marriage—Trustees — Purchasers for Value.] — The wife divorced her husband on the ground of cruelty and adultery. The decree nisi was pronounced in December, 1891, and the decree absolute on the 22nd November, 1892. The petitioner was ordered to have the custody of the three children of the marriage. A settlement of the wife's property was made in 1877, upon the marriage, and no contest arose as to the extinguishment of all interest of the respondent thereunder. By a post-nuptial deed executed in 1878, the respondent brought property into settlement. Under that deed the respondent took the first life interest (subject to an annuity of 300*l.* a year payable to the petitioner until her death or re-marriage) and after his death the property was to go to the respondent's children by the petitioner or by any future wife, as he should appoint, and in default of appointment it was to be equally divided among all his children by the petitioner or any other wife. He was also empowered to raise a sum of 4,000*l.* upon mortgage of his life interest, and there was also a proviso empowering him under certain conditions to appoint the income accruing after his death to any future wife for life, and it gave him power to appoint new trustees. On the 17th December, 1892, the respondent married again after executing on the previous day a settlement substantially in favour of his second wife, and exercising his power of appointment under the post-nuptial deed of 1878 in favour of the child or children (if any) of his second marriage, to the exclusion of the three children of the first marriage. The respondent during the year 1888 charged his life interest under the deed of 1878 with various sums advanced to him. In March, 1891, the respondent was adjudicated bankrupt, and in September, 1892, his life interest under the settlements of 1877 and 1878 were sold by auction by the trustee in bankruptcy, the purchase being completed on the 30th December, 1892. The conditions of sale contained a notice of the divorce and consequent possible application to vary the settlements. The registrar recommended that all interest of the respondent in the property comprised in the settlement of 1877 should be extinguished, and that his powers of appointment under the deed of 1878 should also be extinguished :—The court confirmed the first recommendation, but ordered that the powers of appointment under the deed of 1878 should be extinguished only to the extent of leaving the children of the first marriage to take as if there had been a default of appointment, and that this extinction should only operate during the petitioner's life or until she married again. *Nevill* v. *Nevill*, 69 L. T. 463.

"Net Annual Income"—Cross-examination of Petitioner by Respondent as to Deductions from Gross Income.]—The husband having in 1888 divorced his wife on the ground of her adultery, subsequently by leave of the court filed his petition, in 1891, for variation of the marriage settlements. The registrar reported that the present "net annual income" of the petitioner was 840*l.*, and that of the respondent about 125*l.*, and that the latter would be increased by a further 200*l.* a year upon the death of the respondent's mother, upon the happening of

which event the registrar recommended that 160*l.* should be paid annually by the respondent to the petitioner for the benefit of the children of the marriage, who were in the custody of their father, the petitioner, by order of the court. The registrar refused to allow the respondent to cross-examine the petitioner as to the deductions he claimed to make from his gross income :—Held, that the fact of the respondent being an adulteress did not bar her right to cross-examine her husband as to his means, it not being suggested against her that the proposal to cross-examine was vexatious ; and as it appeared to the court to be desirable, in the present case, in order to arrive at a correct estimate of the petitioner's net annual income, the court referred the matter back to the registrar for further investigation and report. *Driffield* v. *Driffield*, 65 L. T. 795.

Unsettled Property Squandered—Income from Settled Property—Large Proportion Awarded.]—Where a respondent (husband) had recently squandered the bulk of the property over which he had free control, the court awarded to the petitioner more than one-third of the income from the property which had been brought into settlement by the respondent upon the marriage, and further ordered that, after the respondent's death, the award should be increased to more than one-half of that income, but limited dum sola vixerit. *Bashall* v. *Bashall*, 76 L. T. 165.

Reversionary Interests — Permanent Maintenance in excess of one-third of Joint Income secured to Wife in presenti.] — The wife obtained a decree absolute on the grounds of adultery and cruelty, and presented a petition for variation of the marriage settlements and for permanent maintenance. The present joint income of the husband and wife amounted to nearly 1,500*l.* a year. Both were entitled to considerable property in reversion. The registrar recommended either that a present income of 700*l.* a year should be secured to the wife for her life, or, in the alternative, that she should have secured to her an annual sum equal to one-third of the present joint income, such annual sum to be increased upon the falling in of the husband's reversionary interest. On behalf of the husband, it was stated, that, if one of these two courses were to be adopted, he should, of the two, prefer the former. The court thereupon ordered that the husband secure to the petitioner, by way of permanent maintenance, the sum of 700*l.* a year for her life. *Warren* v. *Warren*, 63 L. T. 264.

Respondent's Interest only Partially Extinguished—Right to Appoint New Trustees—Probable increase in Husband's Income.]—After final decree dissolving the marriage upon the ground of the adultery of the respondent with the co-respondent, the petitioner presented a petition for variation of two settlements executed in 1882 in contemplation of the marriage. Substantially, the settlements gave the wife a first life interest in half the income of the fund brought into settlement by herself, and further conferred upon her conditional benefits in certain contingencies, the principal one being that, upon the death of the respondent's mother, now aged about seventy, the respondent's income would be immediately increased from about 300*l.* to about 650*l.* a year. There was also a power of appointing new trustees by the petitioner and respondent during their joint lives, and by the survivor of them during his or her life. The registrar recommended, as to the property brought into settlement by the petitioner, that the whole of the wife's interest and powers should be extinguished ; and as to the property brought into settlement by the respondent that the terms of the settlement should be varied by ordering the trustees to pay 50*l.* a year to the petitioner for the maintenance and education of the infant child of the marriage during her minority, and after twenty-one to the said child ; and that upon the death of the respondent's mother the allowance for the child should be increased to 150*l.* a year. Further, that the respondent's power of appointment amongst the children or remoter issue of the said marriage should be extinguished. It was left for the court to say whether her power of appointing, or joining in the appointment of, new trustees should be extinguished as prayed by the petitioner. The registrar refused to take into account the great probability of the husband's promotion in the office held by him in Her Majesty's household, by which promotion, it was said, that his income would be increased by about the amount of income which would accrue to the respondent on the death of her mother :—Held, that the registrar was right in not taking the husband's probable future promotion and consequent increase of salary into account. But held, that, as the wife's increase of income was a vested interest to which she was absolutely entitled in reversion, the registrar's report as to the increased amount to be paid by the respondent for the benefit of the child upon the reversion falling in was not unreasonable nor contrary to the practice :—Held, also, that, as the wife was still to retain an interest in the fund brought into settlement by herself, her right to appoint, or join in the appointment of, new trustees must be retained in her favour. *Tupper* v. *Tupper*, 62 L. T. 665.

Payment of Annual Sum to Husband.]—Upon application to vary a marriage settlement after a decree for divorce on the husband's petition, it appeared that the wife's income under the settlement amounted to 1,050*l.* a year. The husband possessed an income of about 603*l.* a year, part of which arose from money received from the respondent. There were no children of the marriage. The court varied the trusts of the settlement by ordering the trustees to pay the husband 300*l.* a year during the joint lives of husband and wife. *Farrington* v. *Farrington*, 55 L. J., P. 69 ; 11 P. D. 84.

Freedom from Trusts—Child born.]—On a petition for variation of settlements after a decree for dissolution of marriage by reason of the wife's adultery, where a child had been born between the date of the decree nisi and decree absolute, and fourteen months after the wife had eloped from her husband, the court refused to transfer funds in settlement to the parties free from the trusts of the settlement. *Pryor* v. *Pryor*, 56 L. J., P. 77 ; 12 P. D. 165 ; 57 L. T. 533 ; 35 W. R. 349.

—— **Division of Trust Fund.**]—By a post-nuptial settlement a husband assigned certain property to trustees on trust to pay him the income during his life, or until he had incurred

a forfeiture, and on a determination of his interest, to his wife for her life, with further discretionary trusts for the benefit of the husband's next of kin, or for the benefit of a second wife, or the issue of a second marriage. The husband became bankrupt, and by a compromise sanctioned by the Chancery Division a portion of the fund was assigned to his trustee in bankruptcy, and his interest in the remainder was assigned to the trustees of the settlement. Subsequently the marriage was dissolved on account of the wife's adultery, and on a petition for variation of settlements the registrar proposed that the trusts of the settlement should be extinguished, and that seven-twelfths of the fund should be paid to the husband, and five-twelfths to the wife. Both parties agreed to this, but the trustees of the settlement objected, and the court refused to sanction a division of the fund, but ordered that the income of five-twelfths of it should be paid to the wife, and that in all other respects the trusts of the settlement should remain in force. *Smith* v. *Smith*, 56 L. J., P. 51; 12 P. D. 102; 57 L. T. 375; 35 W. R. 459.

Power to deal with Capital—Discretion of Judge.]—On a petition for variation of a settlement the judge refused to give the wife, the petitioner, any part of the capital of the fund, which had been all settled by the husband, although there were no children of the marriage, or to order payment of the petitioner's costs out of the funds. And he gave a portion only of the income to the wife:—The Court of Appeal affirmed the decision, holding that although the court had undoubted jurisdiction to deal with the capital, it was not for the benefit of the wife to give her any portion of it; and the court refused to interfere with the discretion of the judge as to the amount of income awarded to her. *Ponsonby* v. *Ponsonby*, 53 L. J., P. 112; 9 P. D. 122; 51 L. T. 174; 32 W. R. 746—C. A.

Power of Appointing New Trustees.]—In the variation of settlements the court has jurisdiction to extinguish a joint power of appointment of new trustees. *Oppenheim* v. *Oppenheim*, 53 L. J., P. 48; 9 P. D. 60; 32 W. R. 723.

—— **Wife's Power of Appointment.**]—In a petition for variation of settlements after a decree of dissolution on account of the wife's adultery, the registrar by his report recommended that the power of appointment over the fund given to the wife by the settlement should be extinguished, and that she should be deprived of the power of appointing or joining in the appointment of new trustees. The petitioner had signified his willingness that the respondent should continue to receive 100*l.* a year out of 150*l.* settled on her. The court confirmed the first of these recommendations, but disallowed the second, on the ground that as the respondent was to continue to receive an income from the fund she had an interest in the appointment of trustees. An order extinguishing the power of appointment of funds in the settlement is an order made, within the words of the section, "with reference to the application of the whole or a portion of the property settled." *Bosville* v. *Bosville*, 57 L. J., P. 62; 13 P. D. 76; 58 L. T. 640; 36 W. R. 912.

Wife's Interest Extinguished — Payment of Half of Property—Reversion—Power of Appointment.]—Property was brought into settlement by both the husband and the wife, with a joint power of appointment in favour of the children of the marriage; but with regard to the wife's property, which included a reversionary interest, the settlement gave her, in certain events, a power of appointment in favour of a second or subsequent marriage. The marriage was dissolved on the ground of the wife's adultery, the husband having the custody of the two children of the marriage. The court varied the settlements by absolutely extinguishing the wife's interest in the property brought into settlement by the husband, thus leaving their respective incomes nearly equal. The court further ordered that one-half of the wife's property should be paid to the husband and children, without taking into account the amount of the wife's costs of the suit; and also that one-half of the wife's reversionary interest should, upon its falling into possession, be assigned to the husband and children. The court also extinguished the wife's power of appointment under the joint power, and varied the wife's power of appointment over her own property in favour of a future husband or the children of a future marriage, by restricting its benefit to any husband married after the death of the petitioner, and to children of a subsequent marriage born after the death of the petitioner. *Noel* v. *Noel*, 54 L. J., P. 73; 10 P. D. 179; 33 W. R. 552.

—— **Payment of Income to Husband.**]—A sum of money, the wife's fortune, had been settled on marriage to the separate use of the wife for life. A decree of divorce having been pronounced against her at the suit of the husband, judge ordinary made an order, under the 22 & 23 Vict. c. 61, s. 5, that the trustees of the settlement should stand possessed of the fund, in trust for the person who, under the settlement, would have been entitled were the wife dead. The fund being in court, the husband, as the person so next entitled, applied for an order for the payment of the income to him:—Held, that the Court of Divorce had jurisdiction, and the income was ordered to be paid to the husband. *Pratt* v. *Jenner*, *Jenner*, *Ex parte*, 35 L. J., Ch. 682; L. R. 1 Ch. 493; 12 Jur. (N.S.) 557; 15 L. T. 183; 14 W. R. 852.

Power of Appointment on Second Marriage in case Wife should survive the Husband.]—Where a settlement gives a wife, after the death of her first husband, power to appoint in favour of children by a subsequent marriage, the court refused to vary that power after a decree for divorce, so as to enable the wife to exercise the power before her first husband's death. *Pollard* v. *Pollard*, 63 L. J., P. 104; [1894] P. 172; 6 R. 594; 70 L. T. 815.

Post-nuptial "Settlement" — Absolute Assignment.]—An absolute assignment by a wife to her husband during the marriage of freehold property is not a "settlement" within the meaning of 22 & 23 Vict. c. 61, s. 5. *Chalmers* v. *Chalmers*, 1 R. 504; 68 L. T. 28.

Costs out of Wife's Fund—Guilty Wife—Consent of Infants.]—On a motion for variation of settlements after a decree for dissolution of the marriage on the ground of the wife's adultery, the court, on the recommendation of the registrar, and with the consent of the guardian ad

litem of infant children of the marriage, allowed the costs of all parties to be paid out of the wife's settled fund. *Hamilton* v. *Hamilton*, 1 R. 506; 68 L. T. 467.

Wife's Costs not Considered.]—Where a marriage has been dissolved on the ground of the wife's adultery, the court will not, when directing the variation of the marriage settlements, take into consideration the amount of costs incurred by the wife. *Noel* v. *Noel*, 54 L. J., P. 73; 10 P. D. 179; 33 W. R. 552.

Guilty Wife—Variable Amount—Allowance to Children for Life.]—On a husband's petition, under s. 45 of the Matrimonial Causes Act, 1857, for settlement of property to which the wife, who had been found guilty of adultery, was entitled, the court refused to make the allowance variable to meet a possible fall in the respondent's income; or to limit the husband's receipt of his allowance to such a time as he should be unmarried; or to limit the allowance to the children to the time when they should be under sixteen years of age. *Midwinter* v. *Midwinter*, 62 L. J., P. 77; [1893] P. 93; 1 R. 512; 68 L. T. 262; 41 W. R. 560.

No Children — Reconveyance to Settlor.]—Where a marriage has been dissolved (there being no issue), and the rights of children of a future marriage are the sole limitation to the settlor's absolute right of enjoyment of the settled property, the court will order the trustees to reconvey the property to the settlor for his own use. *Meredyth* v. *Meredyth*, 64 L. J., P. 54; [1895] P. 92; 11 R. 651; 72 L. T. 898; 43 W. R. 304.

Vesting Order—Trustee Act, 1893.]—Where a vesting order was required to carry into effect an order for variation of settlements, the court exercised jurisdiction under the Trustee Act, 1893, s. 35, and made a vesting order. *Storer* v. *Storer*, 11 R. 618.

Consent Order — Mistake — Amendment — Costs.]—The court, upon the application of the testamentary guardians of an infant child of the marriage of the petitioner and respondent, directed, after various references to the registrar, that an order made by Butt, J., in 1886, upon the consent of the petitioner, respondent, and trustees of the marriage settlement, be amended by extinguishing the respondent's interest in a portion of the settled funds; and further directed that the costs of all parties be paid out of the said portion of the trust funds or the income thereof. *Arkwright* v. *Arkwright*, 73 L. T. 287.

Motion to Confirm Registrar's Report.]—A motion to confirm a registrar's report ordering a variation of a settlement after a decree for dissolution of the marriage, need not be made within fourteen days after notice of the filing of the report in the registry by the petitioner. *Farrington* v. *Farrington*, 55 L. J., P. 69; 11 P. D. 84.

Husband's Petition for—Refusal.]—The husband obtained a divorce on the ground of his wife's adultery with the co-respondent. He petitioned that certain jewellery belonging to his wife should be sold, and a settlement made of the proceeds, giving her a life interest in the income arising from the investment of those proceeds, with remainder to himself. His income was substantial, his wife's only 72*l.* a year. The court refused to order any settlement. *Schofield* v. *Schofield*, 64 L. T. 838.

Inquiry before Final Decree — Jurisdiction.]—The court has jurisdiction before the final decree of divorce or judicial separation is pronounced against a guilty wife, to direct an inquiry as to what property the wife is entitled to, in order that the court may be in a position when the final decree is pronounced to order a settlement to be made of the wife's property upon the innocent party or the children of the marriage. *Midwinter* v. *Midwinter*, 61 L. J., P. 1; 65 L. T. 438; 40 W. R. 33—C. A.

Judicial Separation.]—In proceedings for a judicial separation only the court has no power to alter settlements. *Gandy* v. *Gandy*, 51 L. J., P. 41; 7 P. D. 168; 46 L. T. 607; 30 W. R. 673. *See* col. 797.

11. Protection Orders and Maintenance in Case of Desertion.

a. Protection Orders.

Matrimonial Causes Act, 1878—Jurisdiction.]—By the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, if a husband is convicted summarily, or otherwise, of an aggravated assault within the meaning of 24 & 25 Vict. c. 100, s. 43, upon his wife, the court or magistrate before whom he is convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband, and the order is to have the force and effect in all respects of a decree of judicial separation for cruelty.

The order may provide (1) for payment of a weekly sum by the husband to the wife, (2) the custody of the children under ten. The two last provisions do not apply if the wife has committed adultery uncondoned.

This act is amended and enlarged by the Summary Jurisdiction (Married Women) Act, 1895.

Magistrates at petty sessions have power to order a judicial separation for an aggravated assault, even though they only inflict the penalty of fine or imprisonment for a common assault. *Woods* v. *Woods*, 10 P. D. 172; 33 W. R. 323; 50 J. P. 199.

—— Aggravated Assault—Conviction and Order for Separation and Maintenance—Right of Husband to give Evidence.]—Where after the conviction of a husband of an aggravated assault upon his wife under s. 43 of the Offences Against the Person Act, 1861, the justices are asked to make an order under s. 4 of the Matrimonial Causes Act, 1878, the husband is entitled to be called as a witness in the same manner as if the proceedings had been instituted in the divorce court. *Powell* v. *Powell* (14 P. D. 177) overruled. *Jones* v. *Jones*, 64 L. J., P. 84; [1895] P. 201; 11 R. 614; 72 L. T. 662; 43 W. R. 656; 59 J. P. 360.

—— Appeal to what Court.]—An order under

s. 4 of the Matrimonial Causes Act, 1878, or a refusal by the justices to vary such order, is subject to appeal to the probate and admiralty division, although the justices have stated a case for the opinion of the queen's bench division, which has not been determined. *Ib.*

A husband having been convicted of an aggravated assault on his wife was sentenced to one month's imprisonment and the justices ordered a judicial separation and an allowance to the wife of 2*l.* a week; notice of appeal to quarter sessions against the conviction was given, and pending the appeal the husband applied to the probate, divorce and admiralty division to have the order varied:—Held, that the court would hear the appeal, though the appeal to quarter sessions was pending. *Goodwin* v. *Goodwin*, 51 J. P. 583.

Appeals from justices under s. 4 of the Matrimonial Causes Act, 1878, should be made to a divisional court. *Bluett* v. *Bluett*, 1 R. 500; 68 L. T. 260; 57 J. P. 25.

—— **Resumption of Cohabitation, Effect of.**]—Upon the conviction of a husband for an aggravated assault on his wife, justices made an order, under s. 4 of the Matrimonial Causes Act, 1878, that the wife should be no longer bound to cohabit with her husband, and that he should pay to her a weekly sum for her maintenance. The wife subsequently resumed cohabitation with her husband for a time, and then again left him:—Held that the order was annulled by reason of the subsequent resumption of cohabitation, and therefore that the wife could not enforce payment of weekly sums alleged to have become due under it after she again left her husband. *Haddon* v. *Haddon*, 56 L. J., M. C. 69; 18 Q. B. D. 778; 56 L. T. 716; 51 J. P. 486.

—— **Reduction into Possession.**]—Where a wife, entitled to property which is reversionary, or which had not been reduced into possession by the husband, has obtained a protection order under 41 & 42 Vict. c. 19, s. 4, and has afterwards resumed cohabitation with her husband, on the property coming or being reduced into possession, the wife is entitled to it absolutely under 20 & 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8. *Emery's Trust, In re*, 50 L. T. 197; 32 W. R. 357.

—— **Husband Entitled to Legacy—Injunction—Order by Magistrate for Weekly Allowance.**]—In a petition by the wife for dissolution of the marriage, it appeared that before the petition, the husband having been convicted of an aggravated assault on his wife, a magistrate made an order under 41 Vict. c. 19, s. 4, that the wife be not bound to cohabit with her husband, and that he should pay to her the sum of 1*l.* weekly. In the suit in this court orders had been made on the respondent to pay 16*l.* and secure a further sum of 45*l.* to defray the wife's costs. The husband was entitled to the sum of 1,400*l.* under the will of a deceased testatrix, and the wife had obtained an ex parte injunction restraining the husband from receiving any part of the legacy. On an application for the continuation of the injunction and the appointment of a receiver, the court continued the injunction in regard to the costs until the trial or payment of them, but declined to make any order for the enforcement of the magistrate's order for an allowance. *Gillett* v. *Gillett*, 58 L. J., P. 84; 14 P. D. 158; 61 L. T. 401; 38 W. R. 144.

—— **Application to vary Order—Evidence of Wife's Adultery.**]—Where an order has been made under s. 4 of the Matrimonial Causes Act, 1878, authorising a wife to refuse to cohabit with her husband, the presumption of non-access applies from the date of the order as in the case of a judicial separation; and the justices on an application to vary the order on account of the wife's adultery cannot refuse to receive the direct evidence of the husband or the admissions of the wife in proof of the paternity of a child born more than nine months after the separation. *Hetherington* v. *Hetherington*, 56 L. J., P. 78; 12 P. D. 112; 57 L. T. 533; 36 W. R. 12; 51 J. P. 119, 294.

—— **Application to Discharge Order for Payment—How made.**]—Where an order has been made under the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, for the payment of money by the husband or custody of children by the wife, an application to discharge the order on the ground that the wife has been guilty of adultery must be made to the court or magistrates by whom the order was made, and not to the probate and admiralty division. *Ib.*

Summary Jurisdiction (Married Women) Act, 1895—Separation Order—Appeal from Justices—Court to which Appeal Lies.]—The only appeal under s. 11 of the Summary Jurisdiction (Married Women) Act, 1895, from an order of justices made under s. 4 of the act, is to the probate, divorce, and admiralty division of the high court of justice. *Manders* v. *Manders*, 66 L. J., Q. B. 296; [1897] 1 Q. B. 474; 45 W. R. 287; 61 J. P. 105.

—— **Subsequent Application for Payment of Weekly Sum—Jurisdiction.**]—Where a husband has been convicted of an aggravated assault, and an order made for a judicial separation only, the court has no jurisdiction to make an order for the payment by him of a weekly sum to his wife upon a subsequent application. *Woodhead* v. *Woodhead*, [1895] P. 343; 11 R. 659.

—— **Persistent Cruelty—Retrospective Operation.**]—Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, is retrospective in its operation; therefore a married woman is entitled to apply to a court of summary jurisdiction for an order under the act where her husband has been guilty of persistent cruelty towards her, although the acts of cruelty alleged were committed previous to January 1, 1896, the day on which the act came into force. *Lane* v. *Lane*, 65 L. J., P. 63; [1896] P. 133; 74 L. T. 557; 60 J. P. 345.

—— **Costs—Unsuccessful Proceedings Instituted by Wife—Right of Wife's Solicitor to Recover Costs from Husband.**]—Section 5 (d) of the Summary Jurisdiction (Married Women) Act, 1895, confers upon justices exclusive jurisdiction over costs, and upon the dismissal of a wife's summons against her husband for a separation order, under s. 4, by justices who decline to make any order as to costs under s. 5, the solicitor who acted for the wife cannot recover his costs in an action against the husband. *Cale* v. *James*, 66 L. J., Q. B. 249; [1897] 1 Q. B. 418; 76 L. T. 119; 45 W. R. 317; 61 J. P. 230.

—— **Evidence — Notes — Reasons of Magistrates.**]—For the purposes of an appeal under the act full notes of the evidence before the magistrates ought to be taken, and copies furnished to the court. The magistrates should also give their reasons. *Robinson* v. *Robinson*, [1898] 1 P. 153 ; 78 L. T. 392. *And see* col. 823.

Divorce Act, 1857—20 & 21 Vict. c. 85, s. 21.]—It was doubted whether a woman resident within the city of London could obtain a protection order under the words of this section. See *Aldridge, Ex parte*, 1 Sw. & Tr. 88.

Thereupon 21 & 22 Vict. c. 108, was enacted.

—— **Jurisdiction to Grant.**] — A married woman applied to the justices of Plymouth for a protection order, she having since desertion lived outside the borough whilst her husband resided within :—Held, that the county justices had jurisdiction. *Reg.* v. *Plymouth JJ.*, 44 J. P. 168.

—— **Retrospective Effect.**]—A woman having been deserted by her husband acquired some property by her own exertions, which she disposed of by will. Subsequently she obtained an order from a magistrate protecting her earnings and property :—Held, that such order had a retrospective effect, extending back to the commencement of the desertion ; and that the will was a valid instrument to pass the property acquired by her during such desertion. *Elliott, In goods of*, 40 L. J., Mat. 76 ; L. R. 2 P. 274 ; 25 L. T. 203 ; 19 W. R. 1072.

—— **As to what Property — Proceeds of Brothel.**]—An order protecting the earnings or property of a wife deserted by her husband is confined to money or property acquired by lawful industry, and does not extend to property acquired by keeping a brothel. *Mason* v. *Mitchell*, 3 H. & C. 528 ; 34 L. J., Ex. 68 ; 11 Jur. (N.S.) 89 ; 11 L. T. 714 ; 13 W. R. 349.

—— **As Executrix—Power to transfer Stock.**]—A wife deserted by her husband, obtained a magistrate's order under 20 & 21 Vict. c. 85, s. 21. Previously to the date of the order, but subsequently to the desertion, the wife had been appointed executrix, and also residuary legatee, by the will of K., who had died in that interval. After the order, the wife alone took out probate. Part of the testator's residuary estate consisted of stock, which the bank refused to allow her to transfer :—Held, even before 21 & 22 Vict. c. 108, s. 7, that she was entitled to transfer. *Bathe* v. *Bank of England*, 4 Kay & J. 564 ; 27 L. J., Ch. 630 ; 4 Jur. (N.S.) 505 ; 6 W. R. 612.

—— **Reversionary Interest.**] — A married woman, entitled in reversion to a legacy, having been deserted by her husband, obtained a magistrate's order, which, in terms, only affected to protect property acquired by her own industry, or to which she was entitled as trustee :—Held, that, notwithstanding the form of the order, the effect of the 21 & 22 Vict. c. 108, s. 8, was to include in it the reversionary interest. *Whittingham, In re*, 10 Jur. (N.S.) 818 ; 10 L. T. 368 ; 12 W. R. 775.

—— **Legacy.**]—A wife who has obtained an order for protection is entitled to payment of a fund in court, representing a legacy bequeathed to her. *Kingsley, In re*, 26 Beav. 84 ; 28 L. J., Ch. 80 ; 4 Jur. (N.S.) 1010 ; 6 W. R. 849.

—— **Fund to Separate Use.**]—A wife was deserted by her husband : afterwards her father bequeathed a fund for her separate use, without power of anticipation, and she subsequently obtained a protection order :—Held, that she was entitled to payment. *Cooke* v. *Fuller*, 26 Beav. 99.

—— **Acquisition of Property since Date of Order.**]—A wife became entitled, on the intestacy of an uncle, to shares, and the shares were, in pursuance of an agreement between husband and wife, transferred into the joint names of the husband and wife. The husband subsequently deserted his wife, and she obtained a magistrate's protection order. Capital subsequently became payable on account of the shares :—Held, that the shares had not been reduced into possession, and that the return capital payable on them belonged to the wife, as being property acquired since the date of the desertion. *Nicholson* v. *Drury Building Estate Co.*, 47 L. J., Ch. 192 ; 7 Ch. D. 48 ; 37 L. T. 459 ; 26 W. R. 76.

When a wife, entitled to a legacy charged on real estate which had not been reduced into possession by her husband, obtained a protection order, in consequence of her husband's desertion, under 20 & 21 Vict. c. 85, s. 21 :—Held, that the legacy, on being paid to her after the date of the order, was property which then came to or devolved upon her within ss. 21 and 25, and that her receipt was a good discharge. *Coward, In re*, 44 L. J., Ch. 384 ; L. R. 20 Eq. 179 ; 32 L. T. 682 ; 23 W. R. 605. And see *Hughes, In re, Brandon* v. *Hughes*, 67 L. J., Ch. 279 ; [1898] 1 Ch. 529—C. A.

—— **Desertion must be Continuous.**]—The desertion must be continuous. A bonâ fide offer of the husband to provide for his wife, even at the time she claims the order, will deprive her of a right to it. *Cargill* v. *Cargill*, 1 Sw. & Tr. 235 ; 27 L. J., Mat. 69 ; 4 Jur. (N.S.) 764 ; 6 W. R. 870.

—— **Proof of.**]—When, upon the further consideration of an administration suit instituted by a married woman, who had obtained a protection order, suing as a feme sole under 20 & 21 Vict. c. 85, ss. 21, 25, 26, it was proposed to pay to her her share of the testator's estate :—Held, that evidence must be produced that the separation was a continuing one, but her affidavit was accepted as to this fact, and also as to no settlement or agreement for a settlement having been made. *Ewart* v. *Chubb*, 45 L. J., Ch. 108 ; L. R. 20 Eq. 454.

—— **Where for Employment.**]—The absence of a husband in his ordinary occupation as a mariner does not constitute desertion ; and the court cannot take into consideration an actual desertion in past years, which has been terminated by a return to cohabitation. *Aldridge, Ex parte*, 1 Sw. & Tr. 88 ; 6 W. R. 507.

A wife resided with her husband for four years. He then went to London in search of employment, and during the sixteen subsequent years he only on one occasion communicated with his wife. During the first years of absence he wrote several affectionate letters, urging his wife to correspond with him ; the two last were not answered by her, nor did the wife during any period of the absence apply to her husband to return to cohabitation :—Held, that there was

no desertion. *Thompson* v. *Thompson*, 1 Sw. & Tr. 231 ; 27 L. J., Mat. 65 ; 4 Jur. (N.S.) 717 ; 6 W. R. 867.

Absence, to constitute desertion, must be without the consent, direct or indirect, of the party deserted, and in spite of her wish. *Ib.* *See* cols. 752, 824.

Order—Service of.]—Service of a citation on the husband is not necessary. *Hall*, *Ex parte*, 27 L. J., Mat. 19.

The application may be founded on an affidavit of the wife alone. *Ib.*

But it should state sufficient facts to satisfy the court of the fact of desertion. *Sewell*, *Ex parte*, 28 L. J., Mat. 8.

Notice of an application on the part of a wife, deserted by her husband, for a protection order, must be served on him if his whereabouts is known. *Matthew* v. *Matthew*, 19 L. T. 662.

—— **Form of.**]—An order should be in general terms, the court having no power to decide what title the wife may have to specific property. *Mullineux*, *Ex parte*, 1 Sw. & Tr. 77; 27 L. J., Mat. 19 ; 6 W. R. 356.

—— **Entry of, with Registrar of County Court.**]—A married woman obtained a protection order for her property on the 12th April, 1861 ; she made a will on the 19th, and died on the 24th. The order was not entered with the registrar of the county court till the 24th, being more than ten days after it was obtained :—Held, that the requirement of the above provision, as to the entry of the order with the registrar, was directory and not imperative, and, on affidavits from the executors that they were ignorant of the husband's place of abode, probate was granted, limited to the property acquired since the date of the desertion. *Farraday*, *In goods of*, 2 Sw. & Tr. 369 ; 31 L. J., P. 7 ; 7 Jur. (N.S.) 1252 ; 6 L. T. 57.

Effect of Petitioning without Next Friend.]—A married woman, under a magistrate's order of protection, can petition in equity without a next friend, and can obtain an order for payment without serving her husband. *Rainsdon*, *In re*, 4 Drew. 446 ; 28 L. J., Ch. 334 ; 5 Jur. (N.S.) 55 ; 7 W. R. 184.

—— **Payment out—Petition—Service on Husband.**]—On a petition presented by a wife, who had been deserted by her husband, to draw out of court certain sums of money to which she became entitled :—Held, that notice of the petition must be served upon the husband, notwithstanding that a protection order had been obtained protecting from the husband the property of the feme covert. *Sutcliffe*, *Ex parte*, *Dundas*, *In re*, 22 W. R. 676.

—— **Actions by Wife—Adultery after Order.**]—An action is maintainable by a wife for earnings after an order of a police magistrate upon desertion by her husband, notwithstanding that ever since the desertion she has been living in adultery, it not appearing that she had begun the adultery before the time specified in the order. *Thomas* v. *Head*, 2 F. & F. 88.

—— **Commenced before Order made.**]—An order obtained by a woman deserted by her husband, for the protection of property acquired since desertion, will not enable her to maintain an action commenced before the date of the order for injuries to, or in respect of, such property. *Midland Ry.* v. *Pye*, 10 C. B. (N.S.) 179 ; 30 L. J., C. P. 314 ; 4 L. T. 510 ; 9 W. R. 658.

—— **For Libel.**]—A wife who has been deserted by her husband, and has obtained an order of protection, can bring an action in her own name for libel. *Ramsden* v. *Brearley*, 44 L. J., Q. B. 46 ; L. R. 10 Q. B. 147 ; 32 L. T. 24 ; 23 W. R. 294.

—— **On Liability of Husband for Maintenance.**]—Justices at petty sessions refused to make an order, under 13 & 14 Vict. c. 101, s. 5, upon a husband to maintain or contribute towards the maintenance of his wife, who was a lunatic chargeable to the union, on the ground that a protection order, which she had obtained under 20 & 21 Vict. c. 85, s. 21, and which had not been discharged, absolved him from such liability :—Held, that, under the circumstances, the husband was liable, and that the justices were wrong. *Oxford Union* v. *Barton*, 33 L. T. 375.

—— **On Separate Estate of Married Woman.**]—A protection order obtained by a married woman, who has been deserted by her husband, under s. 21 of the Divorce and Matrimonial Causes Act, 1857, only constitutes her a feme sole in respect of her earnings and property acquired after the desertion ; it has no effect on property acquired before the desertion. *Waite* v. *Morland* (38 Ch. D. 135) followed. *Hill* v. *Cooper*, 62 L. J., Q. B. 423 ; [1893] 2 Q. B. 85 ; 4 R. 418 ; 69 L. T. 216 ; 41 W. R. 500 ; 57 J. P. 663—C. A.

—— **On Alimony pendente lite.**]—By obtaining an order of protection, a wife does not deprive herself of her right to alimony pendente lite, in a suit subsequently instituted by her for dissolution of marriage. *Hakewill* v. *Hakewill*, 30 L. J., Mat. 254.

—— **For Necessaries.**]—An order for protection, obtained by a wife, will bar an action for necessaries against the husband. *Tempany* v. *Hakewill*, 1 F. & F. 438.

After Wife's Death.]—Where a married woman obtained a protection order, and died intestate, leaving her husband and children by him, who were minors, and her husband her surviving, the probate court, in the lifetime of the father, who was abroad, granted administration, for the use and benefit of the children, to their uncle, who had been duly elected by them as their guardian for that purpose. *Weir*, *In goods of*, 2 Sw. & Tr. 451 ; 31 L. J., P. 88 ; 8 Jur. (N.S.) 393 ; 6 L. T. 131.

A wife, having been deserted by her husband, obtained a protection order. On her death, in the lifetime of her husband, intestate, the court decreed letters of administration, limited to such personal property as she had acquired, or become possessed of, since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin. *Worman*, *In goods of*, 1 Sw. & Tr. 513 ; 29 L. J., P. 164.

Discharge of Order.]—A husband may come to the divorce court at any time, and apply for

a discharge of the order. *Hall, Ex parte*, 27 L. J., Mat. 19.

An application to discharge a protection order is not limited to the lifetime of the married woman. *Mudge* v. *Adams*, 50 L. J., P. 49; 6 P. D. 54; 44 L. T. 185; 29 W. R. 307.

An order of protection to a married woman granted by a police magistrate or justices, under the 20 & 21 Vict. c. 85, s. 21, could only be discharged by the magistrate or justice by whom it was made. *Sharpe, Ex parte*, 5 B. & S. 322; 33 L. J., M. C. 152; 10 Jur. (N.S.) 1018; 10 L. T. 458; 12 W. R. 756.

b. Maintenance in Case of Desertion.

Under Summary Jurisdiction (Married Women) Act, 1895, 58 & 59 Vict. c. 39.

Jurisdiction of Justices—"Desertion."]—By the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), s. 1, any married woman who has been "deserted" by her husband may summon him before justices, and the justices, "if satisfied that the husband, being able wholly or in part to maintain his wife and family, has wilfully neglected or refused so to do, and has deserted his wife," may order that he shall pay her a weekly sum for her support. Upon a summons by a married woman under the act, it appeared that disputes had arisen between her and her husband, and that they had lived apart under an agreement for separation, by which he undertook to pay her a weekly allowance so long as she should live chastely and should not molest him. He had ceased to make and refused to continue the weekly payments under the agreement. He charged his wife with adultery, but the justices found that the charge was not proved:—Held, that the refusal of the husband to pay his wife the weekly allowance and to carry out the agreement of separation was not sufficient evidence of "desertion" within the act to warrant the justices in making an order against him for her support. *Pape* v. *Pape*, 57 L. J., M. C. 3; 20 Q. B. D. 76; 58 L. T. 399; 36 W. R. 125; 52 J. P. 181.

In order to constitute "desertion" of a wife by a husband, in the legal sense of the term, there must be an existing cohabitation broken by some wrongful act of the husband. But cohabitation does not necessarily imply that a husband and wife are living together physically under the same roof. Married domestic servants and other classes of persons, who from circumstances cannot live night and day under the same roof, may yet be said to cohabit together in the wider sense of the term. *Bradshaw* v. *Bradshaw*, 66 L. J., P. 31; [1897] P. 24; 75 L. T. 391; 45 W. R. 142; 61 J. P. 8. *And see* col. 747.

—— **Retrospective Effect of Act.**]—In 1881 a husband deserted his wife and left the kingdom. On his return from abroad in 1886 his wife applied at petty sessions, under the act passed in that year, for maintenance, and the justices made an order:—Held, that the order was properly made, the question of desertion being purely one of fact for the justices. The act of 1886 was retrospective without express words. It was intended to cure an existing evil, and to afford to married women a remedy for desertion, whether such desertion took place before the passing of the act or not. *Reg.* v. *Birwistle*, 58 L. J., M. C. 158.

Duty of Justices.]—In administering the Summary Jurisdiction (Married Women) Act, 1895, courts of summary jurisdiction should be careful not to interfere too much in matrimonial life. *Harling* v. *Harling*, 70 L. T. 559; 60 J. P. 377.

Residence of Wife.]—A married woman whose husband has deserted and refused to maintain her may obtain an order, under 49 & 50 Vict. c. 52, against him for her support from any magistrate or justices within whose jurisdiction she resides at the time of such refusal or desertion, whichever act is the latest. *Reg.* v. *Leresche*, 56 L. J., M. C. 135; 35 W. R. 805.

Where such an order did not contain the name of the place where the refusal to maintain took place, the court refused to make absolute a rule for a certiorari to bring up and quash the same, it being admitted that the wife's residence was within the jurisdiction. *Ib.*

Voluntary Separation—Offers to resume Cohabitation by Wife—Alleged Desertion of Husband—Delay in Application for Maintenance.]—In 1880 the appellant, a labourer, married the respondent. In 1881 the respondent, with the appellant's consent, went to her mother's house for her confinement. During her absence the appellant broke up their home and took a room in his father's cottage, where the wife refused to live with him on the ground that there was inadequate accommodation. Subsequently the appellant refused the respondent's request to take her back to live with him. In 1894 an order was made by justices adjudging the appellant to pay alimony to the respondent:—Held, that the appellant's request that the respondent should live with him at his father's house was not unreasonable, and that there was no evidence of desertion within the meaning of s. 1 of the Married Women (Maintenance in Case of Desertion) Act, 1886, to warrant an order for alimony after the lapse of so many years from the time when the parties ceased cohabitation. *Jones* v. *Jones*, 43 W. R. 424.

Separation by Mutual Consent—Offer of Wife to return to Cohabitation—Refusal of Husband.]—A husband and wife by deed agreed to live apart, and the husband further covenanted to contribute a certain sum weekly towards the support of his wife. The parties lived apart, but the husband, after a time, failed to continue to contribute to the maintenance of his wife. The wife offered to return to cohabitation, but this offer was refused by the husband who would not allow her to enter his house:—Held, that the husband had not deserted his wife within the meaning of s. 1 of 49 & 50 Vict. c. 52, so as to justify an order for alimony being made upon him by justices under that section. *Reg.* v. *Leresche*, 60 L. J., M. C. 153; [1891] 2 Q. B. 418; 65 L. T. 602; 40 W. R. 2; 17 Cox, C. C. 384; 56 J. P. 37—C. A. *And see* col. 752.

Limit of Time — Desertion more than Six Months before Date of Summons or Complaint.]—By s. 8 of the Summary Jurisdiction (Married Women) Act, 1895, all applications under the act are to be made in accordance with

the summary jurisdiction acts—that is to say, they must be made within six months from the date of the offence complained of, in accordance with s. 11 of the Summary Jurisdiction Act, 1848. But desertion must be regarded as a continuous act, and therefore a summons by a wife against a husband under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, need not be taken out within six months from the date on which he first left her. *Heard* v. *Heard*, 65 L. J., P. 111; [1896] P. 188; 60 J. P. 426.

Persistent Cruelty and Neglect to maintain, causing Wife to live separate and apart.]—"Persistent cruelty or wilful neglect to provide reasonable maintenance," causing a wife to leave her husband within the meaning of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, are not continuing acts so as to avoid the necessity imposed upon the wife by s. 8 of taking proceedings within six months, in accordance with the provisions of s. 11 of the Summary Jurisdiction Act, 1848. *Ellis* v. *Ellis*, 65 L. J., P. 124; [1896] P. 251; 75 L. T. 390; 45 W. R. 144; 60 J. P. 823.

Neglect to maintain Wife—Reasonable Allowance—Husband's Means.]—Before making an order under ss. 4 and 5 of the Summary Jurisdiction (Married Women) Act, 1895, against a husband who has been found guilty of neglecting to maintain his wife, it is the duty of the justices to inquire into the fact whether the husband has means or the capability of earning means. It is not sufficient for the justices to make an order against the husband under s. 5, leaving it to him to apply under s. 7 "to alter, vary, or discharge" such order on the ground of his want of means. *Earnshaw* v. *Earnshaw*, 65 L. J., P. 89; [1896] P. 160; 74 L. T. 560; 60 J. P. 377.

Order Obtained by False Statements and Concealment of Material Facts without Notice to Husband.]—A husband went to America on on the 2nd of March, 1867, with his wife's full consent and approval, to look for employment, and remained away from home until the end of 1876. He left his wife in a lodging-house furnished by him, as landlady of which she made a good living. During his absence he never communicated with his wife by letter, and only sent her one verbal message, which there was no evidence to show she had ever received. There was, however, evidence that he could not write. When he returned home his wife refused to receive him, and shut the door in his face. Next day she went before a police magistrate and obtained a protection order under s. 21 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), on the ground that her husband had deserted her in March, 1867. She did not, however, inform the magistrate that her husband had left England with her consent, or that he had left her in occupation of a lodging-house furnished by him. The husband had no notice of the application for the protection order, nor was he aware of its existence, until it was found among her papers after her death. The husband and wife never lived together again, but they met from time to time on friendly terms at family gatherings:—Held, that the order must be set aside as having been obtained without notice to the husband, and by a false and fraudulent allegation of desertion, and concealment of material facts. *Mahoney* v. *M'Carthy*, 61 L. J., P. 41; [1892] P. 21.

Divorce Act, 1857—Payment out of Share of Estate—Evidence of Separation.]—When upon the further consideration of an administration suit instituted by a married woman, who had obtained a protection order, suing as a feme sole under 20 & 21 Vict. c. 85, ss. 21, 25, 26, it was proposed to pay to her her share of the testator's estate:—Held, that evidence must be produced that the separation was a continuing one, but her affidavit was accepted as to this fact, and also as to no settlement or agreement for a settlement having been made. *Ewart* v. *Chubb*, L. R. 20 Eq. 454.

Desertion existing at Date of Order.]—To enable justices to make an order for maintenance under the Married Women (Maintenance in Case of Desertion) Act, 1886, it is sufficient that, at the time when the order is made, there is evidence of the husband's desertion of the wife. It is not necessary to fix on any particular day as the date when the desertion began. *Wilkinson* v. *Wilkinson*, 58 J. P. 415.

Under Matrimonial Causes Act, 1878—Summons to vary Order—Refusal—Discretion.]—Justices made an order under s. 4 of the Matrimonial Causes Act, 1878 (inter alia), that a husband should pay his wife 30*s.* a week. This order was not appealed against. More than a year afterwards the husband applied to the justices for a summons calling upon his wife to show cause why this order should not be varied by reduction of the weekly payment, upon the ground that his means had diminished. The justices having heard what the husband had to say refused to issue the summons:—Held, that the justices had a discretion to grant or refuse a summons, and had exercised it properly; and also, that such discretion was not, under the terms of s. 4, the subject of review. *Reg.* v. *Huggins*, 60 L. J., M. C. 139.

—— **Order for Separation—Conviction for Aggravated Assault—Appeal to Probate Division—Jurisdiction.**]—Section 4 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), does not give an appeal to the probate, divorce, and admiralty division from a conviction for aggravated assault, but only from the order for judicial separation, made by virtue of the provisions of the above act, as one of the results of the conviction. *Lewin* v. *Lewin*, 60 L. J., P. 85; [1891] P. 254; 64 L. T. 834; 39 W. R. 575; 17 Cox, C. C. 314; 55 J. P. 296.

—— **Order obtained by Guardians—Wife leaving Workhouse.**]—K., in 1877, deserted his wife, who went into the workhouse in 1881; the overseers obtained an order upon K. for maintenance. In 1886 the wife left the workhouse, and applied for an order of maintenance under 49 & 50 Vict. c. 52:—Held that the justices had jurisdiction, and that as the former order was revoked by the wife leaving the workhouse, and as K. had never made any bonâ fide offer to resume cohabitation, she was a deserted wife. *Kershaw* v. *Kershaw*, 51 J. P. 646.

—— **Custody of Children—Magistrates' Order—Appeal—Fresh Evidence—Case remitted.**]—Where the magistrates, who had rightly granted a separation order to the wife, refused to determine in a judicial manner, in the interests of the children, the question of their custody, this court, on appeal, declined to deal with the matter, by receiving fresh evidence, and remitted the case to the magistrates upon the points as to the wife's fitness or unfitness, and as to the amount of her allowance. *Foulkes* v. *Foulkes*, 69 L. T. 461.

—— **Evidence at Hearing—Appeal—Affidavits.**]—A husband having been summarily convicted of an aggravated assault on his wife within 24 & 25 Vict. c. 100, s. 43, the justices before whom he was convicted made an order that the wife should not be bound to cohabit with him, and that he should pay her a weekly sum for her maintenance; and they refused to hear the husband's evidence as to his means:—Held, that the justices were warranted in refusing to allow the husband to be called as a witness, as it was not the intention of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), that there should be any further hearing of the case by the justices after the conviction for assault:—Held, also, that on the hearing of the appeal affidavits as to the merits of the case could not be admitted. *Woods* v. *Woods* (10 P. D. 172) followed. *Powell* v. *Powell*, 14 P. D. 177; 61 L. T. 436; 53 J. P. 519.

—— **Right of Rehearing — Evidence of Adultery.**] — A wife applied to justices for an order of maintenance against her husband under 49 & 50 Vict. c. 52. He suggested adultery against her, but was not prepared to prove it. The justices offered to adjourn it, so as to give time to obtain evidence, but he declined. The justices made the order against the husband:—Held, that he could not afterwards insist on a rehearing on the ground that he had since obtained evidence of the wife's adultery. *Reg.* v. *Oldham JJ.*, 51 J. P. 647.

The power given to justices by s. 2 of the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), to "rehear any such summons at the instance of the husband at any time" is, on the true construction of the act, confined to the cases mentioned in the 2nd proviso to the 1st section, in which proof is offered that the wife has since the making of the order been guilty of adultery. *Sephton* v. *Sephton*, 58 L. T. 281; 52 J. P. 356.

Practice — On Appeal.] — Unless and until special rules are made in the Probate Division regulating the practice as to appeals under s. 11 of the Summary Jurisdiction (Married Women) Act, 1895, the practice as to appeals under s. 4 of the Matrimonial Causes Act, 1878, will apply to them—that is to say they will be regulated by Ord. LIX., rr. 4A, 7, 8, 10, 11, 12 and 16, and those rules will be the only practice applicable. *Swoffer* v. *Swoffer*, 65 L. J., P. 82; [1896] P. 131; 60 J. P. 344.

Upon appeals under the Summary Jurisdiction (Married Women) Act, 1895, the divisional court will not reverse a finding of fact, unless it be shown that the court of summary jurisdiction was clearly wrong in the conclusion at which it arrived. *Harling* v. *Harling*, infra.

—— **Costs.**]—As a general rule, the established practice of allowing a wife her costs will be applied to appeals under the Summary Jurisdiction (Married Women) Act, 1895, in all cases where the wife is the respondent, but this rule has no application to cases in which the wife is the appellant. *Earnshaw* v. *Earnshaw*, supra.

Magistrates' clerks should take notes of the evidence and of the grounds upon which decisions are based, and the costs of such notes will be allowed in the costs of appeals under the act. *Harling* v. *Harling*, 74 L. T. 559; 60 J. P. 377.

12. Alimony and Maintenance.

a. Alimony.

i. *Pendente lite.*

a. When Obtainable by Wife.

In General.]—In allotting alimony pendente lite the wife must be considered as innocent. *Smith* v. *Smith and Tremeaux*, 4 Sw. & Tr. 228; 32 L. J., Mat. 91; 11 W. R. 257. S. P., *Crampton* v. *Crampton and Armstrong*, 32 L. J., Mat. 142.

Her omission to file an answer to a petition charging her with adultery is no ground for refusing to allot alimony or for allotting less than the usual amount. *Ib.*

In what cases a court of equity will decree a wife alimony, though she may have a sentence for it in other spiritual courts. *Angier* v. *Angier*, Pre. Ch. 496; Gilb. Eq. Rep. 152.

The court has not power generally to provide an alimony for the wife's separate use, but if the court has a continuing power over the wife's own property, it will seize on it to maintain her during desertion. *Walker, In re*, Ll. & G., t. Sugd. 327.

Decree operates In personam.]—Decrees in the spiritual court for alimony and maintenance are only against the person of the husband, but affect not his estate so as to take it from his creditors. *Fitzer* v. *Fitzer*, 2 Atk. 511.

Creditors in bankrupt cases are entitled to the interest the husband has in the wife's chose in action during his life. *Ib.*

Effect of Protection Order on.]—By obtaining an order of protection of her property or earnings, a wife does not deprive herself of her right to alimony pendente lite, in a suit by reason of her husband's adultery, subsequently instituted by her for dissolution of marriage. *Hakewill* v. *Hakewill*, 30 L. J., Mat. 254.

Wife in Prison.]—A wife undergoing a sentence of imprisonment for felony is entitled to alimony pendente lite. *Kelly* v. *Kelly*, 4 Sw. & Tr. 227; 32 L. J., Mat. 181; 11 W. R. 958.

After Proof of Adultery.] — Where alimony pendente lite has been allotted to a wife in a petition for divorce, such alimony ceases upon a verdict finding her guilty of adultery, but the court may in its discretion make an order for the alimony to continue. *Wells* v. *Wells* (3 Sw. & Tr. 542) discussed. *Dunn* v. *Dunn*, 57 L. J., P. 58; 13 P. D. 91; 59 L. T. 385; 36 W. R. 539—C. A.

In a suit for dissolution of marriage on the ground of a wife's adultery, alimony pendente

lite will be allotted to the wife at any time before the case comes on before the full court, even though on an issue raised by her in the suit a jury may have found that she has been guilty of adultery. *D'Oyley* v. *D'Oyley*, 4 Sw. & Tr. 226; 29 L. J., Mat. 165.

In a suit for dissolution of marriage instituted by a husband, who has previously obtained a divorce a mensâ et thoro, in an ecclesiastical court, on the ground of his wife's adultery, the wife is not entitled to alimony pendente lite; she is however entitled to costs de die in diem. *Holt* v. *Holt*, 28 L. J., Mat. 12.

On the last day of the sittings the judge allowed the petitioner's witnesses to be examined though the case was not in the list for the day, on the understanding that if the respondent and co-respondent intimated their intention to defend the suit, the case should be reheard. The evidence proved adultery. On a subsequent application for alimony pendente lite, the judge held that the respondent could not be prejudiced by the evidence so taken, notice in the meantime having been given that the respondent and co-respondent intended to defend. *Phillips* v. *Phillips and Medlyn*, 4 Sw. & Tr. 129; 34 L. J., P. 107.

Voluntary Payments by Husband.]—A wife being entitled to alimony pendente lite, the voluntary gift of money during the progress of a suit by him for a divorce, does not per se prove collusion. *Barnes* v. *Barnes and Grimwade*, 37 L. J., Mat. 4; L. R. 1 P. 505; 17 L. T. 268; 16 W. R. 281.

—— **Under Separation Deed.**]—An allowance under a deed of separation is no bar to a wife's petition for alimony pendente lite. *Powell* v. *Powell and Jones*, 43 L. J., Mat. 9; L. R. 3 P. 186; 29 L. T. 466; 22 W. R. 62.

Effect of Plea to Jurisdiction.]—The fact that there is a plea to the jurisdiction of the court in a suit for dissolution of marriage does not affect the power of the court to allot alimony pendente lite. *Ronalds* v. *Ronalds*, L. R. 3 P. 259.

When there was a substantial question of jurisdiction, and some months were to pass before it could be determined, the court, in the exercise of its discretion, allotted alimony pendente lite. *Ib.*

Husband not Filing Answer.]—A husband who has not filed an answer on oath to the petition for alimony pendente lite cannot cross-examine the witnesses produced in support of the petition, on the motion for an allotment, or contradict their evidence. *Constable* v. *Constable*, 39 L. J., Mat. 17; L. R. 2 P. 17; 21 L. T. 401.

Answer Insufficient—Application for Cross-examination—Partnership Accounts—Right to Disclosure of.]—In a suit for dissolution of marriage on the husband's petition, the wife filed a petition for alimony pendente lite. In his answer, the husband admitted that his income arising from his business amounted to 3,000*l.* per annum, but objected to produce his books, on the ground that they would disclose the partnership accounts:—Held, that the husband's answer was insufficient, and that he must file a fuller and further answer; but that he ought not, at any rate until such further answer had been filed, to be ordered to disclose the partnership accounts, or to be cross-examined upon them. *Tonge* v. *Tonge*, 61 L. J., P. 87; [1892] P. 51; 67 L. T. 390.

Wife Taking Property from Husband's House.]—Allegation by a husband in his answer, that the wife had taken from his house furniture of the value of 800*l.* to 1,000*l.* The court refused to make any order for alimony pendente lite on such a state of facts, the wife declining to accept the sum offered by the husband, but allowed the wife to reply to the allegation. *Bremner* v. *Bremner and Brett*, 3 Sw. & Tr. 249; 32 L. J., Mat. 119; 8 L. T. 611; 11 W. R. 687.

Wife Living with Co-respondent.]—A wife is not entitled to alimony whilst she is living with the co-respondent as his wife and supported by him. *Holt* v. *Holt and Davis*, 38 L. J., P. 33; L. R. 1 P. 610; 19 L. T. 662.

On Appeal.]—Alimony is payable to a wife on an appeal, unless it appears that the appeal is frivolous and vexatious, or she has been guilty of laches. *Jones* v. *Jones*, L. R. 2 P. 333; 20 W. R. 320. Affirmed on appeal, 41 L. J., Mat. 53; 26 L. T. 106; 20 W. R. 449.

Petition for Dissolution by Husband—Request to Withdraw.]—A husband petitioned the court for a dissolution of his marriage, by reason of his wife's adultery. In her answer the wife denied such adultery and made countercharges against the petitioner, of adultery and cruelty, which he denied, and directions were given as to the mode of trial of the facts in issue. The petitioner then moved for leave to withdraw the petition on payment of the wife's costs. A few days before the motion was made, the respondent filed a petition for alimony:—Held, that, if a wife uses due diligence in claiming alimony, the husband will not be allowed to withdraw his petition until he has paid the alimony allotted to her up to the time of the withdrawal; but that if the wife delays to present her petition up to the last moment, so that the husband has not had time to answer it, the court will not refuse to allow him to withdraw, until he has filed an answer to such petition, and paid what the court may allot upon it. *Twisleton* v. *Twisleton and Kelly*, L. R. 2 P. 339; 26 L. T. 265; 20 W. R. 448.

Arrears—Application of Ord. XIV.]—A claim for arrears of alimony pendente lite is not a claim for "a debt or liquidated demand in money," within the meaning of Ord. III. r. 6, so as to entitle the plaintiff to judgment under Ord. XIV. r. 1. *Bailey* v. *Bailey*, 53 L. J., Q. B. 583; 13 Q. B. D. 855—C. A. Affirming, 50 L. T. 722; 32 W. R. 856.

—— **Executors of Wife cannot Recover.**]—A bill by the executors of a married woman against her husband, to recover arrears of alimony due at her death, is not sustainable. *Stones* v. *Cooke*, 8 Sim. 321, n. Reversing, 3 L. J., Ch. 225. And see *Kerr* v. *Kerr*, 66 L. J., Q. B. 838; [1897] 2 Q. B. 439; 77 L. T. 29; 46 W. R. 46, *and* col. 860.

Separation Deed—Covenant not to Molest.]—By a separation deed the husband covenanted to make an allowance to the wife determinable

upon her molesting him. The husband subsequently discontinued the allowance on the ground that the wife had broken her covenant not to molest him. The wife afterwards instituted a suit for judicial separation, and applied for an allowance of alimony pendente lite:—Held, that she was entitled to such allowance. *Wood* v. *Wood*, 57 L. J., Ch. 1; 57 L. J., P. 31; 57 L. T. 746; 36 W. R. 33—C. A.

Substituted Service of Petition.]—On a motion for substituted service of a petition for alimony pendente lite, in a case where substituted service of the petition for divorce had previously been ordered by service upon the respondent's agents, the court granted the motion, and as it appeared that a copy of the petition for alimony had already been sent in a registered letter to the agent's address, ordered that further service should be dispensed with. *Odevaine* v. *Odevaine*, 58 L. T. 564; 52 J. P. 280.

Injunction to restrain Removal of Property.]—The court will not, in order to protect a wife's right to alimony, restrain a husband from removing his property out of the jurisdiction of the court before an order for alimony has been made. *Newton* v. *Newton*, 55 L. J., P. 13; 11 P. D. 11; 34 W. R. 123.

Not a "Final Judgment" for Bankruptcy Purposes.]—An order for the payment of alimony pendente lite is not a "final judgment" against the husband within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued against the husband in respect of arrears due under such an order. *Moore, Ex parte* (14 Q. B. D. 627), distinguished. *Henderson, Ex parte, Henderson, In re*, 57 L. J., Q. B. 258; 20 Q. B. D. 509; 58 L. T. 835; 36 W. R. 567; 5 Morrell, 52—C. A.

Payment by Instalments.] — On January 30, 1888, an order for alimony pendente lite, and on February 1, 1888, an order for permanent alimony was made in the probate and divorce division. The sum of 130*l.* being due under these orders, a judgment summons in respect thereof was issued by the wife:—Held, that a receiving order in lieu of committal could not be made by the court against the husband under s. 5 of the Debtors Act, 1869, and that an order directing payment by monthly instalments of 10*l.* should be made. *Otway, Ex parte, Otway, In re*, 58 L. T. 885; 36 W. R. 698; 5 Morrell, 115.

Non-payment — Order for Attachment.] — Where, in an order for payment of alimony, the periods for payment are specified, an absolute order for an attachment under the Debtors Act may be made, without any preliminary order for payment by instalments. *Daly* v. *Daly*, L. R. 17 Ir. 372.

Order for Continuation of Alimony after two Trials—No Verdict of Adultery against Wife—Fi. fa. refused.]—On the trial of cross petitions presented by husband and wife, the jury found that the husband had, but the wife had not, committed adultery, and a decree nisi for dissolution of the marriage was accordingly pronounced by the court. The Queen's proctor having intervened, a second trial took place, when the jury found that both parties had acted in collusion to suppress material facts, but they could not agree as to the charge of adultery, brought by the Queen's proctor against the wife. The court rescinded the decree nisi. The wife appealed, and the husband had ceased to pay the alimony:—Held, that a writ of fi. fa. to enforce the arrears of alimony could not be granted, but that the order for payment of the alimony ought to be renewed until further notice. *Butler* v. *Butler*, 59 L. J., P. 11; 15 P. D. 13; 62 L. T. 123.

Judicial Separation—Injunction to restrain Husband from Parting with Property.]—The court, in a suit for judicial separation, where the wife (petitioner) had obtained an order for alimony pendente lite, refused to grant an injunction to restrain the respondent from parting with certain leasehold property of which he was possessed. *Carter* v. *Carter*, 65 L. J., P. 48; [1896] P. 35; 44 W. R. 400.

Petition for Nullity of Marriage.]—In a suit for a decree of nullity of marriage the court will not grant alimony pendente lite should the marriage be plainly null and void on the face of the petition and answer taken together. *Blackmore* v. *Mills* (f. c. *Blackmore*), 18 L. T. 586; 16 W. R. 893.

In a suit for nullity, alimony continues payable after the decree nisi until the decree is made absolute. *S.*, f. c. *B.* v. *B.*, 53 L. J., P. 63; 9 P. D. 80; 32 W. R. 756.

After Decree Nisi.] — The court refused to make any order for alimony pendente lite, after a decree nisi had been obtained for a dissolution of marriage, by reason of the wife's adultery, the wife having allowed some months to elapse after the commencement of the suit before she filed her petition. *Noblett* v. *Noblett and Kershaw*, L. R. 1 P. 651; 20 L. T. 716.

A decree nisi, if not appealed from, puts an end to the lis between the parties. *Latham* v. *Latham*, 2 Sw. & Tr. 298; 30 L. J., Mat. 163; 7 Jur. (N.S.) 219; 4 L. T. 308; 9 W. R. 680.

The court has power to order alimony pendente lite notwithstanding a decree nisi has been made for dissolution of marriage. *Latham* v. *Latham* (2 Sw. & Tr. 298), overruled. *Ellis* v. *Ellis*, 52 L. J., P. 99; 8 P. D. 188; 49 L. T. 223; 31 W. R. 942—C. A.

Pending Hearing of Application.]—A suit was instituted by the wife for restitution of conjugal rights. She also filed a petition for alimony, and then applied, on the ground of present distress and destitution, that the respondent be ordered to pay her a small sum of money pending its hearing:—The court declined to entertain the application. *Ford* v. *Ford*, 36 L. J., P. 86; 15 L. T. 595.

b. What Regulates Amount Payable.

Husband's Income—Nil.]—A petition set forth, as the only source of income of a husband, that on the death or second marriage of his mother he would be entitled to a share in the residuary estate of his father, provided he attained twenty-one. He was still a minor:—Held, that there was no income out of which the court could allot alimony pendente lite. *Beavan* v. *Beavan*, 2 Sw. & Tr. 652; 31 L. J., Mat. 166; 8 Jur. (N.S.) 769; 7 L. T. 435.

Where a master pilot in the Bengal pilotage

service, on six months' leave of absence without pay, was in the receipt of no income, and was possessed of no property whatever, the court refused to allot to the wife alimony pendente lite. *Fletcher* v. *Fletcher*, 2 Sw. & Tr. 434; 31 L. J., Mat. 82; 6 L. T. 134; 10 W. R. 448.

So where a husband had no income, and his only property was a legacy of 500*l.*, not payable until eleven months after the application for alimony, the court refused to allot alimony pendente lite. *Brown* v. *Brown and Simpson*, 3 Sw. & Tr. 217; 32 L. J., Mat. 144; 9 L. T. 118.

When, upon a husband's answer, it appears that he has no means, the court will refuse to allot alimony; but the wife will be entitled to her costs of moving for an allotment. *Gaynor* v. *Gaynor*, 31 L. J., Mat. 144.

A husband in his answer alleging that he was in insolvent circumstances, and that his only income was weekly wages of meat, drink, washing and lodgings, and 4*s.* a week, the court refused to allot alimony pendente lite. *Capstick* v. *Capstick, Furness and Winder*, 33 L. J., Mat. 105.

—— **Small Payment already Made.**]—When it appeared that a husband had only 60*l.* a year, and that on separating from his wife he had handed to her 70*l.*, the amount of her fortune, the court refused to allot alimony pendente lite. *Coombs* v. *Coombs*, L. R. 1 P. 218; 12 Jur. (N.S.) 673; 14 L. T. 294.

—— **Not immediately Obtainable.**]—In a petition for alimony pendente lite, the husband was admitted to have a sum invested in business, the profits of which, by the deed of partnership, were to accrue, and were not to be drawn out of the business until they had brought up his capital to a certain amount. The court allotted alimony on this sum so invested at the rate of 5*l.* per cent. per annum. *Wilson* v. *Wilson and Howell*, 26 L. T. 108; 20 W. R. 320.

Husband's Income Large.]—Where the husband's income is large, the practice is not to allot a fixed proportion of it as alimony pendente lite, but to give the wife an income suitable to the position which she has hitherto occupied; and the amount is subject to the discretion of the registrar. *Sykes* v. *Sykes*, 66 L. J., P. 162; [1897] P. 306; 77 L. T. 150—C. A.

Wife's Income.]—Where both parties are almost penniless, the power of the wife to maintain herself by her own exertions ought to be taken into account. *Nicholls* v. *Nicholls*, 30 L. J., Mat. 163, n.

Not only a wife's income derived from separate property will be taken into account in allotting alimony pendente lite, but income of which she is in the actual enjoyment, though earned by herself. *Goodheim* v. *Goodheim and Frankinson* or *Tomkinson*, 2 Sw. & Tr. 250; 30 L. J., Mat. 162; 4 L. T. 449; 9 W. R. 853.

—— **Sufficient for her Support.**]—Where in his answer a husband alleges that the wife's income exceeds his, if the wife disputes this, the proper course for her to adopt is to deny the allegation by her replication on oath. *Watts* v. *Watts*, 28 L. J., Mat. 125.

If it should appear on the face of a petition for alimony pendente lite that the wife has a large separate property, the court would probably not compel the husband to set out in his answer a detailed account of his income. *Blackburne* v. *Blackburne*, 36 L. J., Mat. 88; 16 L. T. 435; 16 W. R. 29.

Alimony pendente lite refused to a wife, who for some time before the institution of the suit had been, and still was, supporting herself in service. *George* v. *George*, 37 L. J., Mat. 17; L. R. 1 P. 553; 16 W. R. 112.

If a husband can prove that his wife has sufficient means of support independently of him, even although they are derived from the co-respondent, semble, she will not be entitled to an allotment of alimony. *Madan* v. *Madan and De Thoren*, 37 L. J., Mat. 10; 17 L. T. 326; 16 W. R. 712.

When husband and wife have been living apart for many years before the institution of the suit, and the wife has supported herself during the separation and is still able to do so, alimony pendente lite will not be allotted. *Thompson* v. *Thompson and Johnson*, L. R. 1 P. 553.

—— **Pin-Money.**]—Pin-money is not subject to deduction for alimony, as it is clear of maintenance. *Ball* v. *Coutts*, 1 Ves. & B. 292.

In a suit for alimony, separate maintenance or pin-money is not a good plea. *Colmer* v. *Colmer*, Mos. 121.

Rule and Rate of Allowance.]—Alimony will be allotted on the average annual earnings of a husband, although at the moment when his answer to the petition for alimony is sworn he may be temporarily out of employment. *Thompson* v. *Thompson and Johnson*, 37 L. J., Mat. 33; L. R. 1 P. 553; 18 L. T. 212.

As a rule, alimony pendente lite is allotted in the proportion of one-fifth of the joint income, but the allotment and amount are in all cases in the discretion of the court. *Powell* v. *Powell and Jones*, 43 L. J., Mat. 9; L. R. 3 P. 186; 29 L. T. 466; 22 W. R. 62.

Where an allowance of 40*l.* a year was secured to a wife under a deed of separation executed in 1862, at which time the income of the husband was about 210*l.* a year, but in 1867 he came into the possession of property which brought him in an income of 1,700*l.* a year, and the wife continued to receive the allowance of 40*l.* a year, and did not allege in her petition for alimony pendente lite that her status had been in any way changed by the suit which her husband had instituted against her, the court refused alimony. *Ib.*

According to the practice of the ecclesiastical courts, the court is not at liberty to allot more than one moiety of the joint income to the wife, although she may have brought more than one moiety of the property into settlement. *Haigh* v. *Haigh*, 38 L. J., Mat. 37; L. R. 1 P. 709; 20 L. T. 281.

On an annual income of 8,000*l.*, the court allotted alimony at the rate of 1,000*l.* a year, pending the wife's suit for restitution of conjugal rights. *Edwards* v. *Edwards*, 17 L. T. 584.

A husband's income must be estimated at the amount of the previous year, and not by an average of years. *Kelly* v. *Kelly*, 1 Spinks, 412.

Where a husband had, under a deed of separation, allowed his wife a certain sum, and had ceased to pay it after the date on which he alleged that he had obtained evidence of her adultery, the judged ordinary, on the wife's petition for alimony pendente lite, directed payment by way of alimony pendente lite to be

made at the same rate. *Weber* v. *Weber*, 1 Sw. & Tr. 219 ; 6 W. R. 867.

The institution of vexatious suits by a wife against her husband is a ground for allotting alimony pendente lite at less than the usual rate. *Hakewill* v. *Hakewill*, 30 L. J., Mat. 254.

Allowable Deductions.]—A husband may deduct from real property the expenses of ordinary current repairs, but not of extraordinary and permanent improvements, which ought to be charged on the corpus of the income. *Hayward* v. *Hayward*, 1 Sw. & Tr. 85 ; 28 L. J., Mat. 9 ; 6 W. R. 639.

The general rule in estimating a husband's income is, that he is not entitled to deduct sums paid by way of premium to maintain a policy of insurance on his life ; but where a policy was under settlement for the benefit of his wife and children after his death, and the premium was deducted and paid over to the office by his employers, the court allowed him to deduct the amount of such premium in estimating his income. *Forster* v. *Forster and Thomas*, 2 Sw. & Tr. 553 ; 31 L. J., Mat. 84 ; 6 L. T. 693 ; 10 W. R. 810.

If a husband has contracted to pay off a debt by annual instalments, the amount of each instalment may be deducted from his income. *Patterson* v. *Patterson, Curtis and Dore*, 33 L. J., Mat. 36.

—— **Payments made since Citation.**]—Payments made by the husband and wife since the service of the citation will be deducted from alimony pendente lite. *Crampton* v. *Crampton and Armstrong*, 32 L. J., Mat. 142.

—— **Wife's Adultery.**]—The adultery of the wife is no ground for allotting less than the usual amount of alimony pendente lite, and the averment of such adultery in the answer is irrelevant. *Ib.*

—— **Maintaining Children by Former Marriage.**]—The circumstance that a husband has to maintain several children, the issue of a former marriage, is no ground for allotting less than one-fifth of his income as alimony pendente lite. *Hill* v. *Hill*, 33 L. J., Mat. 104 ; 10 Jur. (N.S.) 371.

Under ordinary circumstances, the expense of educating and maintaining children by a previous marriage does not form a legitimate deduction from a husband's income in allotting alimony pendente lite. *Grafton* v. *Grafton*, 27 L. T. 768 ; 21 W. R. 292.

On a wife's motion for allotment of alimony pendente lite, the husband stated that he had two children by a former marriage, and asked that 200*l.* for their cost of maintenance should be deducted from his annual income of 892*l.* before calculating the amount of alimony. The court refused to allow any deduction, but intimated there might be circumstances, as, for instance, a very large family by a former marriage, in which it might be assented to. *Ib.*

—— **Pension Granted to Wife.**]—In estimating the amount of alimony to be allowed to a wife after a separation, on the ground of cruelty, the husband is not entitled to a deduction out of what would otherwise be payable by him out of his income, in respect of money left by wills since the marriage to his wife's separate use, nor in respect of his wife's salary as a lady-in-waiting to the queen ; but he is entitled to such a deduction in respect of a pension from the crown granted to his wife. *Westmeath* (*Marquis*) v. *Westmeath* (*Marchioness*), 3 Knapp, 42—P. C.

Property to be Considered.]—All the valuable property of the husband will be taken into account in alloting alimony, although he may derive no income from it. *Crampton* v. *Crampton and Armstrong*, 32 L. J., Mat. 142.

Therefore, the value of shares in a company, although no dividend is payable on them, and the annual value of houses occupied by the husband or by others rent free, should be stated in an answer. *Ib.*

The court will not look minutely into the figures when the income to be dealt with is of large amount. *Edwards* v. *Edwards*, 17 L. T. 584.

—— **Inspection of Ledgers.**]—A registrar has power under r. 191 of the Divorce Court Rules, in the course of a proceeding for alimony pendente lite, to order the inspection of a ledger relating to the partnership accounts of the respondent and his partners. *Carew* v. *Carew*, 61 L. J., P. 24 ; [1891] P. 360 ; 65 L. T. 167. *See* cols. 839, 840.

—— **Voluntary Allowances to Husband.**]—A wife cannot include in her husband's income liable to alimony any purely voluntary allowances made to him ; though possibly there might be circumstances under which the wife might be entitled to alimony out of income to which the husband might have no strict legal right. *Haviland* v. *Haviland*, 3 Sw. & Tr. 114 ; 32 L. J., Mat. 67 ; 9 Jur. (N.S.) 208 ; 7 L. T. 757 ; 11 W. R. 550. But see *Bonsor* v. *Bonsor*, 66 L. J., P. 35 ; [1897] P. 77 ; 76 L. T. 168 ; 25 W. R. 304.

Although a husband's income consists only of a voluntary allowance from his father, yet the court will order him to make his wife some allowance, and will stay his suit until he has undertaken to do so. *Moss* v. *Moss and Bush*, 15 W. R. 532.

Decrease or Increase of Faculties—Of Husband.]—In April, 1857, in a suit for nullity of marriage by a husband against his wife, alimony pendente lite was agreed upon at 300*l.* per annum, and confirmed by an order of the court. On an application for a reduction of such rate of alimony, on the husband's affidavit that his income in 1857 was 1,200*l.* and now only 949*l.*, but not explaining how such reduction had been caused, nor stating when or how a sum of 10,000*l.* had been spent, the court refused to interfere. *Shirley* v. *Wardropp*, 1 Sw. & Tr. 317.

—— **Of Wife.**]—In a suit followed by a decree for separation for divorce à mensâ et thoro, by a wife against her husband, a sum had been allotted as alimony by consent. Eight years afterwards her father died, and left her, by will, a small yearly income ; the husband thereupon applied for a reduction of the alimony :—Held, that he was not entitled thereto. *Saunders* v. *Saunders*, 1 Sw. & Tr. 72 ; 4 Jur. (N.S.) 147 ; 6 W. R. 328.

Separation Deed—Agreement by Wife not to claim more than £50.]—In a separation deed, the husband covenanted with the trustee to allow to his wife 50*l.* a year for her support, he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf

that she would not in any way endeavour to compel the husband again to live with her, or to allow her "any further or greater or other support, maintenance, or alimony" than the annuity of 50*l.* :—Held, that in the absence of any act showing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, the court would not, upon interlocutory motion, restrain her from proceeding in the Divorce Court to obtain an allowance for alimony, as incident to her petition for a judicial separation on the ground of cruelty, but the court put her under an undertaking to deal with the alimony as the court should direct. *Williams* v. *Baily*, L. R. 2 Eq. 731.

c. Practice to Obtain.

See Divorce Rules, 1865, rr. 81—94 ; Rr. 1875, rr. 189—192.

Petition and Appearance.]—Semble, that the court has no power to allot alimony pendente lite in a suit in which the husband has not appeared. *Deane* v. *Deane*, 28 L. J., Mat. 23.

Where a husband has appeared to the wife's citation in a suit for judicial separation, the court will entertain an application for alimony pendente lite. Secus, where no appearance has been given by the husband. *Tomkins* v. *Tomkins*, 1 Sw. & Tr. 163.

Where a husband, a respondent, has not entered an appearance, alimony pendente lite by consent will not be allotted. *Clarke* v. *Clarke*, 31 L. J., Mat. 165.

Filing Answer and Appearance.]—The husband shall, within eight days after the filing and delivery of a petition for alimony, file his answer thereto upon oath. R. 84 (1865).

The husband, being respondent in the cause, must enter an appearance before he can file an answer to a petition for alimony. R. 85.

Where before these rules a husband appeared in the suit, but filed no answer to the wife's petition for alimony pendente lite, the court made an order that he should file one within a specified time, in order that if disobeyed he might be proceeded against for contempt. *Roberts* v. *Roberts*, 29 L. J., Mat. 158.

Since these rules, under such circumstances the wife may, after notice, examine the witnesses in support of her petition for alimony. *Ib.*

Answer.]—If an answer alleges that property of which the husband is owner is mortgaged, it should state the date of the mortgage, the name of the mortgagee, and the amount of the mortgage deed. *Crampton* v. *Crampton and Armstrong*, 32 L. J., Mat. 142.

—— **Property and Income must be Set out.**]—Where a petition alleges that the husband has a "net annual income of," &c., he must in his answer state the amount of his gross income, and specify any deductions claimed. *Nokes* v. *Nokes*, 3 Sw. & Tr. 529 ; 33 L. J., Mat. 24 ; 12 W. R. 443.

It is not sufficient if he states merely the amount of his net annual income. *Ib.*

In stating the income derived from land, the answer should state the gross rental, and specify the outgoings. *Ib.*

An allegation "to the best of my judgment I value my stock-in-trade at," &c., is sufficient. *Ib.*

But it is not necessary to specify the value of the husband's stock-in-trade. Such an allegation is irrelevant. *Hick* v. *Hick and Kitchin*, 12 W. R. 444, n.

The answer should state what the husband's income has been during the three years prior to the commencement of the suit. It may, however, add to this a statement of any facts from which the court may draw a conclusion as to his present income. *Williams* v. *Williams*, 36 L. J., Mat. 39 ; L. R. 1 P. 370 ; 15 L. T. 249 ; 15 W. R. 288.

—— **Averment that Wife is Living with Co-Respondent.**]—An averment in an answer to a petition for alimony pendente lite that she is living with the co-respondent is immaterial, and need not be noticed by her ; but, otherwise, where the allegation is that she is supported by him. *Madan* v. *Madan and De Thoren*, 37 L. J., Mat. 10 ; 17 L. T. 326 ; 16 W. R. 211.

A wife is not entitled to alimony whilst she is living with the co-respondent as his wife and is supported by him. *Holt* v. *Holt and Davis*, 38 L. J., P. 33 ; L. R. 1 P. 610 ; 19 L. T. 662.

—— **Husband Failing to File.**]—A husband who has not filed an answer on oath to a petition for alimony pendente lite, cannot cross-examine or contradict the evidence of witnesses produced in support of the petition, either on a motion for an allotment of alimony pendente lite, or on the hearing of a cause as to an allotment of permanent alimony. *Hicks* v. *Hicks*, Ir. R. 9 Eq. 175.

A wife filed a petition for alimony, to which the husband did not answer, and the court made a peremptory order upon him to file an answer to the petition for alimony within a week. *Snowdon* v. *Snowdon*, 40 L. J., Mat. 29 ; L. R. 2 P. 200 ; 24 L. T. 763 ; 18 W. R. 760.

Where a husband filed no answer, the court, in order to save expense, allowed the wife to prove the husband's faculties by affidavits ; but it required that he should have notice of the filing of the affidavits served on him, and also of the motion to ask for alimony upon them. *Mumby* v. *Mumby*, 38 L. J., Mat. 72 ; L. R. 1 P. 701 ; 21 L. T. 155 ; 17 W. R. 1115.

—— **Reforming Answer.**]—Where an answer is ambiguous (e.g. where it does not appear what are the deductions made by the husband from his gross income), the court will order it to be reformed, by inserting an explanation of the ambiguous statements. *Hopper* v. *Hopper*, 28 L. J., Mat. 26.

Amendment of Petition.]—A wife filed a petition for alimony, in which she set forth certain property which she asserted she held to her separate use, and the respondent answered the petition on oath. The court subsequently permitted the wife to amend her petition, by adding an allegation of further income of the husband, and a denial of a greater part of the income which she had attributed to herself in her petition. *Harker* v. *Harker*, 37 L. J., Mat. 11.

Reference to Registrar to Ascertain Amount.]—When the accounts of the husband's income, in his answer to a petition for alimony, are complicated, the court may refer it to the registrar to

ascertain what is the amount of income admitted by the answer. *Smith* v. *Smith*, 30 L. J., Mat. 207.

Examining Husband to Support Petition.]—A wife who has presented a petition for alimony, has a right to subpœna her husband for the purpose of examining him as a witness in support of her petition. *Anderson* v. *Anderson*, 37 L. J., Mat. 64; L. R. 1 P. 512; 18 L. T. 371.

A wife, when she is entitled to examine witnesses in support of her petition for alimony, may subpœna her husband as a witness. *Jennings* v. *Jennings*, 35 L. J., Mat. 12; L. R. 1 P. 35.

A husband who had filed no answer to his wife's petition for alimony was subpœnaed by her to attend at the hearing, and to be examined in support of the petition. He did not answer to his subpœna, and on the service being proved, the court made an order that he should attend on the next motion day, and that an attachment should issue in the event of his non-attendance. *Ib.*

Where the answer of a husband to a petition for alimony pendente lite is not merely insufficiently explicit, but clearly evasive, he will be ordered to attend the hearing, that he may be examined in open court. *Senior* v. *Senior*, 15 W. R. 91.

The court will only permit the husband to be cross-examined on a petition for alimony, when his answer is evasive on the face of it. *Parker* v. *Parker*, 26 L. T. 108.

Where the answer of the husband is not sufficiently explicit, he will be ordered to give a further and fuller answer, but he will not be ordered to attend the hearing that he may be examined in open court, unless his answer is evasive. *Clark* v. *Clark*, 31 L. J., Mat. 32.

Cross-Examination of Husband — Power of Court to order Attendance.]—The court has no power to order that the husband should attend at the hearing of a petition for alimony pendente lite that he may be cross-examined as to the statements in his answer as to the amount of his income. If the answer is ambiguous the court will direct it to be reformed by inserting an explanation. *Hopper* v. *Hopper*, 28 L. J., P. 26.

—— By Wife—Reading Evidence Beforehand — Evidence of Proceedings before Registrar — Rules 86 and 191 of Divorce Court Rules.]—On a petition for alimony pendente lite the wife has not an absolute right to cross-examine her husband. On an application for alimony pendente lite the registrar is entitled to read the evidence beforehand instead of doing so in the presence of the parties. Affidavits ought not to be filed to show what took place before the registrar; if the court desires information on this point it will consult the registrar himself. Where the husband's income is large, the practice is not to allot a fixed proportion of it as alimony pendente lite, but to give the wife an income suitable to the position which she has hitherto occupied; and the amount is subject to the discretion of the registrar. *Sykes* v. *Sykes*, 66 L. J., P. 162; [1897] P. 306; 77 L. T. 150—C. A.

Husband's Books — Inspection of.]—On a motion by a wife that her husband be ordered to give a further and fuller answer to her petition for alimony pendente lite, the husband stated his inability to do so. The court ordered that his books should be submitted for inspection to the wife and such other person as might be agreed upon between the parties or named by the registrar. *Newton* v. *Newton and Allen*, 27 L. T. 768; 21 W. R. 292.

Partnership Books of Husband—Refusal to Produce.]—In a petition by the wife for dissolution of the marriage, she applied for an allotment of alimony pending suit. The respondent in answer filed a balance-sheet, showing a loss on his whole business for the year, and the registrar made an order on the respondent and his partner to produce their account books. They accordingly produced a ledger for the last year, but refused to allow it to be inspected:—Held, that the registrar had power under Rule 191 of the Divorce Court Rules to require an inspection of the ledger, and issued a writ of attachment to enforce compliance with his order. *Carew* v. *Carew*, 61 L. J., P. 24; [1891] P. 360; 65 L. T. 167.

Fraudulent Conveyance — Setting Aside.]—Pending a suit which was instituted by a wife against her husband for a divorce, the husband conveyed his freehold and personal estates to trustees, upon trust to pay out of the income certain mortgages affecting the real estates, and certain scheduled bond creditors, and an annuity to himself, another annuity to his sons, and an annuity of 100*l.* to his wife, if she withdrew the proceedings which were then pending against him, and should not institute any others. The wife prosecuted the suit, and succeeded both in the courts below, and ultimately before the Judicial Committee on appeal. A sentence of divorce was pronounced, and a permanent alimony ordered for her support. Writs of sequestration were issued to enforce payment, not only of that, but of arrears of interim alimony, which had been allowed the wife, and of her costs of suit. The sequestrators being unable by reason of the deed of conveyance to seize the property of the husband, the wife filed her bill to set aside the deed as fraudulent and void as against her. The court declared the deed of conveyance fraudulent and void, and affirmed the order of the court below so far as it gave the plaintiff relief for arrears of alimony and the costs of the several proceedings, but reserved the question as to whether the decree was right in giving the plaintiff a charge on the estates for further alimony. *Blenkinsopp* v. *Blenkinsopp*, 1 De G. M. & G. 495; 21 L. J., Ch. 401; 16 Jur. 787.

Examination of Witnesses.] — In a suit by a wife for judicial separation on the ground of desertion, the court having allowed substituted service of the petition, and petition for alimony pendente lite, and the husband not having appeared, the court allowed the wife to examine witnesses in support of her petition for alimony, without giving the usual four days' notice. *Robinson* v. *Robinson*, 41 L. J., Mat. 40; 26 L. T. 108; 20 W. R. 260.

In a petition for alimony pendente lite, the court ordered a commission to issue to examine witnesses in Scotland, as to the husband's faculties, but it declined to make an order on him to give security for the wife's costs for the commission. *Wilson* v. *Wilson and Howell*, 26 L. T. 107.

Semble, that a wife, by applying to the court for an allotment of alimony, upon the husband's answer is not precluded from afterwards examining

witnesses in support of her petition. *Capstick* v. *Capstick, Furness and Winder*, 33 L. J., Mat. 105.

Entry in Court Book.]—An original order for payment of alimony is entered in the court book, and an office copy of it is delivered to the party in whose favour it is made. *Parr* v. *Parr and White*, 32 L. J., Mat. 91 ; 11 W. R. 550.

Service of Order.]—The proper mode of effecting service of such an order is to leave a copy, and at the same time to produce the original office copy. *Ib.*

Registering.]—A decree, requiring a husband to pay alimony to his wife, was registered in the common pleas. On an application to have the entry expunged, the court of common pleas refused, leaving the husband to his remedy, if any, in the court of chancery. *Holden, Ex parte*, 13 C. B. (N.S.) 641 ; 32 L. J., C. P. 111 ; 9 Jur. (N.S.) 948 ; 7 L. T. 791 ; 11 W. R. 437.

Costs of Obtaining.]—A co-respondent when condemned in costs is liable for the costs of the proceedings to obtain alimony. *Gill* v. *Gill and Hogg*, 3 Sw. & Tr. 559 ; 33 L. J., Mat. 43 ; 10 L. T. 137 ; 12 W. R. 808.

—— **To Whom Payable.**]—*See* 20 & 21 Vict. c. 85, s. 24.

—— **When to Wife's Solicitor.**]—An order that alimony pendente lite be paid to a wife will, on her application, be varied by making the alimony payable to the wife or to her solicitor, but she must bear the costs of the application. *Kelly* v. *Kelly*, 4 Sw. & Tr. 227 ; 32 L. J., Mat. 181 ; 11 W. R. 958.

Where a wife was undergoing a sentence of imprisonment, the court refused so to vary the order without an affidavit by her that she wished the alteration to be made. *Ib.*

When alimony is, by the terms of an order allotting it, made payable to the wife, the husband is not bound, at her request, to pay it to her solicitor. The court allowed such an order to be amended by making alimony payable to the wife's solicitor, but refused to allow her the costs of the motion. *Parr* v. *Parr and White*, 32 L. J., Mat. 90 ; 11 W. R. 257.

An order for the payment of alimony to the wife's solicitor or proctor will not be made except upon the written application or with authority of the wife. *Margetson* v. *Margetson*, 35 L. J., Mat. 80. S. P., *Brown* v. *Brown*, 4 Sw. & Tr. 144 ; 34 L. J., Mat. 102.

When alimony is so paid the solicitor is not entitled to charge for receiving it. *Ib.*

Enforcing Payment.] — Where there was a balance due from the petitioner (the husband) for alimony and costs, and there had been an arrangement between the parties, that the balance should be paid by monthly instalments of 20*l.*, and that an attachment should be granted against him to remain in the registry until he made default in payment of one of the instalments, the court dismissed the petition, and decreed an attachment on the terms arranged. *Bremner* v. *Bremner and Brett*, 3 Sw. & Tr. 378 ; 33 L. J., Mat. 202 ; 10 L. T. 99 ; 12 W. R. 444.

The dismissal of a petition does not prevent the court from enforcing, by attachment, the payment of alimony and costs previously ordered to be paid by the petitioner. *Ib.*

An attachment for non-payment of alimony was granted, although the order did not state to whom payment was to be made, where it appeared that the wife and her solicitor had at the same time demanded payment of the husband, and that he had paid neither. *Ladmore* v. *Ladmore*, 32 L. J., Mat. 157.

—— **Charge on Land.**] — Section 25 of the 20 & 21 Vict. c. 77, enacting that the court shall have the like powers for enforcing its orders as are vested in the court of chancery in relation to suits depending therein, does not constitute an order of the probate court for payment of money a charge on land within 1 & 2 Vict. c. 110, s. 13. *Pratt* v. *Bull*, 1 De G. J. & S. 141 ; 32 L. J., Ch. 144 ; 9 Jur. (N.S.) 239 ; 7 L. T. 702 ; 11 W. R. 295 ; 1 N. R. 298.

—— **When Husband Cannot be Found.**]—Substituted service of orders to pay wife's costs and alimony pendente lite will be allowed by leaving them at the last known residence of the husband, at his solicitor's office, and at the address given in the appearance-book. *Nuttall* v. *Nuttall*, 31 L. J., Mat. 164.

—— **Motion for Attachment—Affidavit of Petitioner.**]—An affidavit of non-payment of arrears of alimony to the person to whom they are ordered to be paid, cannot be read on a motion for an attachment if filed subsequently to the notice of motion. *Symons* v. *Symons and Pike*, 30 L. J., Mat. 215. *See* Divorce Rules, 1865, rr. 110—112.

—— **When Refused.**]—The court refused to allow an attachment to issue against a common workman dependent upon his weekly earnings of 24*s.* a week, and whose sole property consisted of furniture of the value of 4*l.*, for non-payment of 2*l.* 4*s.* arrears of alimony pendente lite, but gave the wife leave to sue out a fi. fa. for the sum. *Ward* v. *Ward*, 1 Sw. & Tr. 484 ; 29 L. J., Mat. 17.

—— **On Bankruptcy of Husband.**]—A wife cannot prove in bankruptcy against her husband's estate for arrears of alimony. *Rice, Ex parte*, 10 L. T. 103. See *Linton, In re ; Hawkins, In re*, and *Kerr* v. *Kerr*, cols. 859, 860.

An order of discharge in bankruptcy protects a husband from any proceeding to enforce payment of alimony in respect of which he has been attached before the order of discharge was granted ; and a rule to show cause why sequestration should not issue against his estate will therefore be discharged. *Dickens* v. *Dickens*, 2 Sw. & Tr. 645 ; 31 L. J., Mat. 183 ; 7 L. T. 395.

—— **By Filing Bill in Equity.**]—A bill in equity lies for arrears of alimony after the death of the wife. *Stones* v. *Cooke*, 3 L. J., Ch. 225.

—— **Fund in Court—Solicitor's Lien.**]—On non-payment of certain sums due for alimony and costs, a writ of sequestration issued against the husband's property, and an order was made on K. to pay into court a sum of money awarded in an action to be paid by K. to the husband. On motion on behalf of the wife to order such sum to be paid out in part satisfaction of her attorney's taxed costs and her own alimony, the court

refused to make such order, the husband's attorneys in the action having satisfied the court that they had a lien for costs in that cause exceeding the sum so paid into court. *Munt* v. *Munt*, 2 Sw. & Tr. 661; 31 L. J., P. 134; 7 L. T. 438. See also *Harrison* v. *Harrison*, col. 857. *And see* col. 858.

Ne exeat regno against Husband.]—Ne exeat regno will be granted in case of alimony decreed by spiritual court. *Pearne* v. *Lisle*, Ambl. 76.

The writ of ne exeat regno does not issue for alimony after a decree in the ecclesiastical court, pending an appeal from that decree. *Street* v. *Street*, Turn. & R. 322.

The writ of ne exeat regno is in the nature of equitable bail: therefore in the case of alimony marked only for the arrears actually due, and not carried further by analogy to the case of a judge holding to bail for uncertain damages upon a personal tort. *Haffey* v. *Haffey*, 14 Ves. 261.

Ne exeat issues in cases of alimony, but only for sums actually due, and costs. *Shaftoe* v. *Shaftoe*, 7 Ves. 171. S. P., *Dawson* v. *Dawson*, 173; *Oldham* v. *Oldham*, id. 410.

Upon a suit in ecclesiastical court by wife for alimony, quære whether before the decree court will not grant writ of ne exeat regno against husband. *Coglar* v. *Coglar*, 1 Ves. J. 94.

Ne exeat granted to prevent husband from avoiding payment of alimony. *Whitmore, Ex parte*, Dick. 143.

Semble, the court will not interfere, either to compel or to restrain the payment of alimony, as such, except so far as to grant a writ of ne exeat against the husband. *Vandergucht* v. *De Blaquiere*, 8 Sim. 315; 7 L. J., Ch. 270; 2 Jur. 738. *S. C.* on appeal, 5 Myl. & C. 229; 3 Jur. 1116. *And see* col. 858.

d. Commencement and Duration of Payment.

When Commencing.]—Alimony pendente lite is payable from the date of the service, not of the return, of the citation. *Nicholson* v. *Nicholson*, 31 L. J., Mat. 165.

The respondent cohabited with and was supported by the co-respondent for some time after the filing of the petition and the service of the citation. In allotting alimony pendente lite, the court ordered that the alimony should run from the date at which the respondent ceased to cohabit with the co-respondent, instead of from the service of the citation. *Holt* v. *Holt and Davis*, 38 L. J., Mat. 33; L. R. 1 P. 610; 19 L. T. 662.

A husband is liable for reasonable expenses incurred by his wife till the decree for alimony is made. Where several months had elapsed from the return of the citation, 50*l.* had been paid on account, by order of the court, an alimony, pendente lite, of 120*l.* per annum, was decreed payable from the date of the decree. *Hayward* v. *Hayward*, 1 Sw. & Tr. 85; 28 L. J., Mat. 9; 6 W. R. 639.

A wife is entitled to an allotment of alimony pendente lite at any time before the hearing, although evidence has been taken de bene esse in support of the petition which proves that she has been guilty of adultery. *Phillips* v. *Phillips and Medlyn*, 4 Sw. & Tr. 129; 34 L. J., Mat. 107.

Duration of.]—In a suit for dissolution of marriage on the ground of the wife's adultery, when the case is tried by jury, alimony pendente lite ceases when the time for moving for a new trial has elapsed. *Madan* v. *Madan and De Thoren*, 19 L. T. 612; 17 W. R. 265.

A decree nisi for dissolution of marriage, if not appealed from, puts an end to the lis between the parties, and alimony pendente lite will not therefore be due after the date of the decree nisi; but where a husband moved to have a decree made absolute, he being resident in India, and it appeared that a sum of money was due to the wife on account of alimony pendente lite, the court refused to make the decree absolute. *Latham* v. *Latham and Gethin*, 2 Sw. & Tr. 298; 30 L. J., Mat. 163; 7 Jur. (N.S.) 219; 4 L. T. 308; 9 W. R. 680. But see *Ellis* v. *Ellis*, ante, col. 832.

Semble, that alimony pendente lite in a suit by a husband for dissolution of marriage continues payable after a decree nisi, and until it is made absolute. *Nicholson* v. *Nicholson and Ratcliffe*, 32 L. J., Mat. 127; 9 L. T. 118.

Suspension of.]—The trial of a suit by the wife for judicial separation being postponed at her instance, the court directed the payment of the alimony pendente lite which had been allotted to her to be suspended from the date of the postponement until the cause was tried. *Rogers* v. *Rogers*, 34 L. J., Mat. 87.

Adultery of Wife.]—A wife obtained a decree nisi for the dissolution of her marriage by reason of her husband's adultery and cruelty, with costs. Subsequently the queen's proctor intervened, and proved that she had been herself guilty of adultery, and the petition was dismissed. Alimony had been allotted pendente lite:—Held, that the wife was entitled to be paid by the husband alimony up to the day on which her adultery had been proved, and costs, only to the extent of the money paid into the registry to meet the expenses of the suit. *Whitmore* v. *Whitmore*, 35 L. J., Mat. 39; L. R. 1 P. 96; 13 L. T. 723.

Alimony pendente lite ceases when a wife's adultery is conclusively proved; that is, on the pronouncing the decree nisi in cases heard before the court itself, or in cases heard before a jury, when the time has elapsed for moving for a new trial before the court; and if that is refused by the court, when the further time for appealing from such refusal has elapsed. *Wells* v. *Wells and Hudson*, 3 Sw. & Tr. 542; 33 L. J., Mat. 151; 10 Jur. (N.S.) 755; 10 L. T. 696.

Refusal of Court to Rescind Order.]—The court refused to rescind an order for alimony pendente lite on an allegation, supported by affidavits, that the wife was maintaining herself by prostitution; the wife in her affidavit denying the truth of the allegation, and the charge of prostitution being the main question in the suits. *Patch* v. *Patch*, 38 L. J., Mat. 27; 19 L. T. 662; 17 W. R. 265.

ii. *Permanent Alimony.*

a. Generally.

Not Chargeable by Wife with Debts.]—Permanent alimony is a different thing from, and not analogous to, the wife's separate property; is variable in amount at the discretion of the judge of the ecclesiastical court, and is not chargeable by the wife with payment of her

debts. *Vandergucht* v. *De Blaquiere*, 8 Sim. 315; 7 L. J., Ch. 270; 2 Jur. 738. But see *S. C.* on appeal, 5 Myl. & C. 229; 3 Jur. 1116, where the Lord Chancellor reversed the order of the Vice-Chancellor on the ground that part of the sum charged was not alimony.

A married woman divorced from her husband, and entitled to alimony under the sentence of the ecclesiastical court, accepted a bill of exchange for articles of dress supplied to her by the drawer, and made payable at her bankers, to whom her alimony was paid:—Held, that she did not thereby charge her alimony. *Ib.*

Not Provable in Husband's Bankruptcy.]—A liability to pay alimony is not a debt provable in bankruptcy. *Linton* v. *Linton*, 54 L. J., Q. B. 529; 15 Q. B. D. 239; 52 L. T. 782; 33 W. R. 714; 49 J. P. 597.

Nor are arrears. *Hawkins, In re, Hawkins, Ex parte*, [1894] 1 Q. B. 25; 10 R. 29; 69 L. T. 769; 42 W. R. 202. *Kerr* v. *Kerr*, 66 L. J., Q. B. 838; [1897] 2 Q. B. 439; 77 L. T. 29; 46 W. R. 46. *See* cols. 859, 860.

Previous Agreement.]—In deciding questions of alimony on a dissolution of marriage the attention of the court is not to be confined to the terms of a previous agreement for separation, where the agreement contains no covenant not to sue and the circumstances have changed, but all the facts must be considered. An agreement between parents cannot deprive the court of jurisdiction to give maintenance to children. *Bishop* v. *Bishop*, 66 L. J., P. 69; [1897] P. 138; 76 L. T. 409; 45 W. R. 567.

A wife petitioned for a dissolution of her marriage. Before the case came on for hearing she withdrew her petition and compromised the suit, her husband agreeing to pay her the sum of 130*l.* per annum during their joint lives for the maintenance of herself and the only child of the marriage. The agreement entered into between the parties contained the following passage:—"This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved." Subsequently the husband was guilty of adultery and also of statutory desertion, and the marriage was dissolved on those grounds:—Held, that the wife was not precluded by the existence of the above agreement from filing her petition for permanent maintenance in the usual way. *Ib.*

Damages Obtained against Co-Respondent.]—Although the court has authority to include, in its decree for a dissolution of marriage, an order upon the husband to make provision for the future maintenance of the wife, it will only do so under very special circumstances. It will be more ready to settle upon her whatsoever sum of money may be recovered by way of damages against the co-respondent. *Latham* v. *Latham and Gethin*, 30 L. J., Mat. 43; 7 Jur. (N.S.) 218.

Assignment of Allowance out of Lunatic's Estate.]—On a decree for judicial separation an order was made for payment of 60*l.* a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in lunacy and chancery the dividends of a sum of stock to which he was entitled in a chancery suit were ordered to be carried to his account in the lunacy, and 60*l.* a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in lunacy, and in the suit, to have the annuity paid to her:—Held, that the petition must be refused, on the ground that whether the annuity was considered as alimony or as an allowance made to the wife by the court in lunacy, it was not assignable. *Robinson, In re*, 53 L. J., Ch. 986; 27 Ch. D. 160; 51 L. T. 737; 33 W. R. 17—C. A.

Guilty Wife—Judicial Separation.]—The court has jurisdiction to order permanent alimony to be paid to the guilty wife after a decree for judicial separation in a suit instituted by the husband. *Gooden* v. *Gooden*, [1892] P. 1; 65 L. T. 542; 40 W. R. 49—C. A.

Release of Past and Future Payments—Consideration.]—A promise to release arrears and future payments of alimony is not supported by a consideration of a sum less than the arrears. *Cumber* v. *Wane* (1 Str. 426) and *Foakes* v. *Beer* (9 App. Cas. 605) followed. *Underwood* v. *Underwood*, 63 L. J., P. 109; [1894] P. 204; 6 R. 604; 70 L. T. 390; 42 W. R. 372—C. A.

Inquiry as to Husband's Means on Application for Alimony pendente lite.]—When alimony pendente lite has once been awarded, no evidence can be given on any subsequent application for permanent alimony in the same suit except for the purpose of showing that an alteration has taken place in the husband's means *Bonsor* v. *Bonsor*, 66 L. J., P. 35; [1897] P. 77; 76 L. T. 168; 45 W. R. 304.

b. Amount Payable.

General Principles.]—The amount of permanent alimony does not vary with the amount of marital delinquency. *Hooper* v. *Hooper*, 30 L. J., P. 49.

In the absence of proof that a husband's income has altered, permanent alimony will be awarded upon the income upon which alimony pendente lite was allotted, and neither party will be allowed to dispute the correctness of the estimate then taken. *Franks* v. *Franks*, 31 L. J., Mat. 25.

Although the wife may since have discovered that his income at that time was greater. *Greenwood* v. *Greenwood*, 32 L. J., Mat. 136.

In allotting permanent alimony, the court will take into consideration the circumstance that the husband is obliged, in order to earn his income, to live in a more expensive place than his wife, and when that is the case, will not allow her the usual proportion of such income. *Lewis* v. *Lewis*, 35 L. J., Mat. 92; L. R. 1 P. 230; 14 L. T. 770; 14 W. R. 1023.

The court can order an annuity to be secured to the wife only on making the decree; the order, therefore, would be permanent, and incapable of being varied to meet the varying fortunes of the husband. *Rawlins* v. *Rawlins*, 4 Sw. & Tr. 158; 34 L. J., Mat. 147; 13 L. T. 212.

Where the husband's income was professional, and the wife was entitled to a sum of money in reversion, which was imminent, the court refused to make any order under 20 & 21 Vict. c. 85, s. 32. *Ib.*

The court ought also to consider the conduct of the parties. *Ib.* See also *Medley* v. *Medley*, col. 851.

In decreeing alimony the court is governed by the same rules as the ecclesiastical courts, and it will not therefore make an order for securing permanent alimony, which would have the effect of charging the husband's property with its payment, whatever alteration might take place in his circumstances at a future time. *Hyde* v. *Hyde*, 4 Sw. & Tr. 80; 34 L. J., Mat. 63; 12 L. T. 235; 13 W. R. 545.

A wife applied for permanent alimony on a decree for judicial separation by reason of cruelty. The husband stated on affidavit, that since the petition for alimony pendente lite an answer had been filed, he had parted with his business (which was the principal source of income) for a yearly payment of 300*l.* for seven years, and five per cent. on the value of warehouse, stock-in-trade, debts, &c. The court held that, in allotting alimony, the 300*l.* yearly must be taken as income, observing that, if the income really failed, the husband could apply for a reduction of alimony. *Moore* v. *Moore*, 3 Sw. & Tr. 606; 34 L. J., Mat. 146; 11 L. T. 459.

Where the only income of a husband was 60*l.* a year, derived from independent property, and he turned his wife out of doors, and his mistress was living with him, the court awarded a moiety of the income as permanent alimony. *Avila* v. *Avila*, 31 L. J., Mat. 176.

Where a husband's income was 1,650*l.*, alimony at the rate of 500*l.* per annum was ordered. *Willcocks* v. *Willcocks*, 32 L. J., Mat. 205.

Judicial Separation.]—A wife who has obtained a final decree of judicial separation in her favour, and has previously thereto filed her petition for alimony pending suit, on such decree being affirmed on appeal to the full court, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply to the judge ordinary by motion for an allotment of permanent alimony; provided that she shall, eight days at least before making such application, give notice thereof to the husband, or to his proctor, solicitor, or attorney. R. 91 (1865).

The eight days must be reckoned exclusively of the day on which the notice is given and of that on which the motion is made. *Robinson* v. *Robinson*, 30 L. J., Mat. 189.

When a husband obtains a judicial separation on the ground of the wife's cruelty, the court will require him to make a provision for her maintenance. *Pickard* v. *Pickard*, 3 Sw. & Tr. 523; 33 L. J., Mat. 158; 10 Jur. (N.S.) 830; 10 L. T. 789; 13 W. R. 188.

A judicial separation, on the ground of the wife's cruelty, will not be decreed, except on the condition that the husband makes some reasonable provision for her maintenance. The husband will not be required to give a bond with sureties to secure the payment of such provision. *Forth* v. *Forth*, 36 L. J., Mat. 122; 16 L. T. 574; 15 W. R. 1091.

The court is bound by the practice of the ecclesiastical courts in allotting permanent alimony after a decree of judicial separation. *Haigh* v. *Haigh*, 38 L. J., Mat. 37; L. R. 1 P. 709; 20 L. T. 281.

—— **Subsequent Decree nisi for Dissolution.**]—If permanent alimony has been allotted to a wife on her obtaining a decree of judicial separation, and the husband afterwards obtains a decree nisi for dissolution of marriage on the ground of her adultery, the court will not, before that decree has been made absolute, discharge the order for payment of alimony. *Stoate* v. *Stoate*, 30 L. J., Mat. 108.

Dissolution—Husband in Fault.]—The principles by which the court will be guided in exercising that discretion are, that a wife having by her husband's misconduct, been deprived of her position, she ought not to purchase redress at the cost of being left destitute; that it would be impolitic to give a wife any great pecuniary interest in obtaining a dissolution of the marriage tie; and that such provision should be payable only so long as the wife remains chaste and unmarried. *Fisher* v. *Fisher*, 2 Sw. & Tr. 410; 31 L. J., Mat. 1; 8 Jur. (N.S.) 103; 5 L. T. 364; 10 W. R. 122.

Basis of Calculation of Amount to be Secured.]—A decree absolute having been made for dissolution of a marriage on the ground of the husband's cruelty and adultery, and the custody of the children having been given to the wife, the proper basis of calculation of the sum to be secured by the husband for his wife's maintenance is the amount the husband could draw out of his business without his partner's consent, and not the amount of the husband's share of profits. *Hanbury* v. *Hanbury*, 63 L. J., P. 105; [1894] P. 315; 6 R. 591; 70 L. T. 569; 42 W. R. 434—C. A. Appeal compromised, [1895] A. C. 417; 11 R. 302; 72 L. T. 480—H. L. (E.)

—— **Deductions Allowable.**]—In estimating the amount of alimony to be allowed a wife after a separation, on the ground of cruelty, the husband is not entitled to a deduction out of what would otherwise be payable by him out of his income, in respect of money left by wills since the marriage to his wife's separate use, nor in respect of his wife's salary as a lady-in-waiting to the Queen: but he is entitled to such a deduction in respect of a pension from the crown granted to his wife. *Westmeath* v. *Westmeath*, 3 Knapp, 42—P. C.

—— **Debts of Wife.**]—A suit in the ecclesiastical court for separation was promoted by a wife against her husband. Alimony pendente lite was allotted, and when sentence was given in favour of the wife, permanent alimony was allotted. The alimony pendente lite had not been obtained without delay and compulsion, and permanent alimony had not been paid at all. The wife had incurred debts which the husband had been compelled to pay. He sought to deduct these amounts from the future payment of alimony:—Held, that he was not entitled so to do. *Harmer* v. *Harmer*, 3 Jur. (N.S.) 168; 5 W. R. 413.

—— **Income Tax.**]—When an allotment of permanent alimony has been made to a wife upon a calculation of the husband's income, in which calculation the income and property tax has been deducted, the husband is not allowed under the Income Tax Act (5 & 6 Vict. c. 35), ss. 102, 103, to deduct the tax from his payments of alimony to the wife. *Frankfort* v. *Frankfort*, 4 Notes of Cases, 280.

In payments on account of alimony, the party paying may deduct income tax. *Pemberton* v. *Pemberton*, 2 Notes of Cases, 17.

After a decree nisi for a dissolution of marriage at the petition of a husband, the wife filed a petition for permanent alimony, or for some payment in lieu thereof, setting forth the amount and sources of her husband's income. On motion on behalf of the husband, the court directed the petition for alimony to be struck off the file of the court, and refused to allow the costs to be taxed against the husband. *Winstone* v. *Winstone and Dyne*, 2 Sw. & Tr. 246; 30 L. J., Mat. 109; 3 L. T. 895. See also *Laxton* v. *Laxton*, 30 L. J., P. 208.

Examination of Husband.]—After a decree nisi for dissolution of marriage at the suit of a wife, the husband will not be ordered to attend in court that he may be examined on his answer to the petition for alimony pendente lite, with a view to getting an order that he secure a provision to the wife under 20 & 21 Vict. c. 85, s. 32. The wife may, however, examine witnesses to show the husband's means. *Mead* v. *Mead*, 31 L. J., Mat. 30.

Where an answer is filed to a petition for alimony pendente lite, but no such alimony is allotted, and the wife afterwards applies for permanent alimony, she will not be allowed to file a fresh petition, but, upon giving notice, may examine witnesses to contradict the statements in the husband's answer in the petition for alimony pendente lite. *Sykes* v. *Sykes*, 31 L. J., Mat. 38.

Application for.]—An application for permanent alimony should be made on motion. *Wallace* v. *Wallace*, 32 L. J., Mat. 34; 8 Jur. (N.S.) 1082.

Varying.]—The court, under 20 & 21 Vict. c. 85, s. 3, has jurisdiction to vary a decree of the ecclesiastical court allotting permanent alimony. *Harmar* v. *Harmar*, 32 L. J., Mat. 118; 8 L. T. 291; 11 W. R. 750.

Under 20 & 21 Vict. c. 85, s. 32, the court can order an annuity to be secured to a wife only on making a decree; the order, therefore, would be permanent and incapable of being varied to meet the varying fortunes of the husband. *Rawlins* v. *Rawlins*, 4 Sw. & Tr. 158; 34 L. J., Mat. 147; 13 L. T. 212.

The 29 & 30 Vict. c. 32, s. 1, empowers the court in every case, from time to time, to vary an order for permanent maintenance, and to order monthly payments, whatever the amount of the allowance. *Jardine* v. *Jardine*, 51 L. J., P. 4; 6 P. D. 213; 30 W. R. 91—C. A.

—— **For Decrease of Alimony.**]—Where a husband's income has diminished since allotment of alimony pendente lite, he may, upon the application for permanent alimony, bring that fact before the court by affidavit. *Davies* v. *Davies*, 32 L. J., Mat. 152.

It is not necessary that he should file a petition alleging such a diminution. *Ib.*

—— **For Increase of Alimony.**]—If upon an application for permanent alimony a wife desires to show that the husband's income has increased or that her own has diminished since alimony pendente lite was allotted, her proper course is to file a petition alleging such increase or diminution. *Fisk* v. *Fisk*, 31 L. J., Mat. 60.

Notice of an application for an increase of permanent alimony should be given to the husband. Notice to the attorney who conducted the suit for him is insufficient. *Louis* v. *Louis*, 41 L. J., Mat. 18; 25 L. T. 856; 20 W. R. 215.

—— **Covenant not to sue for.**]—A covenant not to sue for increased alimony in the event of a divorce grounded on future misconduct will not be implied in an agreement for separation. *Gandy* v. *Gandy*, infra (51 L. J., P. 41; 7 P. D. 77, 168; 54 L. J., Ch. 1154; 30 Ch. D. 57) explained. *Jardine* v. *Jardine*, supra.

Order—Form of Decree.]—The order for permanent alimony under 20 & 21 Vict. c. 85, s. 32, must be embodied in the decree dissolving a marriage, if such a decree has been pronounced and registered. *Vicars* v. *Vicars*, 29 L. J., Mat. 20.

Any such decree in s. 32 of 20 & 21 Vict. c. 85, taken in connection with 23 & 24 Vict. c. 144, s. 7, must be read as the decree (absolute) which finally dissolves the marriage; and therefore the order securing permanent alimony to the wife under the provisions of the section need not form part of the decree nisi. *Charles* v. *Charles*, 36 L. J., Mat. 17; L. R. 1 P. 260; 15 L. T. 416.

An order for permanent provision for a divorced wife, made under 20 & 21 Vict. c. 85, s. 32, must form part of the decree dissolving the marriage. In making such an order the judge ordinary exercises a power which could only have been exercised by the full court before the 23 & 24 Vict. c. 144, and the appeal from the order lies, not to the full court, but to the House of Lords. *Sidney* v. *Sidney*, 35 L. J., P. 46; L. R. 1 P. 78; 13 L. T. 682; 14 W. R. 317.

—— **Husband out of Jurisdiction.**]—Where a husband is out of the jurisdiction of the court, the only power which the court has, in case of dissolution of marriage, to make provision for the wife, is to make an order on the husband to secure a sum of money to her. *Robotham* v. *Robotham*, 1 Sw. & Tr. 190; 27 L. J., Mat. 61; 6 W. R. 735.

—— **Payment of Arrears.**]—The court, contrary to the usual practice, made an order for the payment of arrears of alimony, specifying the amount, where it appeared probable that the husband, who was an officer serving in India, would be compelled by the India Office to obey such an order. *Louis* v. *Louis*, 41 L. J., Mat. 19; 25 L. T. 856; 20 W. R. 215.

Suspension of Decree until Secured.]—A husband sued for a judicial separation on the ground of his wife's cruelty, and established his case. Since the cessation of cohabitation the husband had made his wife an allowance, and at the hearing said he would continue it. The court intimated that the allowance should be secured to the wife by deed, and, on the husband objecting, suspended the decree until its suggestion should be carried out. *Phillip* v. *Phillip*, 21 W. R. 392.

Mode of Serving Order.]—Service of an order for the payment of alimony is effected by showing to the party to be served an office copy of the order, and by leaving with him a copy of it. *Parr* v. *Parr and White*, 4 Sw. & Tr. 229.

Enforcing, as to.]—*See* col. 858.

Maintenance of Children.]—A wife had an

income from property settled on her by the husband of 196*l.* a year. The husband had an income of 367*l.* a year. There were three children of the marriage who were in the custody of the wife. The court, in allotting permanent alimony, ordered that in addition to the 196*l.* a year which the wife enjoyed under the settlement, the husband should allow her 30*l.* a year for the maintenance of each of the children. *Todd* v. *Todd*, 42 L. J., Mat. 62; 29 L. T. 252.

Husband's Property Abroad.]—The provisions of 20 & 21 Vict. c. 85, s. 32, respecting permanent maintenance, empower the court to order a gross or annual sum to be secured for the benefit of the wife, but not to make a direct order on the husband to pay a gross or annual or other periodical sum to the wife. The qualification that the maintenance is to be for the wife "dum sola et casta vixerit" is not usually inserted in the order but in the deed of security. The provisions of 29 & 30 Vict. c. 32, respecting the payment of monthly or weekly sums to the wife, do not apply to the case of a husband who has property abroad sufficient and available for a security. Per Jessel, M.R.: An order for maintenance cannot be made in the alternative for securing a gross or annual sum of money, or else for the payment of monthly or weekly sums by the husband. *Medley* v. *Medley*, 51 L. J., P. 74; 7 P. D. 122; 30 W. R. 937—C. A.

Undertaking by Third Party to Pay.]—The father of the respondent on her marriage undertook, in a letter to the husband, to make her an allowance of 100*l.* per annum during his life. Such allowance had been paid for some years in one sum in a particular month of the year. The court refused to grant to the wife alimony out of her husband's income, which did not much exceed her allowance, the month in which it might be expected that the allowance would be paid not having arrived. *Eaton* v. *Eaton and Campbell*, L. R. 2 P. 51; 21 L. T. 733.

Alimony — Separation Deed — Agreement by Wife to take Fixed Sum for Maintenance —Subsequent Judicial Separation on Suit by Wife — Maintenance — Increase of Alimony — Change of Circumstances.]—Where a decree of judicial separation is pronounced between husband and wife who have been living apart under a separation deed, which deed contains no covenant by the wife not to sue for increased alimony, but does include an acceptance by her of a fixed sum for maintenance, the court has jurisdiction—if the circumstances have changed so as to throw on her an increased burden—to allot to her a larger allowance. *Gandy* v. *Gandy* (51 L. J., P. 41; 7 P. D. 77, 168; 54 L. J., Ch. 1154; 30 Ch. D. 57) explained. *Judkins* v. *Judkins*, 66 L. J., P. 76; [1897] P. 138; 76 L. T. 409; 45 W. R. 567—C. A.

Husband's Means inquired into on application for Alimony pendente lite.]—When alimony pendente lite has once been awarded, no evidence can be given on any subsequent application for permanent alimony in the same suit except for the purpose of showing that no alteration has taken place in the husband's means. *Bonsor* v. *Bonsor*, 66 L. J., P. 35; [1897] P. 77; 76 L. T. 168; 45 W. R. 304.

—— **Children—Education thrown on Wife.**]—The expense thrown upon the wife of educating a child is a reason for increasing her alimony beyond the sum which she has, in an agreement for separation, accepted as permanent maintenance. *Bishop* v. *Bishop*, 66 L. J., P. 69; [1897] P. 138; 76 L. T. 409; 45 W. R. 567—C. A.

Support of Children by Wife.]—If the husband is relieved from the obligation of supporting his children by reason of their custody being given to the wife the court can increase the permanent alimony already given to the wife. *Halligan* v. *Halligan*, [1896] 1 Ir. R. 244—C. A.

c. Practice to Obtain.

See Divorce Rules, 1865, rr. 81—94; Rr. 1875, rr. 189—192.

Discretion of Court.]—A decree nisi for dissolution of marriage was made against a wife on the 3rd of August, 1880, and was made absolute in due course. The wife appealed, and her appeal was dismissed on the 19th of July, 1881. On the 30th of July she took out a summons to have permanent maintenance allowed her. Owing to her absence abroad the summons was not heard till December, 1882, when the president dismissed it. The wife appealed:—Held, on appeal, that as the application to the president was out of time, and he had exercised a discretion under the special circumstances of the case, the court would not interfere with his decision. *Robertson* v. *Robertson*, 8 P. D. 94; 48 L. T. 590; 31 W. R. 652—C. A.

Answer.]—A petition for an order for permanent maintenance under 20 & 21 Vict. c. 85, s. 32, must be presented in accordance with r. 96, after the decree nisi and before the decree absolute; and r. 98, which requires the respondent to file an answer to it on oath, is a binding rule with which the court will not dispense except upon special grounds. The fact that it appears on the face of the petition that the petitioner has a separate income, is not a ground on which the court will dispense with that rule. *Charles* v. *Charles*, 36 L. J., Mat. 17; L. R. 1 P. 260; 15 L. T. 416.

When Petition should be Filed.]—The court will allow a petition for permanent alimony to be filed after it has made a final decree for a judicial separation. *Covell* v. *Covell*, 41 L. J., Mat. 81; L. R. 2 P. 411; 27 L. T. 324; 20 W. R. 894.

A wife obtained a decree of judicial separation by reason of the adultery of the husband. No application was made for alimony pending suit, but after the final decree had been pronounced, she filed a petition for permanent alimony. The husband appeared under protest:—Held, that the court had power to entertain the petition, and that the husband was bound to answer to the merits. *Ib.*

The petition for such provision cannot be filed until after the decree nisi has been pronounced; and the order must form part of the decree absolute. *Charles* v. *Charles*, supra.

d. Maintenance.

Petition for.]—A petition for permanent maintenance under 20 & 21 Vict. c. 85, s. 32, may be presented at any time after the decree nisi, and the order for maintenance need not necessarily form part of the decree absolute. *Bradley* v.

Bradley, 47 L. J., P. 53; 3 P. D. 47; 39 L. T. 203; 26 W. R. 831. *See* Divorce Rules, 1865, rr. 95—103; 1877, rr. 204, 214, 215.

What Court Considers.]—On a question of permanent maintenance, the court will consider the ability of the husband as well as the conduct and income of the wife, not only as to the amount but as to whether it shall make any order at all for maintenance. *Ratcliffe* v. *Ratcliffe and Anderson*, 1 Sw. & Tr. 467; 29 L. J., Mat. 171; 7 W. R. 727.

Petition for, before Decree Nisi—Jurisdiction.]—The effect of s. 32 of the Matrimonial Causes Act, 1857, and the rules and regulations made under the provisions of the Divorce Acts, is to enable the court, before a decree nisi for divorce has been made absolute, to confirm the report of the registrar approving of maintenance for the wife, to order the husband to secure the maintenance to the wife upon the decree becoming absolute, and in the meantime to restrain him from dealing with his property so as not to leave sufficient security. *Waterhouse* v. *Waterhouse*, 62 L. J., P. 115; [1893] P. 284; 69 L. T. 618—C. A.

Permanent Maintenance — Post-nuptial Settlement—No Express Covenant not to Sue for Divorce — Order in Excess of Amount Allotted by Settlement.]—The wife, who had obtained a decree dissolving her marriage, petitioned for permanent maintenance. By post-nuptial deeds, made apparently in consideration of the abandonment of former proceedings instituted by her, she was to receive an allowance of 100*l.* a year in the event of the adultery or cruelty of her husband. The husband's income was 600*l.* a year:—Held, that she was entitled, notwithstanding the deed, to permanent maintenance at the rate of 200*l.* a year. *Wilkinson* v. *Wilkinson*, 69 L. T. 459.

Discretionary Bar — Decree Nisi — Petitioner to secure Maintenance for Respondent, to be payable dum sola et casta vixerit.]—Upon a petition by a husband for divorce on the ground of his wife's adultery, in which the respondent counter-charged cruelty and adultery, the jury found that the respondent and co-respondent had committed adultery; that the petitioner had not committed adultery, but that he had been guilty of cruelty towards his wife. There was no finding as to whether the petitioner's cruelty had conduced to the respondent's adultery. The court, being of opinion that the adultery of the respondent with the co-respondent was not brought about by the petitioner's cruelty, exercised its discretion under the Matrimonial Causes Act, 1857, s. 31, by pronouncing a decree nisi, at the same time directing that the decree should not be made absolute unless the petitioner secured to his wife, by deed, an allowance of 36*l.* a year for her maintenance. The court further ordered that the deed should contain a clause, providing that the allowance to the wife should only be payable so long as she should remain chaste and unmarried. *Badham* v. *Badham and Gorst* (62 L. T. 663) followed; *Lander* v. *Lander* ([1891] P. 161) distinguished. *Edwards* v. *Edwards*, 63 L. J., P. 62; [1894] P. 33; 70 L. T. 39.

Reversionary Property—Dum casta et sola Clause.]—The court in allotting permanent maintenance will not interfere with reversionary interests, except under special circumstances, where for instance it would be otherwise impossible to secure a provision for the wife. On a petition for permanent maintenance and variation of settlements, after decree absolute at the wife's suit for adultery and cruelty, the registrar found that the respondent would come into possession, on the death of a person aged ninety years, of a sum which would about double his income. The wife, in addition to the income arising out of a fund in settlement in which she had the first interest, was entitled to a sum in reversion which would also about double her income. The husband had brought nothing into settlement, and the registrar proposed that he should secure to his wife a present annual payment bringing up her income to a third of the joint income, and that on his reversion falling in he should secure a further sum bringing up her future income to the same proportion, taking her reversion also into consideration. The court refused to confirm this recommendation, but allotted the wife an annual sum equal to one-third of the husband's present income, leaving the reversionary interests of both parties untouched. The court also declined to insert a dum sola et casta vixerit clause in the order. *Harrison* v. *Harrison*, 56 L. J., P. 76; 12 P. D. 130; 57 L. T. 119; 35 W. R. 703. *See* col. 857.

Order for Securing Amount upon Husband's Property.]—A wife who had obtained a decree dissolving her marriage, petitioned the court for permanent maintenance. The husband was a naval officer, who, in addition to his pay, was entitled to property in Ireland producing about 100*l.* per annum. The respondent was entitled to the property under a document executed by his father, beginning: "This indenture," with the signatures of two witnesses, but no attestation clause at the end, which document was admitted to probate as a will. There was a clause in the will restraining him from charging or parting with the property. Upon a motion to confirm the registrar's report, the court, holding that the respondent's interest in the property was an estate in fee simple, and that the restraining clause was therefore repugnant, ordered the respondent to secure to the petitioner upon the property in question the sum of 84*l.* per annum for her life. *Corbett* v. *Corbett*, 58 L. J., P. 17; 14 P. D. 7; 60 L. T. 74; 37 W. R. 114—C. A.

Notwithstanding Deed of Separation.] — A wife, by a deed of separation, agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance. Subsequently, having discovered that he had been guilty of incestuous adultery, she obtained a decree for dissolution of the marriage:—Held, that, notwithstanding the deed, she was entitled to the usual order for permanent maintenance. *Morrall* v. *Morrall*, 50 L. J., P. 62; 6 P. D. 98; 47 L. T. 50; 29 W. R. 897.

Wife Petitioner—Injunction to Restrain Husband from Dealing with Property till Order complied with.]—Where a husband was ordered to secure a lump sum of money for the permanent maintenance of his wife, who had obtained a decree absolute for the dissolution of her marriage, the court, following *Sidney* v. *Sidney* (17 L. T. 9),

also granted an injunction restraining the husband from dealing with certain of his property until such order had been complied with. *Newton* v. *Newton*, 65 L. J., P. 15; [1896] P. 36.

Voluntary Allowance of Husband — Dissolution on Wife's Petition.]—A wife obtained a dissolution of her marriage, and subsequently petitioned for permanent maintenance. The registrar reported that the husband was in debt to the amount of nearly 20,000*l.*, and that he was without means, with the exception of an allowance of 60*l.* a month, paid to him by his brother as long as he resided out of England. The report concluded by recommending that the husband be ordered to pay his wife 15*l.* a month by way of permanent maintenance:—Held, that, though the allowance of 60*l.* a month was voluntary, it might nevertheless be treated as income for this purpose, and that the registrar's report must be confirmed with costs against the co-respondent. *Haviland* v. *Haviland* (32 L. J., P. 67; 3 Sw. & Tr. 114) commented on. *Bonsor* v. *Bonsor*, 66 L. J., P. 35; [1897] P. 77; 76 L. T. 168; 45 W. R. 304. But see *Moss* v. *Moss and Bush*, 15 W. R. 532.

Amount—Basis of Calculation of Amount to be Secured.]—A decree absolute having been made for dissolution of a marriage on the ground of the husband's cruelty and adultery, and the custody of the children having been given to the wife, the proper basis of calculation of the sum to be secured by the husband for his wife's maintenance is the amount the husband could draw out of his business without his partner's consent, and not the amount of the husband's share of profits. *Hanbury* v. *Hanbury*, 63 L. J., P. 105; [1894] P. 315; 6 R. 591; 70 L. T. 569; 42 W. R. 434—C. A.

—— **Discretion of Court.**]—A decree for dissolution of marriage was granted on the wife's petition, the husband having been guilty of adultery and aggravated cruelty. The court, in making an order for permanent maintenance, directed that the husband should secure to the petitioner a sum equal to one-third of his ascertained income, and refused to confine the operation of the order to such period as the petitioner remained unmarried. *Lister* v. *Lister*, 15 P. D. 4; 38 W. R. 81—C. A.

Where a wife, who had obtained a decree of dissolution of marriage, had no fortune, and her husband had some, and also trading profits, neither large nor certain, the court considered that the wife was entitled to a maintenance only, and ordered that the husband should secure to her an annuity of 100*l.* for the support of herself and her daughter, payable so long as she should remain chaste and unmarried, to be reduced to 80*l.* if the daughter should die or marry. *Ib.*

In exercising the power of ordering a husband to make a provision for his wife who has obtained a decree of dissolution of marriage, the court will generally be guided by the principles laid down in the above case, where a husband was ordered to secure to the wife, so long as she should remain chaste and unmarried, an annuity sufficient to maintain her. There may, however, be circumstances which would justify the court in ordering a more liberal provision to be made for the wife. A wife having obtained a decree of dissolution of marriage on the ground of adultery and desertion, the court, taking into consideration the conduct of the parties and other circumstances, ordered the husband to secure to her the payment of 2,000*l.* absolutely. *Morris* v. *Morris*, 31 L. J., Mat. 33.

Where a wife had obtained a decree of judicial separation, and the court had ordered that she should have the custody of three children all under seven, alimony pendente lite having been allotted on the presumption that the husband's income was 400*l.* per annum, the court allotted to the wife 160*l.* per annum as permanent alimony; 100*l.* for herself, and 20*l.* per annum for each of the children. *Whildon* v. *Whildon*, 2 Sw. & Tr. 388; 30 L. J., Mat. 174; 5 L. T. 138.

The wife during the coverture became entitled to a small estate of inheritance. On the dissolution of the marriage on her petition, by reason of the husband's adultery and cruelty, the court ordered that he should pay to the wife an annuity to the amount of two-thirds of the rents, and secure such an annuity on the property. *George* v. *George*, 38 L. J., Mat. 34; 20 L. T. 232.

When the court pronounces a decree of dissolution of marriage at the suit of a wife, it will, if the circumstances permit, order the husband to secure her a permanent maintenance, on the principle, as to amount, of permanent alimony on a decree of judicial separation. *Sidney* v. *Sidney*, 4 Sw. & Tr. 178; 34 L. J., Mat. 122; 11 Jur. (N.S.) 815; 12 L. T. 826.

—— **Wife in Fault.**]—On a decree nisi for dissolution of marriage on the ground of the adultery of a wife, who on her marriage had a fortune of 1,678*l.*, which was not settled, but was received by the husband, the court ordered that the husband should settle 1,000*l.*, upon trust, that the interest be applied for the benefit of the wife so long as she conducted herself properly and remained unmarried, and that upon her interest ceasing the fund should be held in trust for the children of the marriage in equal shares, and that 1,000*l.* damages awarded against the co-respondent, should be paid to the husband in lieu of the sum he would have to settle, and that the decree should be suspended until the settlement should be made. *Bent* v. *Bent and Footman*, 2 Sw. & Tr. 392; 30 L. J., Mat. 175; 5 L. T. 139.

On a decree of dissolution by reason of the wife's adultery, she having, under a marriage settlement, the interest after her husband's death of 10,000*l.*, and a right to dispose of one-fifth of that sum, the court directed the husband to secure her an annuity during his life of 150*l.*, quamdiu casta vixerit, on condition of her giving up the right to dispose of the 2,000*l.*; and directed the damages assessed against the co-respondent to go, first, in payment of the wife's costs; secondly, in payment of husband's; and thirdly, any surplus in satisfaction of the annuity to the wife. *Keats* v. *Keats and Montezuma*, 1 Sw. & Tr. 334; 28 L. J., Mat. 57; 5 Jur. (N.S.) 176; 7 W. R. 377.

Whether special circumstances are required to induce the court to give permanent alimony to a wife against whom a decree for dissolution is made, and who has no means of support, quære *Robertson* v. *Robertson*, 8 P. D. 94; 48 L. T. 590; 31 W. R. 652.

Power of Wife to Assign or Release.]—

Where a decree for dissolution of marriage has been made and the husband has been ordered, under s. 32 of the Matrimonial Causes Act, 1857, to secure an annual sum to the wife, she can release or alienate it. A decree for dissolution of marriage having been made on a wife's petition, an order was made directing her husband to secure to her on certain property the sum of 90*l.* per annum, payable monthly, as permanent maintenance, and directing him to execute an assignment of the property to secure that sum. By agreement between the parties the deed was not executed, and after several payments had been made under the order the wife by deed released her husband from further payments in consideration of a gross sum then paid to her:—Held, that, although monthly payments were directed, the order was made under s. 32 of the Matrimonial Causes Act, 1857, and that the wife had power to release the husband. Held also, that, although the deed of assignment had not been executed as directed, the court had no jurisdiction to direct the order to be perfected now by the execution of the deed. *Malcolmcan* v. *Malcolmcan*, 77 L. T. 474—C. A.

An allowance ordered by the court under s. 1 of the Matrimonial Causes Act, 1866, to be paid by a husband for the maintenance of a divorced wife is personal to the wife, and cannot be assigned or released by her without the sanction of the court. *Watkins* v. *Watkins*, 65 L. J., P. 75; [1896] P. 222; 74 L. T. 636; 44 W. R. 677—C. A.

Per Lindley, L.J.: A divorced wife may release, and perhaps assign, her right to arrears of such an allowance, but she cannot prospectively deprive herself, or be deprived, of her right to enforce payment of it in the future. *Ib.*

Accumulated Arrears — Enforcing Payment of.]—Semble, the object of the allowance being to provide maintenance for the divorced wife, and not to enable her to make accumulations, the court will not, if she allows it to fall into arrear, allow her to enforce payment of arrears for several years. *Ib.*

Charging Order — Solicitor — Costs.]—A sum secured to the wife on a dissolution of marriage under s. 32 of the Divorce Act, 1857, is not alimony, and is property in respect of which the court has jurisdiction to grant the wife's solicitor a charging order for costs under s. 28 of the Solicitors Act, 1860; but the court will not grant such an order unless the solicitor make out a primâ facie case of inability to obtain payment in any other way. *Harrison* v. *Harrison*, 58 L. J., P. 28; 13 P. D. 180; 60 L. T. 39; 36 W. R. 748—C. A.

e. Dum Sola et Casta Clause.

"Dum Sola" Clause—Discretion of Court.]—The court in making an order, upon a decree for dissolution of marriage, that the husband shall pay to his wife an annual sum of money for her permanent maintenance, has, under 20 & 21 Vict. c. 85, s. 32, an absolute discretion, according to the circumstances of each case, either to order the payment during the whole of her life or so long as she remains unmarried. *Lister* v. *Lister*, 15 P. D. 4; 62 L. T. 90—C. A.

An order for permanent maintenance may be made containing a "dum sola" clause without the addition of "et casta." *Smith* v. *Smith*, 67 L. J., P. 54; [1898] P. 29.

"Dum Casta" Clause.]—The petitioner obtained a decree nisi on the ground of his wife's adultery, but at the time of pronouncing the decree, the learned judge intimated that an allowance must be made by the petitioner to his wife. The solicitors for the petitioner and respondent settled an agreement, which was signed by both the parties. One of the terms in the agreement was that the allowance should continue so long as the respondent should remain chaste and unmarried. The court, while expressing disfavour with the dum casta clause, made the decree absolute. *Weller* v. *Weller*, 63 L. T. 263.

"Dum sola et casta" Clause.]—There is no rule that a "dum sola et casta" clause ought, in the absence of special circumstances, to be inserted in an order for maintenance under 29 & 30 Vict. c. 32, s. 1. The court has a discretion to insert or omit the clause upon consideration of the facts of the case. *Wood* v. *Wood*, 60 L. J., P. 66; [1891] P. 272; 64 L. T. 586—C. A.

Where the parties had lived apart for many years, and the husband ultimately obtained a decree nisi for a dissolution of his marriage on the ground of his wife's adultery, the court refused to make the decree absolute until the husband had made provision for his wife's maintenance, and refused to order the insertion of a "dum sola et casta" clause into the order for such maintenance. *Lander* v. *Lander*, 60 L. J., P. 65; [1891] P. 161; 64 L. T. 120; 39 W. R. 416; 55 J. P. 152.

See also *Harrison* v. *Harrison*, col. 854; *Saunders* v. *Saunders*, col. 809; *Bradley* v. *Bradley*, col. 1014; and *Kettlewell* v. *Kettlewell*, [1898] P. 138—C. A.

The clause is usually, in case of maintenance, inserted in the deed of security, not in the order. *Medley* v. *Medley*, col. 851.

Adultery of Wife—Cruelty of Husband not Conducing to.]—Upon a petition by a husband for divorce on the ground of his wife's adultery, where the jury found adultery by the wife and cruelty by the husband, but not conducing to the adultery, the court in granting a decree nisi ordered the husband to secure his wife an allowance of 36*l.* a year for her maintenance, but payable only so long as she should remain chaste and unmarried. *Badham* v. *Badham and Gorst* (62 L. T. 663), followed. *Lander* v. *Lander*, supra, distinguished. *Edwards* v. *Edwards*, 63 L. J., P. 62; [1894] P. 33; 70 L. T. 39. And see *Morris* v. *Morris*, 31 L. J., Mat. 33, and cols. 784—6.

f. Enforcing Order.

Attachment (*see* Divorce Rules, 1865, rr. 110—112; Rr. 1877, r. 203).]—A decree having been made absolute for a divorce on the wife's petition, the husband, as part of the final order, was directed to pay a permanent maintenance to his wife at the rate of 200*l.* a year:—Held, that the court had no power to grant an attachment against the husband for non-payment of arrears of the annuity due under the order. *De Lossy* v. *De Lossy*, 15 P. D. 115; 62 L. T. 704; 38 W. R. 511.

An application for an attachment against a husband for non-payment of alimony and costs should be made in one motion. The costs for two motions will not be allowed against the husband. *Watts* v. *Watts*, 4 Sw. & Tr. 274; 31 L. J., P. 29.

By Attachment of Rents.]—A feme covert who has obtained a decree in the ecclesiastical court for a divorce à mensâ et thoro, and for permanent alimony, may attach the rents of her freehold, for which her husband could distrain. *Carpenter* v. *Carpenter*, 2 Hog. 64.

Appointment of Receiver.]—The probate and divorce division ordered a husband, against whom it granted a divorce, to pay alimony. The divorced wife brought an action in the chancery division against her late husband and the trustees of a post-nuptial settlement made by him during the continuance of a former marriage, to enforce payment of arrears, and recurring payments of alimony, by the appointment of a receiver of his life interest under such settlement:—Held, that she was entitled to the appointment of a receiver, and that the court would not take into consideration the injury done to the children of the former marriage, by depriving their father of his power to consent to their advancement out of the settlement funds. *Oliver* v. *Lowther*, 42 L. T. 47; 28 W. R. 381.

Husband dissipating Property.]—If a divorced husband is dissipating his property, or putting it out of his power, a court of equity will grant an injunction and receiver to protect it for the benefit of the former wife. *Sidney* v. *Sidney*, 17 L. T. 9. And see *Newton* v. *Newton*, 65 L. J., P. 15; [1896] P. 36.

Sequestration.]—The court made an order on the respondent for payment of permanent alimony at the rate of 110*l.* per annum, so long as he was in receipt of a rent-charge of 400*l.* per annum (his only source of income), the trustees of which had a discretionary power to refuse payment, in which event it enured to the benefit of the tenant for life. The respondent had prior to the date of the order become a bankrupt, but the trustees had nevertheless continued to pay him the rent-charge, and he had failed to comply with the order of the court. The court (the respondent and trustees opposing) directed a sequestration in general terms to issue against the property of the respondent. *Clinton* v. *Clinton*, L. R. 1 P. 215; 14 L. T. 257; 14 W. R. 545.

—— **Indian Officer's Pension.**]—The pension of an officer in the Indian army is not liable to sequestration for payment of costs and permanent maintenance. *Birch* v. *Birch*, 52 L. J., P. 88; 8 P. D. 163; 32 W. R. 96.

—— **Civil Service Pension—By Sequestration.**]—The court in enforcing payment of alimony and costs will authorise sequestrators to receive portions of a civil service pension. *Sansom* v. *Sansom*, 48 L. J., P. 25; 4 P. D. 69; 39 L. T. 642; 27 W. R. 692.

Ne exeat regno, as to.]—*See* col. 843.

Husband's Bankruptcy—Proof on Estate.]—An order for permanent alimony made until further order under the terms of the 29 Vict. c. 85, s. 1, is not an annuity which can be valued and proved in bankruptcy. *Prescott* v. *Prescott*, 20 L. T. 331.

—— **"Future Debt or Liability."**]—A liability to pay alimony in weekly sums by an order made in divorce under s. 1 of 29 & 30 Vict. c. 32, is not "a future debt or liability" provable in bankruptcy under the Bankruptcy Act, 1883, s. 37, sub-s. 3; and, notwithstanding the bankruptcy of the person liable, payment may be enforced as of a debt due in pursuance of an order of a competent court under s. 5 of the Debtors Act. *Linton* v. *Linton*, 54 L. J., Q. B. 529; 15 Q. B. D. 239; 52 L. T. 782; 33 W. R. 714; 2 Morrell, 179; 49 J. P. 597—C. A.

—— **Arrears accrued after Receiving Order.**]—Arrears of alimony payable under an order of the divorce division of the high court, which have accrued due after the date of the receiving order and before proof, are not provable in bankruptcy. *Hawkins, In re, Hawkins, Ex parte*, [1894] 1 Q. B. 25; 10 R. 29; 69 L. T. 769; 42 W. R. 202; 1 Manson, 6.

Per Vaughan Williams, J.: Whether such instalments accrued due before or after receiving order. *Ib.*

Arrears before Receiving Order—Commitment—Proof in Bankruptcy.]—Arrears of alimony, under an order of the divorce court, which have accrued before a receiving order has been made against the husband, do not constitute a debt provable in bankruptcy by the wife; but as such arrears constitute a debt enforceable under s. 5 of the Debtors Act, 1869, a committal order, on proof of means, is good. *Kerr* v. *Kerr*, 66 L. J., Q. B. 838; [1897] 2 Q. B. 439; 77 L. T. 29; 46 W. R. 46; 4 Manson, 207.

13. Proceedings.

See Rules and Regulations of 1865, 1875, made under the Divorce Acts, rr. 1—3, 34—38, 56—61.

a. Petition.

General Rules—Power of Judge.]—Since 23 & 24 Vict. c. 144, s. 1, the judge ordinary has power to make and to alter or revoke rules and orders concerning the practice and procedure of the court, without the concurrence of the other judges. *Charles* v. *Charles*, 36 L. J., Mat. 17; L. R. 1 P. 260; 15 L. T. 416. *Wilson* v. *Wilson and Howell*, 41 L. J., Mat. 1; L. R. 2 P. 341; 25 L. T. 600; 20 W. R. 125.

Entitling Petition.]—A petition for dissolution of marriage should be addressed to the court for divorce and matrimonial causes. *Evans* v. *Evans*, 1 Sw. & Tr. 78; 27 L. J., P. 31; 6 W. R. 356.

Pleadings should be Short.]—All pleadings should be as short as is consistent with alleging a legal ground for the prayer. The respondent may apply for further specification, if necessary. *Suggate* v. *Suggate*, 1 Sw. & Tr. 489; 28 L. J., Mat. 7; 5 Jur. (N.S.) 127, *and see* Rules (1865), 34—38.

Domicil.]—It is not absolutely necessary that the question of domicil should be raised by the pleadings. The court may allow the question to be raised at the hearing if the evidence then adduced points to a doubt as to the court's jurisdiction. *Parkinson* v. *Parkinson*, 69 L. T. 53. *See* col. 730.

Consolidation of several Petitions.]—If it is expedient to bring before the court acts of adultery alleged to have occurred after the date of the original petition, a supplemental petition should be filed for the purpose; and on the preliminary proceedings being completed the two petitions will be consolidated. *Borham* v. *Bor-*

ham and Brown, 40 L. J., Mat. 6; L. R. 2 P. 193; 23 L. T. 600; 19 W. R. 215.

Second Petition for same Ground of Relief.]—A wife filed a petition for a dissolution of marriage on the ground of adultery, coupled with desertion and cruelty. The case was tried before the 22 & 23 Vict. c. 61, which renders the wife competent to give evidence of desertion and cruelty. The court refused to dissolve the marriage, on the ground that there was not sufficient evidence of desertion and cruelty, but pronounced a decree of judicial separation on the ground of adultery. After 22 & 23 Vict. c. 61, she applied for leave to file a second petition for a dissolution of marriage containing the allegations that she had before failed to establish. The judge ordinary granted leave, but expressed a strong opinion that the full court would refuse to rehear the case. *Bevan* v. *Bevan*, 4 Sw. & Tr. 265; 29 L. J., P. 45.

Amended Petition—Advertisement.]—Where a respondent is cited by advertisement, and leave to amend the petition is afterwards granted, the amended petition need not be advertised. *Smith* v. *Smith*, 3 Sw. & Tr. 216; 32 L. J., Mat. 145; 9 L. T. 118. *See* Divorce Rules, 1865, r. 187.

—— **Re-serving.**] — If a respondent, misnamed in a petition, has been served, but has not appeared, the petition, when amended, must be re-served. *Kisch* v. *Kisch*, 33 L. J., Mat. 115. *And see* r. 39.

Delay in Presenting Petition.]—Where "unreasonable delay in presenting the petition" is the ground for seeking to rescind a decree nisi, the question for the jury is whether the petitioner knew, or had reason to believe, that the respondent had been guilty of adultery two years or more before presenting his petition. *Brougham* v. *Brougham*, 64 L. J., P. 125; [1895] P. 288; 11 R. 667.

Delay in objecting to Form of.]—After a petition had been served upon a respondent, his solicitor on two occasions applied to the judge in chambers for further time to file an answer, and both applications were granted:—Held, that it was too late afterwards to take objection to the form of the petition, and to ask that certain paragraphs of it should be struck out. *Hepworth* v. *Hepworth*, 30 L. J., Mat. 215; 6 Jur. (N.S.) 831.

Petitioner's Adultery admitted in Pleadings.]—Where a petitioner in his pleadings admitted that he had been guilty of adultery and pleaded condonation by the respondent, the court allowed the case to go to the jury. *Boucher* v. *Boucher*, 1 R. 494; 67 L. T. 720.

Estoppel — Cross Petitions — Decree Nisi on Wife's Petition — Collusion — Intervention of Queen's Proctor—Rescission of Decree—Second Suit by Husband.]—A verdict of cruelty and adultery against a husband upon a wife's petition in the divorce court for dissolution of marriage, followed by a decree nisi which is afterwards rescinded on grounds dehors the verdict and wholly unconnected therewith, is conclusive evidence of the husband's guilt in a subsequent suit between the same parties, where the husband seeks similar relief against the wife. *Butler* v. *Butler*, 63 L. J., P. 1; [1894] P. 25; 1 R. 535; 69 L. T. 545; 42 W. R. 49—C. A.

Signature of Petition—Leave to present Petition verified by Affidavit of Petitioner's Solicitor—Practice—Evidence by Affidavit.]—Where a husband, desirous of petitioning for a dissolution of marriage, was in permanent employ abroad, and the adultery was committed during his absence, the court allowed an unsigned petition verified by the affidavit of his solicitor to be presented, but ordered a copy signed by the petitioner and verified by his own affidavit to be filed as soon as practicable. The court subsequently gave leave to prove at the trial the domicil, marriage, cohabitation and separation by affidavit. *Hobson, Ex parte*, 6 R. 661; 70 L. T. 816.

Interim Receiver—Wife's Petition—Arrears of Alimony—Costs Unpaid—Ex parte Application.]—Where money was due to the wife for arrears of alimony and taxed costs, and her husband had a bill of sale on his furniture, the court, on an ex parte application, appointed a receiver of the amount said to be standing in the husband's name at his bank over the next motion day, and limited to the amount stated in the affidavits. *Angliss* v. *Angliss*, 1 R. 532; 69 L. T. 462.

Molestation — Husband Refusing to Leave Wife's House—Injunction.]—Where the molestation alleged by the petitioner in a divorce suit is that the husband refuses to leave the house of the wife, the court will grant an injunction. *Northledge* v. *Northledge*, 6 R. 660; 70 L. T. 815.

Change of Solicitor.]—When an order has been made for the change of the attorney in a suit the order must be drawn up and filed in the registry before any step can be taken by the new attorney. *Grice* v. *Grice and Penfold*, 32 L. J., Mat. 134.

Petition Alleging Adultery.]—A petition for a divorce on the ground of adultery must allege adultery in distinct terms. *Ambler* v. *Ambler and Houghton*, 32 L. J., Mat. 6; 7 L. T. 299; 11 W. R. 111.

Adultery will not be inferred from bigamy alone being alleged in the petition. *Bonaparte* v. *Bonaparte*, 65 L. T. 795.

It is not sufficient that the petition alleges information and belief of the petitioner that the respondent has committed adultery. *Spilsbury* v. *Spilsbury*, 3 S. & T. 210; 32 L. J., Mat. 126; 9 L. T. 23.

A petition alleged that the respondent and the co-respondent had been living and cohabiting together, but contained no specific charge of adultery. Neither the respondent nor the co-respondent appeared:—Held, that the allegation was insufficient, and leave to amend was refused at the hearing. *Forman* v. *Forman and Davies*, 32 L. J., Mat. 80; 11 W. R. 401.

Allegations of adultery, cruelty, or misconduct, without specifying particulars, are bad. *Windham* v. *Windham and Giuglini*, 32 L. J., Mat. 89; 9 Jur. (N.S.) 82.

A general allegation of adultery, not specifying person, place, or time, is bad, and will be struck out. *Porter* v. *Porter and Jaggard*, 3 Sw. & Tr. 796; 33 L. J., Mat. 207; 13 W. R. 108.

A petition by a wife for a judicial separation, on the ground of adultery, contained a paragraph alleging that the husband had had two illegitimate children, the issue of an adulterous connection, born on certain specified days:—Held,

that the paragraph was objectionable, as pleading mere evidence, and should be struck out. *Matison* v. *Matison*, 29 L. J., Mat. 80.

On proof of petition for dissolution of marriage by reason of the adultery of the wife, some evidence should be given of the conduct of the husband towards the wife previously to the adultery, and what care he took of her. *Boddington* v. *Boddington*, 27 L. J., P. 53. *And see* col. 735.

—— **With Persons Unknown—Striking out Allegations—Undefended Suit.**]—Where a petition in an undefended suit contained allegations of adultery with two co-respondents, and also with two unknown persons, the court ordered the paragraphs of the petition referring to the two unknown persons to be struck out. *Peacock* v. *Peacock*, 6 R. 656. *And see* col. 923.

Alleging Cruelty.]—In a petition asking for relief on the ground of cruelty, acts sufficient to establish legal cruelty should be alleged. *Suggate* v. *Suggate*, 1 Sw. & Tr. 489; 28 L. J., Mat. 7.

A petition, alleging that on the 26th day of July, 1848, and other days between that day and the 24th of July, 1858, the respondent was guilty of cruelty to the petitioner, is not sufficient, but such acts should be specified as, if proved, would constitute cruelty. *Ib.*

But the precise date of the commission of such acts need not be alleged. *Ib.*

It is not necessary that every charging paragraph in a petition by reason of cruelty should allege a fact or facts on which, if proved, the court could found a sentence. Some allegations short of this are admissible, as showing the habits and animus of the party charged. *Leete* v. *Leete*, 2 Sw. & Tr. 568; 31 L. J., Mat. 121; 6 L. T. 507.

Allegations of actual violence, however general as to time and place, can only be met by a summons for particulars. *Ib.*

A petition for judicial separation on the ground of cruelty should specify all the acts of the respondent intended to be relied on as constituting cruelty. *Goldney* v. *Goldney*, 32 L. J., Mat. 13.

A general allegation, that during a specified time the respondent "committed divers acts of cruelty," is bad, and is ground for an order that the petition be amended by specifying such acts, but not for an order that particulars of the acts of cruelty be given. *Ib.*

A petition, which concluded with a prayer of judicial separation by reason of the husband's cruelty, and also for the custody of the children, containing a paragraph charging the husband with cruelty to the children:—Held, that the two questions of cruelty to the wife and cruelty to the children cannot be mixed up together; that cruelty to the wife must be established before the court can entertain the question of the final custody of the children; that, consequently, misconduct to the children, unless in the presence of the mother, should not be alleged in the petition, but should be proved afterwards, if necessary, by affidavit. *Suggate* v. *Suggate*, 1 Sw. & Tr. 489; 28 L. J., Mat. 46; 5 Jur. (N.S.) 127.

Cruelty may consist in the aggregate of the acts alleged in a petition, and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant the relief sought. *Green* v. *Green*, 33 L. J., Mat. 64. *And see* col. 740.

Alleging Desertion.]—When a petition alleges desertion only as the ground for judicial separation, proof of cruelty previously to desertion will not be admitted, even to explain a subsequent refusal on the part of the petitioner to return to cohabitation. *Brookes* v. *Brookes*, 1 Sw. & Tr. 326; 28 L. J., Mat. 38.

A petition for dissolution of marriage by reason of the husband's adultery and desertion was directed to be amended by a distinct averment of the fact of desertion; some statements of circumstances in such a petition may be necessary, but evidence should not be pleaded. *Pyne* v. *Pyne*, 1 Sw. & Tr. 80; 6 W. R. 507. *And see* col. 747.

For Reversal of Decree of Judicial Separation.]—A petition for the reversal of a decree of judicial separation, under 20 & 21 Vict. c. 85, s. 23, on the ground that it was obtained in the petitioner's absence, is good on demurrer, although it alleges personal service on the petitioner of the citation in the judicial separation suit; for the word "absence" means non-appearance in the suit, and not absence without notice or knowledge of the suit. *Phillips* v. *Phillips*, 35 L. J., Mat. 70; L. R. 1 P. 169; 14 L. T. 604; 14 W. R. 902.

It is not sufficient in such a petition to allege merely the non-appearance of the petitioner, but the petition must further set out the cause of his non-appearance, and must also state circumstances tending to show that the decree was wrong on the merits. *Ib.*

Brought by Lunatic.]—The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage. Such a suit may be instituted by the committee of the estate of the lunatic. *Baker* v. *Baker*, 49 L. J., P. 49; 5 P. D. 142; 42 L. T. 332; 28 W. R. 630. Affirmed, 49 L. J., P. 83; 6 P. D. 12—C. A. *See* Divorce Rules, 1875, r. 196.

The committee of a lunatic may maintain a suit for judicial separation, on the ground of the adultery of the wife of the lunatic. *Woodgate* v. *Taylor*, 2 Sw. & Tr. 512; 30 L. J., Mat. 197; 5 L. T. 119.

Brought against Lunatic.]—A suit for dissolution of marriage cannot be maintained against a lunatic. *Bawden* v. *Bawden*, 2 Sw. & Tr. 417; 31 L. J., Mat. 94; 8 Jur. (N.S.) 157; 6 L. T. 27; 10 W. R. 292.

Where such a suit has been instituted, the court refused to appoint a curator ad litem to the respondent in order to enable the petitioner to proceed with the suit. *Ib.*

By 20 & 21 Vict. c. 85, s. 31, a petitioner, upon proof of the adultery of his wife, is absolutely entitled to a decree dissolving the marriage, unless certain acts mentioned therein are proved against him. In a case in which the wife was found by a jury to have become lunatic before the institution of the suit, and had remained in this state:—Held, that such lunacy was no ground for staying the proceedings, not being within the exceptions of the above section. *Mordaunt* v. *Moncrieffe*, 43 L. J., Mat. 49; L. R. 2 H. L. (Sc.) 374; 30 L. T. 649; 23 W. R. 12.

A jury having found that the respondent was in such a state of mind as to be unfit to answer the petition or to instruct an attorney for her defence, an order was made that no further proceedings should be taken in the suit until she recovered her mental capacity. After a period of two years, and on evidence that she was not likely to recover, the court, on the application of

the petitioner, dismissed the petition, so as to afford him an opportunity to appeal against the order. *Mordaunt* v. *Mordaunt, Cole and Johnstone*, 41 L. J., Mat. 42 ; L. R. 2 P. 382 ; 26 L. T. 812 ; 20 W. R. 553.

Suing In Formâ pauperis.]—The rule laid down in *Carson* v. *Pickersgill* (14 Q. B. D. 859), that a successful plaintiff suing in formâ pauperis in an action tried before a judge and jury is entitled upon taxation, as against the defendant, to costs out of pocket only, applies to the case of a pauper petitioner in the divorce division as against a co-respondent. *Richardson* v. *Richardson*, 64 L. J., P. 119 ; [1895] P. 346 ; 11 R. 663 ; 73 L. T. 135 ; 44 W. R. 102—C. A.

—— **Assignment of Counsel.**]—A person suing in formâ pauperis, to whom counsel has been assigned, cannot appear by other counsel until there has been a renunciation, or a new assignment, or the party has been dispauperised. *Hamer* v. *Boreham*, 1 Sw. & Tr. 26 ; 27 L. J., P. 107. *And see* Divorce Rules, 1865, rr. 25—27, 208—211, and Rules of 1880, rr. 208—211.

Custody of Children.]—If a petitioner claims the permanent custody of the children, a prayer to that effect should be inserted in the petition. *Seymour* v. *Seymour*, 1 Sw. & Tr. 332.

b. Citation.

See Divorce Rules, 1865, rr. 8, 9.

Address Unknown.]—When the address of a respondent is unknown, he may be described in the citation as late of the last known place of his residence. *Forster* v. *Forster*, 32 L. J., Mat. 134.

Name of Respondent Misspelt.]—If the name of a respondent is misspelt in a citation, and there is no appearance, the court will not order that service of such citation shall be deemed sufficient, but a fresh one must be extracted. *Cotton* v. *Cotton and Kinnis*, 4 Sw. & Tr. 275 ; 32 L. J., Mat. 133.

Second Petition where First not Served.]—A petition was filed and a citation issued on the part of a wife for a judicial separation on the ground of cruelty. Neither this petition nor the citation was served. The wife's solicitor, in consequence of fresh instructions, afterwards filed a second petition for a judicial separation, on the ground of adultery coupled with cruelty, and a citation issued thereon. The husband was served, and entered an appearance in the second suit. The court directed the second suit to proceed. *Turner* v. *Turner*, 2 Sw. & Tr. 426 ; 31 L. J., Mat. 134 ; 5 L. T. 849 ; 10 W. R. 292.

Amending.]—In an affidavit verifying a petition for dissolution of marriage, a co-respondent's christian name was stated to be John instead of William, and a similar mistake was made in the citation and petition : the court allowed the citation and petition to be amended, and did not require the affidavit to be resworn. *Reuss* v. *Reuss and Applegarth*, 32 L. J., Mat. 168.

When a citation has issued for dissolution of marriage, on the ground of adultery and desertion, and the petition is afterwards amended by adding a charge of cruelty, if the respondent has appeared to the citation, a fresh citation is not necessary. *Rowley* v. *Rowley*, 1 Sw. & Tr. 487 ; 29 L. J., Mat. 15 ; 7 W. R. 653.

In a suit by a wife against her husband, who was abroad, for dissolution of marriage on the ground of bigamy and adultery, and where substituted service was temporarily refused, the citation, requiring an appearance in eight days, was directed to be altered so as to extend the time to six weeks. *Robotham* v. *Robotham*, 1 Sw. & Tr. 73 ; 27 L. J., Mat. 33 ; 4 Jur. (N.S.) 148 ; 6 W. R. 328.

By Advertisement.]—Where a husband had had no tidings of his wife, who left him in 1850, except as living with the adulterer in 1851, and could gain no information of her by inquiring of her relations or at the places at which she was last supposed to have been, the court directed the citation to be left in the registry, and advertisements of that fact to be inserted in newspapers. *Peckover* v. *Peckover*, 1 Sw. & Tr. 219.

Where a respondent is cited by advertisement, and leave to amend the petition is afterwards granted, the amended petition need not be advertised. *Smith* v. *Smith*, 3 Sw. & Tr. 216 ; 32 L. J., Mat. 145 ; 9 L. T. 118.

The insertion in a newspaper, of advertisements, on the 7th and 14th of a month, is a sufficient compliance with an order to advertise twice within the interval of a week. *Elsley* v. *Elsley*, 32 L. J., Mat. 145.

Service of Citation and Petition.]—When every reasonable effort has been made to trace the respondent for the purpose of effecting a personal service of the citation and petition in a suit for dissolution of marriage, but without success, the court will dispense with such personal service. *Appleyard* v. *Appleyard and Smith*, L. R. 3 P. 257.

—— **Registered Letter.**]—In a petition for divorce it appeared that the respondent and co-respondent were residing together abroad, and that by the law of the place where they resided the co-respondent, a foreigner, had a right of action against any person serving him with English process :—Held, that the citation might be served on the co-respondent by inclosing it in a registered letter addressed to him, another copy being sent to the respondent so as to make it more probable that it would come to his knowledge. *Trubner* v. *Trubner*, 59 L. J., P. 56 ; 15 P. D. 24 ; 62 L. T. 186 ; 38 W. R. 464 ; 54 J. P. 167. See *Cornish* v. *Cornish*, 59 L. J., P. 84 ; 15 P. D. 131 ; 62 L. T. 667.

The court made an order for substituted service of a divorce petition and citation upon a husband by registered letter ; but directed that such service should not be treated as complete service until the court should be satisfied that the letter was actually received by the proposed respondent. *Cox* v. *Cox*, 61 L. T. 698.

Substituted Service — No Inquiries made — Affidavit of Petitioner.] — Except under very special circumstances, it has been the invariable practice of the court not to give leave for substituted service of a petition and citation unless the motion for such substituted service is supported by an affidavit of the petitioner. *Williams* v. *Williams*, 65 L. J., P. 98; [1896] P. 153.

The court will not substitute service of the citation, without evidence that personal service could not be effected, and, therefore, it

refused to substitute service where there was no evidence of the respondent's place of residence at the time of making the affidavit, or of any inquiries made to ascertain it. *Moore* v. *Moore*, Ir. 5 R. Eq. 172.

To entitle a petitioner, in a suit for dissolution of marriage, on the ground of the husband's adultery, to proceed without personal service of the citation, it is not sufficient to show that the respondent is abroad, and that the petitioner does not know where he is; some attempts should be made to discover and serve him. *Sadlow* v. *Sadlow*, 28 L. J., Mat. 4.

A wife filed a petition for a dissolution of marriage, charging her husband with adultery and bigamy. He was in New York. Substituted service of the citation was refused until an affidavit made before some competent authority, whether a personal service could be effected, was produced. *Robotham* v. *Robotham*, 1 Sw. & Tr. 73; 27 L. J., Mat. 33; 4 Jur. (N.S.) 148; 6 W. R. 328.

An application was made on behalf of a wife, who had presented a petition for dissolution of marriage, to dispense with personal service of the citation, and allow substitutional service on the brother of the husband. Affidavits showed that the husband was living abroad under an assumed name, and that the wife could not ascertain where he was, but that her husband's brother was in communication with him, and had undertaken to forward the citation to him. The application was rejected on the ground that personal service might be effected through the husband's brother. *Chandler* v. *Chandler*, 27 L. J., Mat. 35.

In a suit for dissolution of marriage on the ground of a wife's adultery, affidavits, in support of a motion to dispense with personal service of the citation, and copies of the petition stated that the wife had deserted her husband at Liverpool in August, 1857; that there was reason to believe that she afterwards lived in this country with Q., the co-respondent, as his wife; that in October, 1857, two persons passing under the names of Mr. and Mrs. Q., sailed from London for Australia, and afterwards landed in Melbourne; that there was reason to believe that the said Mrs. and Mr. Q. were the respondent and co-respondent; that inquiries had been made in Melbourne of the agent of the ship in which those persons went to Australia, and of other shipping agents there, also of the inspector of police at Sydney, but that no trace of them, or of their movements, could be discovered. The judge dispensed altogether with service on the respondent and co-respondent. *Cook* v. *Cook and Quaile*, 28 L. J., Mat. 5.

In a suit by a wife for judicial separation, application having been made for an order that service of the citation and copy of the petition upon the father of the husband should be deemed good service, upon affidavits that the wife did not know where the husband was, and that his father, though it was believed he knew his address, would not disclose it, and that the wife had last heard from her husband in 1854, when he wrote to her; the judge refused to make the order without an affidavit that inquiries had been made for the husband at the place from which the letter was addressed, but subsequently granted it on an affidavit that such inquiries had been made there, and that he had left, and gone to another place, which he had also left, and that the person in whose employ he had been at the latter place did not know whither he had gone. *Lacey* v. *Lacey*, 28 L. J., Mat. 24.

Service of a citation upon a co-respondent will be dispensed with if, after a sufficient search, he cannot be found. *Parker* v. *Parker*, 5 Jur. (N.S.) 103.

In a suit by a wife against her husband for a judicial separation by reason of his adultery, he had left his home, and it was found impossible to serve him with the petition or citation. An affidavit of that fact having been brought in, service was dispensed with. *Deane* v. *Deane*, 4 Jur. (N.S.) 148.

A wife filed a petition for dissolution of marriage, but was unable to effect personal service of the citation, in consequence of her husband having gone abroad, but whither she knew not. A., knowing where the husband was, though refusing to give his address, forwarded to him, by post, an office copy and a plain copy of the petition, and two copies of the citation. The husband returned by post to A. the plain copy of the petition and one of the copies of the citation, on which were indorsed memoranda signed by him, acknowledging the receipt of the office copy of the petition and also a copy of the citation. The husband not having entered an appearance, the wife was allowed to proceed without further service. *Chandler* v. *Chandler*, 28 L. J., Mat. 6.

—— **Respondent in Prison.**]—If a respondent is in prison, the court will not be satisfied with substituted service of the petition and citation to be made on an official of the gaol in which he is confined, unless there is a reasonable probability that the contents of those documents will thereby become known to him. *Bland* v. *Bland*, 44 L. J., Mat. 14; L. R. 3 P. 233; 32 L. T. 404; 23 W. R. 419.

—— **In Lunatic Asylum.**]—The respondent in a suit for nullity of marriage being resident in a lunatic asylum, and having a mother living, it was ordered that the citation should be served upon him personally in the presence of the superintendent of the asylum, and also on his mother. *B.*, f. c. *B.* v. *B.*, Ir. R. 9 Eq. 551.

Loss of Original Citation—Refusal of Certificate by Registrar—Motion for leave to proceed.]—In a case where, after repeated searches in the principal probate registry at Somerset House, the original citation could not be found, and a clerk to the solicitor, who was, at the time of the alleged service on the respondent, acting for the petitioner, made an affidavit setting out the facts and stating that, on the day following the alleged service, he lodged the original citation in the principal registry, the registrar, after personally cross-examining the said clerk as to his affidavit, refused to certify that the case was in order and ready for trial. On appeal to the judge, upon motion:—Held, that the registrar was right in refusing his certificate. Whether, if satisfied that the original citation had, in fact, been duly served, but that it had afterwards been lost or mislaid, the court would allow a petitioner to proceed to trial in the absence of the original citation without requiring a fresh citation to be extracted and served, quære. *Cridland* v. *Cridland*, 60 L. T. 398.

—— **After Service.**]—A citation was personally served upon the respondent, but was lost or destroyed by the clerk to whom it was given to

be returned into the registry. The court allowed a duplicate to be filed with the usual affidavit of service. *Chillcott* v. *Chillcott and Smith*, 43 L. J., Mat. 8; 29 L. T. 548; 22 W. R. 166.

The court will not make an order dispensing with the necessity for the return of a citation into the registry, even when it is satisfied that the original citation has been lost by the carelessness or fraud of a defaulting solicitor. *Perret* v. *Perret and Allt*, 35 L. T. 910.

Respondent Abroad.]—A wife's remedy for matrimonial wrongs must be usually sought in the place of her husband's domicil. The English divorce court has not jurisdiction against a foreigner, after he has quitted this country, for not rendering conjugal rights to his wife while he was here. The provisions of s. 42 of 20 & 21 Vict. c. 85 (for service out of her Majesty's dominions), do not apply to suits for restitution of conjugal rights. *Firebrace* v. *Firebrace*, 47 L. J., P. 41; 4 P. D. 63; 39 L. T. 94; 26 W. R. 617. *See* col. 732.

Served Abroad.]—Two natural-born English subjects were married in England. The husband afterwards went to America, became domiciled there, and there committed bigamy and adultery. The wife petitioned for a dissolution of the marriage. The citation and a copy of the petition were personally served on the husband in America, but he did not appear:—Held, that the service of the citation on him in America was sufficient, and that, notwithstanding his change of domicil, the court had jurisdiction to dissolve the marriage. *Deck* v. *Deck*, 2 Sw. & Tr. 90; 29 L. J., Mat. 129; 2 L. T. 542; 8 W. R. 666.

Undertaking of Solicitor to Accept Service.]—An undertaking by a respondent's solicitor to appear is not sufficient. The citation must be served upon the respondent. *De Niceville* v. *De Niceville*, 37 L. J., Mat. 43.

The court will not allow a suit to proceed upon the mere undertaking of an attorney to accept service of the citation for the respondent. Personal service on the respondent is necessary, unless the court has dispensed with such service. *Milne* v. *Milne*, 4 Sw. & Tr. 183; 34 L. J., Mat. 143.

Filing with Certificate of Service.]—A petitioner, having extracted a citation, forwarded it to Australia, to be served on the respondent and co-respondent. No service was effected, and the agent omitted to return the instrument:—Held, that no further steps could be regularly taken on the petition before the citation, with a proper certificate annexed, was filed in the registry. *Cook* v. *Cook and Quaile*, 2 Sw. & Tr. 50; 28 L. J., Mat. 37; 5 Jur. (N.S.) 103.

An affidavit of service of a citation which refers to the certificate of service indorsed on the citation, and states that such indorsement is true, is insufficient. It should state in terms that the citation was served. *Rich* v. *Rich*, 32 L. J., Mat. 77.

An affidavit of service of a citation and petition should allege that the party served is a respondent in the suit. *Temple* v. *Temple*, 31 L. J., Mat. 34.

A citation, together with a copy, as also a certified copy of the petition, were forwarded to Australia, with directions for service. On the return of the citation it was found that the affidavit of service made no mention of the certified copy of the petition having been left with the respondent:—Held, that nevertheless the petitioner might proceed to prove her petition. *Moon* v. *Moon*, 5 Jur. (N.S.) 1365.

Indorsement of Service.]—Where a respondent had been personally served with the citation at Shanghai, and the citation had been returned without the certificate of service required by r. 14 indorsed on it, the court allowed the suit to proceed without re-service. *Coghill* v. *Coghill and Laureiro*, 35 L. J., Mat. 32; L. R. 1 P. 26.

Returning into Registry.]—A petitioner for dissolution of marriage sent out citations for service on the respondent and co-respondent, who had gone to Australia. Efforts having been made to discover and serve them without success, personal service was dispensed with. The solicitor in Australia employed to effect service having omitted to return the citations to this country, the judge refused to allow the petition to be set down for hearing until they should be returned. *Cook* v. *Cook and Quaile*, 2 Sw. & Tr. 50; 28 L. J., Mat. 37; 5 Jur. (N.S.) 103.

c. Appearance.

See Divorce Rules, 1865, rr. 19—22, 56—61; Rules, 1875, r. 185.

Within what Time.]—An appearance may be entered at any time within twenty-one days of the service of the citation. *Child* v. *Child*, 3 Sw. & Tr. 537; 33 L. J., Mat. 156; 12 W. R. 992.

May be Extended.]—In a suit by a husband for dissolution of marriage, after the time for appearing had elapsed, the court gave the respondent leave to appear and file an answer, on condition that she should, before the trial, allow herself to be confronted with the petitioner's witnesses for the purpose of identification. *Hindmarsh* v. *Hindmarsh*, 35 L. J., Mat. 31; L. R. 1 P. 24.

Where a wife had been deterred from putting in an appearance to a petition filed by her husband, charging her with adultery, in consequence of a threat made by her husband's agent, the court (the case having been adjourned) gave her leave to appear and file an answer. *Alexander* v. *Alexander and Amos*, 1 Sw. & Tr. 95; 29 L. J., Mat. 56; 6 Jur. (N.S.) 56; 8 W. R. 452.

The case, on coming on for rehearing (the wife having filed an answer), was treated as a new and not as an adjourned case. *Ib.*

When Too Late.]—An issue raised by a respondent in a suit by a husband for dissolution of marriage, by reason of his wife's adultery, in which damages were claimed against a co-respondent, having been set down for trial by a jury, the court refused to allow the co-respondent, on the day previously to that fixed for the trial, to enter an appearance, on the ground that the application was then too late. *Pounsford* v. *Pounsford and Bulpin*, 30 L. J., Mat. 188.

Non-Appearance.]—In a suit for dissolution of marriage on the ground of a wife's adultery, the respondent did not appear. The co-respondent denied the adultery, and that issue was found by a jury in favour of the husband. The evidence upon which the verdict was founded being unsatisfactory, the judge declined upon it to make a decree against the respondent. *Dolby*

v. *Dolby and Hewitt*, 2 Sw. & Tr. 228 ; 30 L. J., Mat. 110 ; 3 L. T. 679 ; 9 W. R. 476.

—— **Verdict against Co-respondent—Examination of Respondent by Court—Petition dismissed against her.**]—In a petition by the husband for dissolution of the marriage on the ground of adultery, the respondent filed no answer and did not appear. The jury found a verdict against the co-respondent, and assessed the damages against him at 50*l*. The court, not being satisfied with the evidence against the wife, directed her to be summoned, and having heard her evidence, on which she was cross-examined, to the effect that she had been forced, came to the conclusion that the charge of adultery had not been established against her, and dismissed the petition against her, but gave judgment against the co-respondent for the damages with costs. *Long* v. *Long*, 60 L. J., P. 27 ; 15 P. D. 218.

And see *Seymour* v. *Seymour*, 1 Sw. & Tr. 332.

Admitting Jurisdiction.]—A wife filed a petition for dissolution of marriage, which was served on the husband, who appeared absolutely, and obtained further time to answer. He filed an answer, excepting to the jurisdiction of the court, by reason of his want of an English domicil, and the incapacity of the wife to institute a suit in her own name by reason of her infancy ; on motion to take this answer off the file :—Held, that it was too late for the respondent to raise such objection. *Zycklinski* v. *Zycklinski*, 2 Sw. & Tr. 420 ; 31 L. J., Mat. 37 ; 5 L. T. 690.

A respondent in a suit by her husband for dissolution of marriage having entered an absolute appearance, cannot afterwards plead to the jurisdiction of the court, nor can she raise such objection by act on petition. *Forster* v. *Forster and Berridge*, 3 Sw. & Tr. 144 ; 31 L. J., Mat. 185 ; 9 L. T. 147.

If a respondent intends to plead to the jurisdiction of the court, she should appear under protest. Semble, however, that at the hearing she may, notwithstanding, object to the jurisdiction. *Ib.*

A respondent who appears absolutely, thereby admits the jurisdiction of the court, and cannot afterwards amend his appearance in order to plead to the jurisdiction. *Garstin* v. *Garstin*, 4 Sw. & Tr. 73 ; 34 L. J., Mat. 45 ; 13 W. R. 508.

A party who appears absolutely and not under protest, cannot plead to the jurisdiction, and delay filing an answer on the merits until the question of jurisdiction raised by the plea is determined ; but in his answer on the merits he may also plead the matters on which he relies as showing that there is no jurisdiction. *Wilson* v. *Wilson and Howell*, 41 L. J., Mat. 1 ; L. R. 2 P. 341.

A respondent in a suit for dissolution of marriage, who has entered an absolute appearance, cannot file an answer raising the question of jurisdiction solely, but may in an answer pleading to the merits also allege facts raising the question of jurisdiction. *Wilson* v. *Wilson and Howell*, 40 L. J., Mat. 77 ; 24 L. T. 671 ; 19 W. R. 879.

A respondent who has entered an absolute appearance will not be permitted to withdraw it in order to enter an appearance under protest to enable him to plead to the jurisdiction. *Moore* v. *Moore*, Ir. R. 5 Eq. 371.

—— **Under Protest.**]—Where, in a suit for dissolution of marriage, the alleged adulterer, who had been made a co-respondent, appeared under protest and pleaded to the jurisdiction, the court, on an application of the petitioner, dismissed the co-respondent from the suit on payment of his costs. *Gaynor* v. *Gaynor and Degliantoni*, 31 L. J., Mat. 116.

Semble, if a foreigner appears to a citation otherwise than under protest, he submits himself to the jurisdiction of the court. *Bond* v. *Bond*, 2 Sw. & Tr. 93 ; 29 L. J., Mat. 143 ; 2 L. T. 543 ; 8 W. R. 630.

If a respondent in a suit for dissolution of marriage intends to plead to a dilatory plea, he should appear in person, and under protest. *Forster* v. *Forster and Berridge*, 31 L. J., Mat. 185 ; 9 L. T. 147.

d. Answer.

See Divorce Rules, 1865, rr. 28—31, 32, 38, and Rules, 1875, r. 186.

Denial of Jurisdiction of Court only.]—In a suit for dissolution of marriage the respondent filed an answer, merely denying the jurisdiction of the court, and such answer was ordered to be taken off the files, unless within a limited time the respondent amended it by adding thereto an answer on the merits. She thereupon entered an appeal from such order. Notwithstanding such appeal, the court directed in what manner the petition, as unopposed, should be heard. *Wilson* v. *Wilson and Howell*, 40 L. J., Mat. 58 ; L. R. 2 P. 292 ; 25 L. T. 206 ; 19 W. R. 1072.

When out of Time.]—If a respondent does not enter an appearance within the time (generally eight days) named in the citation, the petitioner can move for directions as to the mode of trial without waiting for the expiration of the time (twenty-one days) allowed for filing an answer. *Wood* v. *Wood and Hutchins*, 36 L. J., Mat. 48 ; L. R. 1 P. 266 ; 15 L. T. 418.

Where a respondent does not answer the petition within twenty-one days, the petitioner may proceed with the evidence : a petitioner cannot at once proceed to give evidence, but before doing so must serve the respondent with a summons to show cause. *Ward* v. *Ward*, 27 L. J., Mat. 34 ; 4 Jur. (N.S.) 366.

Not Answering—Effect of.]—In a suit for dissolution of marriage where the co-respondent has appeared, but has put in no answer, he cannot, at the hearing of the petition, be allowed to take any part in the proceedings. He cannot dispute the allegations of the petition either by cross-examining the witnesses in support of it, or by addressing the court ; nor can he be heard even on the question of costs. *Norris* v. *Norris and Gyles*, 1 Sw. & Tr. 174 ; 27 L. J., Mat. 72 ; 6 W. R. 640.

Where a respondent is in default by failing to file an answer in due course, he cannot object to a paragraph of the petition on the ground of irrelevancy. *Burrell* v. *Burrell*, 32 L. J., Mat. 136. S. P., *Hepworth* v. *Hepworth*, 6 Jur. (N.S.) 831. As to co-respondent not answering, see *Lyne* v. *Lyne and Blackney*, col. 784.

—— **Condonation—Noticed by Court, though not Pleaded.**]—Condonation proved at the hearing will be noticed by the court, although it has not been pleaded. *Curtis* v. *Curtis*, 4 S. & T. 234.

Leave for further Time.]—An application for leave to file an answer, after a cause has been set down for trial, must be supported by an affidavit showing reasonable grounds for granting it. *Jago* v. *Jago and Graham*, 32 L. J., Mat. 49 ; 11 W. R. 551.

By obtaining further time to plead, a respondent waives any objection to the sufficiency of the charge of adultery in a petition; he is, however, entitled to particulars of the charge. *Hepworth* v. *Hepworth*, 30 L. J., Mat. 215; 6 Jur. (N.S.) 831; 3 L. T. 180.

A petition for dissolution of marriage by reason of adultery of the wife, having been partly heard as unopposed, stood over for further evidence. The wife then applied for leave to file an answer to the petition on an affidavit which stated that she denied the charges made against her, and had otherwise a good defence. An order to show cause having been served on the husband, on his non-appearance, permission was granted. *Alexander* v. *Alexander and Amos*, 6 Jur. (N.S.) 56; 8 W. R. 452.

An answer filed without the leave of the judge, after the time allowed by the rules for filing it has elapsed, may be treated by the petitioner as a nullity. *Avila* v. *Avila*, 30 L. J., Mat. 104.

New Averments must be verified by Affidavit.]—Where a petition, on the face of it, sets up a sufficient case, it should be met by a responsive plea, and cannot be dismissed by the court on an affidavit of facts, which might be a sufficient plea in law. *Evans* v. *Evans*, 1 Sw. & Tr. 78; 27 L. J., Mat. 31; 6 W. R. 356.

All matter in answer beyond a simple denial must be verified by affidavit, which, however, need not be in absolute terms. *Tourle* v. *Tourle*, 1 Sw. & Tr. 165; 27 L. J., Mat. 52; 6 W. R. 544.

A petition for dissolution of marriage on the ground of the wife's adultery, charged various acts of adultery. The respondent in her answer pleaded, first, a denial of the adultery; secondly, desertion; thirdly, condonation; and, fourthly, connivance. Her affidavit, filed in pursuance of the above rule, did not verify the third and fourth pleas, it being supposed that by doing so the adultery would be admitted:—Held, that these pleas should be verified, as the respondent, by doing so, would not admit the adultery, each plea being to be construed by itself. *Ib.*

Form of.]—An answer to a petition for dissolution of marriage must not necessarily be in conformity with a common law plea, either by way of traverse or of confession and avoidance. It is intended to be a substantial statement of the respondent's case, but should be within a reasonable degree of brevity. *Gaston* v. *Gaston*, 13 L. T. 412.

Therefore, the court directed an answer to be reformed, which detailed with needless particularity the history of the married life, and pleaded matters which might be given in evidence under a simple traverse. *Ib.*

In answer to a petition for judicial separation on the ground of desertion, the respondent may set out facts showing that there was reasonable cause for the desertion, but such facts should be stated succinctly. *Hill* v. *Hill*, 33 L. J., Mat. 187; 10 Jur. (N.S.) 371.

What can be Pleaded.]—In a petition for divorce on the ground of adultery, it is not competent to plead the ante-nuptial incontinence of the respondent, even though it and the adultery are charged to have been committed with the same person. *Fitzgerald* v. *Fitzgerald*, 32 L. J., Mat. 12; 11 W. R. 85.

In answer to a petition for judicial separation on the ground of cruelty, the respondent pleaded a traverse and condonation, and further alleged that the petitioner had consented to a deed of separation, and that the suit was not instituted bonâ fide, but for the purpose of obtaining an increased allowance. The court refused to order these allegations to be struck out. *Williams* v. *Williams*, 35 L. J., Mat. 85; L. R. 1 P. 178; 14 L. T. 770; 14 W. R. 1022.

But an allegation that by reason of the deed of separation the petitioner was not entitled to institute the suit, was ordered to be struck out. *Ib.*

An impediment to marital intercourse supervening after marriage in consequence of the disease of the wife, cannot be pleaded in bar by the husband to a suit by her for judicial separation on the ground of his adultery. *M.* v. *M.*, 31 L. J., Mat. 168.

Cruelty is no answer to a suit for judicial separation on the ground of adultery. *Tuthill* v. *Tuthill*, 31 L. J., Mat. 214.

The adultery of the wife, if it has been condoned by her husband, is no bar to a suit by her for judicial separation, on the ground of adultery subsequently committed by him. *Seller* v. *Seller*, 1 Sw. & Tr. 482; 28 L. J., Mat. 99; 5 Jur. (N.S.) 686; 8 W. R. 5.

Where, in answer to a wife's petition on the ground of cruelty, the husband alleges such conduct on the part of the wife as justified him in the use of force, the answer should state generally the nature of the wife's conduct, but need not go into dates or other particulars. *Shaw* v. *Shaw*, 2 Sw. & Tr. 515; 31 L. J., Mat. 35; 6 L. T. 477.

Cruelty may consist in the aggregate of the acts alleged in an answer, and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant the relief sought. *Green* v. *Green*, 33 L. J., Mat. 64.

An allegation by a husband in answer to his wife's suit on the ground of cruelty and adultery that she had wilfully withdrawn herself from his bed, and refused him conjugal rights, is no answer. *Rowe* v. *Rowe*, 4 Sw. & Tr. 162; 34 L. J., Mat. 111; 11 Jur. (N.S.) 568; 12 L. T. 639; 13 W. R. 1048.

—— **Prior Decrees.**]—A wife, in answer to the husband's petition for dissolution on the ground of her adultery, pleaded that in a prior suit she had been judicially separated from him:—Held, that the prior decree was no bar to the suit. *Yeatman* v. *Yeatman and Rummell*, 21 L. T. 733. See *S. C.*, 21 L. T. 401.

—— **Undue Familiarities alleged against Petitioner—Motion to Strike Out—Refusal.**]—A husband petitioned for a divorce upon the ground of his wife's adultery. The wife, in her answer, denied the adultery, pleaded condonation, and alleged as follows:—"That in and since the year 1887 the petitioner had paid marked attention to an unmarried lady with whom the petitioner and the respondent were acquainted, and when the respondent has remonstrated with him he has told her he would not and could not give up his intimacy with the said lady, and he has invited the said lady to his house, and corresponded with her notwithstanding the respondent's repeated objections and remonstrances, and has made her presents, and that he has absented himself from the respondent's society in order to enjoy the society of the said lady, and has frequently told the respondent that he has been fascinated by the said

lady, and that he would have run away with her if she had consented: that in and since the year 1890 the petitioner had paid marked attention to another lady, and has refused to give up his intimacy with her, notwithstanding the respondent's objections and remonstrances, and that he has been guilty of acts of undue familiarity with the said lady"; and that the petitioner, by such wilful neglect and misconduct, had conduced to the adultery (if any) of the respondent. The following particulars were subsequently filed in respect of the statements: "The name of the unmarried lady was Miss A., and the flirtation extended from the year 1887 to the filing of the petition. The name of the unmarried lady was Miss B., and the flirtation extended from the 12th Nov., 1892, to the filing of the petition; and the act of familiarity spoken of, the petitioner putting his arm round her waist, and she sitting on his knee at . . . in the month of December, 1892, and his arm round her waist on the 2nd January":—Held, that, if the facts alleged were proved, it was not impossible that the judge might come to the conclusion that the husband had by his neglect conduced to the wife's adultery, and therefore the court would not order them to be struck out. *Cox* v. *Cox*, 70 L. T. 200—C. A.

Counter-charges.]—In a suit for dissolution, brought by a wife, the husband made counter-charges of adultery against her. On the allegation that the charges so made were identically the same as those made in a previous suit brought by the husband, in which the jury had decided that the wife had not been guilty of adultery, the court was asked to strike out the paragraphs containing such charges:—Held, that in order that all the facts should appear on the pleadings, the proper course was for the wife to file a replication, so that the husband might reply to it. *Robinson* v. *Robinson*, 46 L. J., P. 47; 2 P. D. 75; 36 L. T. 414; 25 W. R. 376.

In a wife's answer to a petition of the husband, charging her with adultery, it is not proper to set forth his ante-nuptial connection with her. Inasmuch as the court, in its discretion, may refuse to dissolve a marriage if the petitioner, during its continuance, has been guilty of certain misconduct therein mentioned, any circumstances which have occurred since the marriage, and which can influence such discretion, may be stated in the answer. *Allen* v. *Allen and D'Arcy*, 28 L. J., Mat. 81; 5 Jur. (N.S.) 128.

Where the husband alleged, in one paragraph, that the wife had been incontinent before marriage, and in another that she had been incontinent before and had committed adultery with the same person after marriage, the court ordered the whole of the former paragraph, and so much of the latter as related to incontinence before marriage, to be struck out as irrelevant. *Mawford* v. *Mawford*, 14 W. R. 516.

A petitioner charged her husband with adultery and cruelty and prayed for a dissolution of their marriage. The respondent denied both the adultery and cruelty, and further stated that the petitioner had habitually treated him with insolence and neglect, set his orders and wishes at defiance, and for two years wilfully absented herself from his residence. On an application that the answer be amended by striking out the latter part:—Held, that it was properly introduced, as explanatory of the violent conduct attributed to the respondent. *Hughes* v. *Hughes*, 35 L. J., Mat. 94; L. R. 1 P. 219.

To a petition by a wife for judicial separation, on the ground of cruelty, the respondent pleaded adultery. The court refused to order the plea to be struck out, but left the petitioner to demur. *Hall* v. *Hall*, 32 L. J., Mat. 117; 11 W. R. 810.

Counter-claim for Judicial Separation in Action on Separate Deed.]—Where a deed of separation had been executed between a husband and wife who had continued to live apart, and the wife more than five years afterwards, by counter-claim to an action by the husband to enforce the deed, claimed as against him a judicial separation on the ground of alleged cruelty:—Held, that her right to judicial separation was barred by lapse of time and by the execution of the deed of separation. *Besant* v. *Wood*, 12 Ch. D. 605; 40 L. T. 445.

Amendment of.]—*See* col. 881.

e. Particulars.

See Divorce Rules, 1865, r. 38, form 87.

When and how Obtained.]—A general allegation, that during a specified time the respondent "committed divers acts of cruelty," is bad, and is ground for an order that the petition be amended by specifying such acts, but not for an order that particulars of the acts of cruelty be given. *Goldney* v. *Goldney*, 32 L. J., Mat. 13.

It is the practice to ask for an order for particulars by summons in chambers, and not by motion in court. *Higgs* v. *Higgs and Hopkins*, 32 L. J., P. 64; 11 W. R. 154.

Where such an order is obtained upon motion in court, the extra costs incurred by proceeding by motion instead of by summons will not be allowed. *Ib.*

A petition for dissolution of marriage alleged a specific act of adultery on the 25th of August, and other acts of adultery between that day and the 31st of October. The court declined to order particulars of the dates of these latter acts of adultery. *Boddy* v. *Boddy*, 28 L. J., Mat. 16.

The court ordered particulars to be given of a charge of adultery on divers occasions between the 1st of January, 1862, and the 30th of October, 1862, at divers places in Bristol, and the neighbourhood unknown to the petitioner, on an affidavit that the petitioner was unable to give particulars. *Higgs* v. *Higgs and Hopkins*, 32 L. J., Mat. 64; 11 W. R. 154.

Allegations of actual violence, however general as to time and place, can only be met by a summons for particulars. *Leete* v. *Leete*, 2 Sw. & Tr. 568; 31 L. J., Mat. 121; 6 L. T. 507.

A petition alleged that the co-respondent lived in the same house with the petitioner and his wife for two years, and that the adultery was committed on divers occasions during that period. The court refused to order the petition to be amended by the insertion of further particulars of the acts of adultery, being of opinion that it gave sufficient information of the charge to enable the respondent to meet it. *Smith* v. *Smith and Liddard*, 29 L. J., Mat. 62; 5 Jur. (N.S.) 1318.

Where a co-respondent charged a petitioner with having committed adultery with three females, named, without time or place, in one and the same paragraph, the court refused to let the answer be amended by alleging the adultery with each of the three females in three distinct

paragraphs, with time and place, on the ground that the inconvenience arising from the mode of pleading might be corrected by applying for particulars. *Hunt* v. *Hunt and Duke*, 2 Sw. & Tr. 574 ; 31 L. J., Mat. 163 ; 6 L. T. 727.

In a suit by a husband for dissolution of marriage, the petitioner, in pursuance of an order made on the application of the respondent, delivered particulars in which he alleged generally "adultery with A. at Malta between 1859 and 1862, and during a journey in Switzerland, Savoy, Sardinia and Italy." Upon application for further and better particulars, it appeared that the information of the petitioner was solely derived from a diary and certain correspondence of the respondent. The court ordered that unless particulars, setting out the dates and occasions of the alleged adultery, should be given to the respondent ten days before the trial, the petitioner should be precluded at the trial from giving any save documentary evidence of the adultery charged. *Codrington* v. *Codrington and Anderson*, 3 Sw. & Tr. 368 ; 33 L. J., Mat. 53 ; 10 L. T. 139.

A petition for dissolution of marriage alleged that the co-respondent had lived in the same house with the petitioner and his wife for two years and that the adultery was committed "on divers occasions during that period." The court refused further particulars. *Smith* v. *Smith and Liddard*, 29 L. J., P. 62.

Not Corresponding to Charges.]—When a respondent filed as particulars of cruelty alleged in her answer allegations of cruelty which did not correspond with the charge in the answer, but were fresh charges, the court ordered them to be struck out. *Sanderson* v. *Sanderson, Stephens and Hiscock*, 41 L. J., Mat. 24 ; 25 L. T. 857 ; 20 W. R. 261.

In a wife's petition for a judicial separation on the ground of cruelty, particulars were ordered to be given, but as they did not correspond with the original charges, the court ordered them to be struck out. Subsequently they were allowed to be added to the petition as new charges. *Grafton* v. *Grafton*, 28 L. T. 144.

Facts Omitted in Particulars.]—When particulars of a general charge of adultery contained in a petition have been ordered and delivered, the petitioner, if he intends at the hearing to prove acts of adultery not included in the particulars, should give notice of them to the other side a reasonable time before the hearing. If he omits to do so, the hearing will be adjourned. *Bancroft* v. *Bancroft and Rumney*, 34 L. J., Mat. 31 ; 13 W. R. 506.

Where Insufficient.]—On a summons for particulars of a charge of adultery an order was made to give at least ten days before the trial particulars specifying dates and occasions, or the petitioner to be precluded from giving other than documentary evidence in support of certain charges of adultery. A statement purporting to be particulars was given, but with scarcely any specification of dates and occasions. At the trial evidence other than documentary was objected to, on the ground that the order for particulars had in substance not been complied with, but the judge ordinary held that the evidence was admissible, and that if the particulars were not sufficient, the proper course would have been to apply for further and better particulars. *Codrington* v. *Codrington and Anderson*, 4 Sw. & Tr. 63.

Of Plea that Marriage was Illegal.]—A husband, in answer to his wife's petition for divorce, pleaded that she was not his lawful wife, as he had contracted a previous marriage. On motion for particulars of the previous marriage the court ordered them to be set out in the pleas, and not by way of particulars, but dispensed with their averment on oath, on the ground that it might form the basis of a prosecution for bigamy. *Silver* v. *Silver*, 21 L. T. 734.

f. Amendment of Pleadings.

See Divorce Rules, 1865, rr. 34—38.

When Allowed.]—The question for the court is wholly different where a pleading is demurred to, and where it is moved to order the amendment or reformation of a pleading ; in the latter case, the court will consider what form is convenient in the circumstances, and whether the party applying is likely to be injured or obscured in his view of the case by the pleading as it stands, without prejudging the question of the sufficiency of the answer if established in evidence. *Griffith* v. *Griffith*, 3 Sw. & Tr. 355 ; 33 L. J., Mat. 81 ; 10 L. T. 308.

A petition alleged that the respondent and co-respondent had been living and cohabiting together, but contained no specific charge of adultery. Neither the respondent nor the co-respondent appeared :—Held, that the allegation was insufficient, and leave to amend was refused at the hearing. *Forman* v. *Forman and Davis*, 32 L. J., Mat. 80 ; 11 W. R. 401.

The court will not order a pleading to be amended unless it is so framed as to embarrass the opposite side. *Green* v. *Green*, 33 L. J., Mat. 83.

Petition—By adding Charge.]—A wife, who had instituted a suit for judicial separation, on the ground of cruelty, subsequently discovered that her husband had also been guilty of adultery. The court allowed her to amend her petition by adding a charge of adultery and praying for dissolution of marriage on the ground of cruelty and adultery, without extracting a fresh citation ; but directed that the petition, when amended, should, be re-served. *Cartlidge* v. *Cartlidge*, 31 L. J., Mat. 135 ; 8 Jur. (N.S.) 493.

A petition for dissolution of marriage contained an inferential, but not a distinct, charge of adultery at a specified time and place. Personal service on the respondent had been dispensed with. Neither the respondent nor co-respondent appeared at the hearing. Adultery at the alleged time and place having been proved, the court allowed the petition to be amended by adding a distinct charge of adultery without requiring the petition to be re-served. *Ambler* v. *Ambler and Hoghton*, 32 L. J., Mat. 6 ; 7 L. T. 339 ; 11 W. R. 111.

Where a petitioner, after an adjournment of the case part heard, in order to procure further evidence, asks leave to amend his petition by adding a new charge, it is an objection to granting the application that the charge had come to his knowledge before the petition in its original form was drawn. *Bannister* v. *Bannister and Davis*, 29 L. J., Mat. 53.

After hearing a petition by a wife for dissolution of marriage on the ground of adultery and cruelty, no decree having been pronounced the

court allowed the petition to be amended by the addition of a charge of bigamy, which came to her knowledge in the interval between the cause being set down for hearing and the hearing. *Walker* v. *Walker*, 30 L. J., Mat. 214.

On the hearing of her petition for dissolution of marriage the wife proved the adultery of the husband, but failed to establish the charge of desertion. The court allowed her subsequently to amend her petition by adding a charge of cruelty, but intimated that strict proof would be required to support it. *Parkinson* v. *Parkinson*, 39 L. J., Mat. 21; L. R. 2 P. 27.

A petitioner for divorce is by precedent entitled to the leave of the court to amend his petition, by adding charges of fresh acts of adultery committed after the date of the petition by the respondent with the co-respondent. The court, however, expressed a doubt as to such a course standing investigation on appeal, and intimated that the better course would be for the petitioner to file a supplemental petition, and to consolidate the two petitions before the hearing. *Borham* v. *Borham and Brown*, 40 L. J., Mat. 6; L. R. 2 P. 193; 23 L. T. 600; 19 W. R. 215.

Cruelty is a matrimonial offence which must essentially be within the wife's knowledge when she files her petition; and the court, therefore, will not allow her to add new charges to her petition, except under very special circumstances. *Austin* v. *Austin*, 41 L. J., Mat. 8; 25 L. T. 856; 20 W. R. 128.

When in a suit for judicial separation on the ground of cruelty the petition had been filed for nearly a year, issue had been joined, and the cause set down for trial; the court refused to allow the petitioner to amend her petition by adding further charges of cruelty. *Ib.*

A wife brought a suit for dissolution on the ground of adultery and cruelty. She proved the adultery, but failed to prove the cruelty. The hearing was adjourned, and she subsequently discovered that the communication of syphilis amounted to legal cruelty. The court allowed her to add a charge of cruelty to that effect to the petition. *Parkinson* v. *Parkinson*, 21 L. T. 597.

A petition by a wife for dissolution of marriage, on the ground of adultery and desertion, may be amended by adding a charge of cruelty if the court is satisfied that the fresh charge is brought forward bonâ fide, and not for the purpose of vexation. *Rowley* v. *Rowley*, 1 Sw. & Tr. 487; 29 L. J., Mat. 15; 7 W. R. 653.

—— **By Striking out Charge.**]—The court allowed a petition for judicial separation to be amended by striking out a charge of adultery, in order that the petitioner's evidence might be admitted in support of the charge of cruelty, the respondent having appeared and pleaded, but directed that any costs incurred relating to the charge of adultery should not be taxed against the husband. *Hudson* v. *Hudson*, 33 L. J., Mat. 5; 9 Jur. (N.S.) 1302; 12 W. R. 216.

—— **Dates of Charges.**]—A petition for dissolution of marriage, on the ground of adultery and cruelty, charged cruelty "in and during the months of April and May." The respondent filed an answer, denying the charges. At the trial the respondent did not appear, and the petitioner failed to prove cruelty at the time alleged, but established cruelty in June and July:—Held, that the petition might be amended by substituting the date of the cruelty proved. *Bunyard* v. *Bunyard*, 32 L. J., Mat. 176; 11 W. R. 990.

Where a petition alleged adultery in the months of September and October, and the answer denied the adultery but pleaded condonation up to the 29th September, the court refused an amendment but suggested that the petitioner might demur. *Windham* v. *Windham and Giuglini*. 32 L. J., Mat. 89; 9 Jur. (N.S.) 82.

—— **No appearance by Respondent—Petition re-served.**]—A petition contained a single allegation of adultery on a specific date. It was duly served on the respondent, who entered no appearance. At the hearing, application was made to amend the petition by inserting "September" instead of "November." The court granted the application, but refused to allow the case to proceed until the petition, as amended, had been re-served upon the respondent, and ordered the hearing to stand over for that to be done. *Charter* v. *Charter*, 58 L. J., P. 44; 60 L. T. 872.

—— **Of Charge of Adultery—With whom.**]—A petition charged adultery with G., and claimed damages. The respondent denied the charge. The co-respondent appeared, but did not file an answer. At the trial, before any witnesses were examined, the claim for damages was withdrawn. The evidence of two witnesses tended to prove that the respondent, on the 24th of September, 1861, committed adultery with some person unknown; and another witness proved that at the same place and time of day, but on the 17th of July, 1861, a man named G. had passed some hours in the respondent's company. Upon an application of the husband, the petition was amended by substituting for the charge of adultery with G. a charge of adultery with some person unknown, The jury found a verdict for the respondent. Subsequently a rule for a new trial was made absolute upon affidavits that the latter witness had made a mistake in her evidence, and that the circumstances sworn to by her took place on the 24th of September, 1861. Upon the application of the husband, the court ordered the petition and record to be amended by reinserting the charge of adultery with G. upon payment of costs, but refused to allow a reinsertion of the claim for damages. *Jago* v. *Jago and Graham*, 32 L. J., Mat. 48; 11 W. R. 192.

—— **After Rule Nisi.**]—A wife petitioned for a dissolution of her marriage, by reason of the husband's adultery and cruelty, and proved both charges. The decree nisi was suspended at her request, and subsequently she asked to be allowed to amend the petition, by substituting a prayer for judicial separation. The respondent opposed the alteration, and alleged that the petitioner herself had been guilty of adultery. The court granted liberty to the respondent to file affidavits in support of the charge; and no affidavits being filed, allowed the petition to be amended as prayed. *Mycock* v. *Mycock*, 39 L. J., Mat. 56; L. R. 2 P. 98; 23 L. T. 238; 18 W. R. 1144.

—— **By adding Claim for Damages.**]—When the object appeared to be bonâ fide to obtain damages, the court allowed a paragraph praying

for damages to be added to a petition before an answer had been filed. *Symonds* v. *Symonds and Hannan*, 23 L. T. 568 ; 19 W. R. 166.

Leave was granted to amend a petition for dissolution of marriage by adding a claim for damages. *Bartlett* v. *Bartlett and Balmanno*, 34 L. J., Mat. 64.

At the date of filing his petition the only evidence which the petitioner had was the confession of the respondent. He subsequently obtained independent evidence of her alleged adultery with the co-respondent, and he then applied to amend his petition by adding a claim for damages. The court allowed the amendment. *Henslow* v. *Henslow and Beardsley*, 40 L. J., Mat. 31 ; 24 L. T. 846 ; 19 W. R. 786.

—— **From Claim for Judicial Separation to Dissolution.**]—Where both parties are before the court, a wife's suit for judicial separation may be turned into one for a dissolution of marriage without issuing a fresh citation, but there must be a re-service of the petition on the respondent. *Cartlidge* v. *Cartlidge*, 4 Sw. & Tr. 249.

The court granted an application by a wife that a petition for a judicial separation filed by her might be dismissed, and that she might substitute for it a petition for dissolution of marriage, upon the terms of her paying the costs. *Lewis* v. *Lewis*, 29 L. J., Mat. 123.

—— **Allegation of Desertion.**]—A petition for dissolution of marriage by reason of the husband's adultery and desertion was directed to be amended by a distinct averment of the fact of desertion ; some statements of circumstances in such a petition may be necessary, but evidence should not be pleaded. *Pyne* v. *Pyne*, 1 Sw. & Tr. 80 ; 6 W. R. 507.

—— **From Claim for Dissolution to Judicial Separation.**]—The adultery of the respondent having been proved, and also cruelty and misconduct on the part of the petitioner which conduced to such adultery, the court refused to allow a prayer for judicial separation to be substituted for that for dissolution of marriage, in order that the evidence of the misconduct of the petitioner should be expunged. *Lempriere* v. *Lempriere and Roebel*, 37 L. J., Mat. 78 ; L. R. 1 P. 569 ; 19 L. T. 50 ; 16 W. R. 1192.

It is competent for the court to decree a judicial separation, although the petition prays only for a decree for a dissolution of marriage, if the facts proved will entitle a petitioner to the former, but not to the latter decree. *Smith* v. *Smith*, 1 Sw. & Tr. 359 ; 28 L. J., Mat. 27 ; 7 W. R. 382.

A petition of a wife prayed simply a decree of dissolution of marriage on the ground of adultery and desertion. At the hearing, adultery having been proved, but not desertion, the court decreed a judicial separation. *Ib.*

Where, on a petition for dissolution of marriage, by a wife, the only facts which in the opinion of the court the petitioner is at liberty to prove would be ground for a decree of judicial separation only, and the petitioner refuses to amend the petition by praying for judicial separation, the petition must be dismissed. *Rowley* v. *Rowley*, 4 Sw. & Tr. 137 ; 11 Jur. (N.S.) 562 ; 12 L. T. 505.

The court will, at the prayer of a petitioner, at the hearing make a decree of judicial separation instead of a decree nisi for dissolution, although the petition prays for dissolution, and facts are proved on which the dissolution might have been granted. *Dent* v. *Dent*, 4 Sw. & Tr. 105 ; 34 L. J., Mat. 118 ; 13 L. T. 252.

Of Answer.]—The court inclines to order an amendment of a plea where that will enable a point of law to be raised by demurrer. *Holland* v. *Holland*, 16 W. R. 406.

The court will allow an allegation praying for relief to be added to the prayer of an answer containing charges of adultery and cruelty in a suit for dissolution of marriage, for the purpose of allowing the suit to be continued. *Firminger* v. *Firminger and Ollard*, 17 W. R. 335.

A co-respondent whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that the petitioner had been guilty of adultery, or of such misconduct as would induce the court to exercise its discretion by withholding a decree ; but upon a statement being made that the co-respondent would probably be able to establish a case of such misconduct on the part of the petitioner if he had the opportunity, the court allowed him to amend his answer by the insertion of various counter-charges against the petitioner, and reserved the question of the costs of the day until the merits of the case had been ascertained. *Plumer* v. *Plumer and Bygrave*, 4 Sw. & Tr. 257.

When a husband brought a suit for dissolution on the ground of adultery with the co-respondent, and the wife answered charging the husband with adultery and cruelty, and prayed for a judicial separation, and the jury found for the wife on all the issues :—The court allowed the prayer of the answer to be amended, and pronounced a decree nisi for dissolution on the application of the wife. *Corpataux* v. *Corpataux and Staub*, 23 W. R. 456.

In a suit for dissolution of marriage, on the ground of the wife's adultery with the co-respondent, the latter pleaded only a denial. The court refused to allow the co-respondent, after his answer was filed, to add a charge of cruelty against the petitioner. *Jayne* v. *Jayne and Protheroe*, 21 L. T. 401 ; 18 W. R. 53.

Application to rescind Amendment.]—A wife petitioned for judicial separation, on the ground of cruelty and adultery ; the respondent traversed the charges, and afterwards obtained leave to amend his answer by adding a counter-charge of adultery. Before leave to amend was granted, and after an order for payment of the wife's taxed costs, the respondent became bankrupt on his own petition. An application to rescind the order for the amendment of the answer, on the ground that the respondent had become bankrupt solely for the purpose of avoiding payment of his wife's costs, and that the order was made by the court in ignorance of the bankruptcy, was rejected. *Greatorex* v. *Greatorex*, 34 L. J., Mat. 9.

Notice of Application for.]—Notice of an application for leave to amend a petition for dissolution of marriage should be given to the other party, or the petition may be withdrawn and served de novo. *Wright* v. *Wright*, 1 Sw. & Tr. 80 ; 27 L. J., Mat. 32 ; 6 W. R. 507.

An application was made to the court to amend an answer by adding to it a fresh charge of adultery. Notice of the intended application

was served upon the opposite party the evening previously. The facts in issue were appointed to be decided by a common jury, at the sittings then in progress:—Held, that the rules as to notice were not applicable. *Hitchcock* v. *Hitchcock*, 36 L. J., Mat. 40.

Although the opposite party has only four days allowed to amend his answer to such amended petition or answer, the court will, if it is advisable, direct that the cause shall not be heard until the expiration of ten days from the day on which the amended answer was filed. *Ib.*

Re-Service upon Amendment.]—When the respondent and co-respondent did not appear, the court refused to allow the petition to be amended at the hearing, by adding an averment of adultery with some person unknown, without re-service. *Wallace* v. *Wallace, Guiter and Macnamara*, 32 L. J., Mat. 47; 9 Jur. (N.S.) 134; 11 W. R. 112.

Where a petition for dissolution of marriage has been served in which a mistake is made in the christian name of the person with whom the respondent is alleged to have committed adultery, the court will allow it to be amended, but it must be re-served. *Love* v. *Love*, 32 L. J., Mat. 134.

When leave is given to amend a petition, on the ground that it does not allege adultery to have been committed in direct or distinct terms, but upon information and belief only, and the respondent has not appeared, it must be re-served as amended. *Spilsbury* v. *Spilsbury*, 3 Sw. & Tr. 210; 32 L. J., Mat. 126; 9 L. T. 23.

After the hearing of an undefended petition which had been adjourned for further evidence, an allegation was added to the petition by the leave of the court, and it was re-served upon the respondent. When it again came on for hearing, the court treated it as a new petition, and required evidence of all the facts necessary to found a decree, as well as of the additional allegation. *Walker* v. *Walker*, 31 L. J., Mat. 117.

Where both parties are before the court, a wife's suit for judicial separation may be turned into one for a dissolution of marriage without issuing a fresh citation, but there must be a re-service of the petition on the respondent. *Cartlidge* v. *Cartlidge*, 4 Sw. & Tr. 249.

—— **When Excused.**]—In a suit by a husband for dissolution of his marriage, he had obtained leave to proceed without a co-respondent and without personal service upon the respondent, who had been cited by advertisement. The husband was afterwards allowed to amend his petition by inserting fresh charges of adultery, without citing the respondent again. *Smith* v. *Smith*, 3 Sw. & Tr. 216; 32 L. J., Mat. 145; 9 L. T. 118; 11 W. R. 989.

Re-Entry for Trial.]—Where a petition has been set down for hearing, and is afterwards amended and re-served, it must be re-entered, and cannot be restored to the place which the original suit occupied in the list of causes. *Milner* v. *Milner*, 30 L. J., Mat. 103.

g. Demurrer.

See Divorce Rules, 1865, r. 67.

If a petition for judicial separation sets forth facts which, if proved, would disentitle the petitioner to redress claimed, it is proper to bring the question before the court by way of demurrer. *Seller* v. *Seller*, 28 L. J., Mat. 99; 5 Jur. (N.S.) 686.

Questions whether a decree in a former suit is admissible in evidence in a subsequent suit, and if so, whether such evidence would be conclusive, cannot be decided on demurrer, but must be determined at the hearing when the evidence is tendered. *Conradi* v. *Conradi*, 36 L. J., Mat. 68; L. R. 1 P. 391; 16 L. T. 392; 15 W. R. 881.

h. Abatement of Suits.

By Death of Petitioner.]—By the death of a petitioner a suit for dissolution of marriage abates. If, therefore, he dies after a decree nisi has been pronounced, the court cannot make it absolute. *Grant* v. *Grant, Bowles and Patteson*, 2 Sw. & Tr. 522; 31 L. J., Mat. 174; 6 L. T. 660.

—— **43 Eliz. c. 2, s. 7.**]—Under the 43 Eliz. c. 2, s. 7, the grandfather and grandmother may be called upon to maintain their pauper grandchild not able to work, and, if a father, who, in virtue of his possible liability under this statute to maintain his grandchildren, is entitled to maintain a suit for the purpose of obtaining a decree annulling his child's marriage, dies pending such a suit, neither the mother's nor the father's executors can revive the abated suit; the mother, because she had no interest in the suit when it was commenced; and the executor, because the statutory liability is merely personal. *Bevan* v. *M'Mahon and Bevan*, 2 Sw. & Tr. 58; 28 L. J., Mat. 127; 5 Jur. (N.S.) 686; 2 L. T. 255; 8 W. R. 453.

By Death of Respondent.]—A petition for dissolution of marriage abates on the death of the respondent, but the court will not, on the application of the petitioner, order that the petition and affidavit in support be removed from the files of the court. *Brocas* v. *Brocas*, 2 Sw. & Tr. 383; 30 L. J., Mat. 172; 5 L. T. 137.

On Lunacy of Respondent.]—A husband petitioned for a dissolution of his marriage, by reason of the adultery of his wife. At the time when he presented the petition she was in confinement as a pauper lunatic in a county lunatic asylum:—Held, that the court had no authority to appoint a curator ad litem to represent the interests of the wife in defence of the suit. *Bawden* v. *Bawden*, 2 Sw. & Tr. 417; 31 L. J., Mat. 94; 8 Jur. (N.S.) 157; 6 L. T. 27; 10 W. R. 292.

By Death of Co-Respondent.]—Semble, that when a co-respondent dies during the pendency of a suit for dissolution of marriage, a motion should be made for leave to strike his name out of the petition. *Sutton* v. *Sutton and Peacock*, 32 L. J., Mat. 156.

i. Cross Suits.

Where the same issues are raised in cross suits, the court will in general stay one, without reference to their position in the cause list. *Osborne* v. *Osborne and Martelli*, 3 Sw. & Tr. 327; 33 L. J., Mat. 38; 10 Jur. (N.S.) 80; 9 L. T. 456.

Where there are cross suits, and the wife in her suit (which was for a judicial separation on the ground of cruelty) was, by the verdict of the jury, acquitted of the charges of adultery alleged in the husband's answer, the court refused to allow this verdict to be pleaded in answer to the

husband's petition for dissolution, in which the same acts of adultery were charged. *Bancroft* v. *Bancroft and Rumney*, 3 Sw. & Tr. 597; 34 L. J., Mat. 31.

Judicial separation was decreed on a verdict establishing the husband's cruelty, though an issue in a cross suit as to his wife's adultery was pending. *Bancroft* v. *Bancroft*, 4 Sw. & Tr. 84; 34 L. J., Mat. 70; 12 L. T. 236; 13 W. R. 548.

Both Parties claiming Relief.]—When a husband petitions for a dissolution of marriage on the ground of his wife's adultery, and she in her answer prays for a judicial separation on the ground of desertion, the court will not at his instance (the wife opposing) terminate the suit by dismissing the petition. *Schira* v. *Schira and Sampajo*, L. R. 1 P. 466.

j. Withdrawal and Dismissal of Petition.

See Divorce Rules, 1875, r. 193.

Dismissal—Petitioner not Appearing.]—If at the hearing of a petition by a wife for dissolution of marriage, on the ground of adultery and desertion, no one appears on behalf of the petitioner, the respondent has a right to have the petition dismissed. *Desmarest* v. *Desmarest*, 31 L. J., Mat. 34.

Where a notice was given by a petitioner's solicitors to the solicitors of the respondent and co-respondent of the abandonment of the petition for dissolution of marriage, the court, on a motion on the part of the respondent and co-respondent, supported by an affidavit of service of notice of motion on the petitioner's solicitors, dismissed the petition and condemned the petitioner in the costs. *Symons* v. *Symons and Pike*, 2 Sw. & Tr. 435; 31 L. J., Mat. 84; 6 L. T. 163; 10 W. R. 449.

Where a wife, the petitioner, did not appear on the day of hearing, the court before dismissing the petition required that a rule to show cause should be first served upon her, and intimated that in all such cases that practice should be followed. *Curtis* v. *Curtis*, 38 L. J., Mat. 9; 19 L. T. 610.

When a petitioner fails to appear at the hearing, the court will either grant a rule to dismiss the petition, or, if information is laid before it tending to show that the petitioner does not intend to go on with his suit, will dismiss it at once. *Round* v. *Round*, 20 L. T. 87.

—— **Misconduct of Petitioner.**]—In a husband's suit for dissolution of marriage, the jury found that the wife had committed adultery with the co-respondent; that the husband had been guilty of adultery and cruelty, and had infected his wife with a venereal disease; and that his misconduct had been condoned, and had not conduced to her adultery; and the jury refused to award damages against the co-respondent. The court, in the exercise of its discretion under 20 & 21 Vict. c. 85, s. 31, dismissed the petition, and directed that the wife should have the general costs of the suit. *Wildey* v. *Wildey and Ryder*, 26 W. R. 239.

Where in a suit for a dissolution of marriage by a husband the adultery was proved, but the petition was dismissed on the ground of his gross misconduct, the court refused to make any order as to the costs of the petitioner or co-respondent. *Hick* v. *Hick and Kitchen*, 34 L. J., Mat. 11.

Agreement for Compromise.]—A husband and wife are competent to make a binding agreement for compromise of a divorce suit. *Hart* v. *Hart*, 50 L. J., Ch. 697; 18 Ch. D. 670; 45 L. T. 13; 30 W. R. 8.

An agreement for good consideration, that the petitioner in a suit for dissolution of marriage will withdraw from the suit, is binding, if it has not been obtained by fraud or duress. *Sterbini* v. *Sterbini*, 39 L. J., Mat. 82; 22 L. T. 552.

Where the parties, on the eve of the trial of a suit by the wife for judicial separation, by reason of cruelty, agreed that the cause should not be moved to settle terms of deed of separation and that arbitration should be resorted to, the court refused to allow her to proceed with the original suit, she having wilfully interposed obstacles to the progress of the arbitration. *Hooper* v. *Hooper*, 1 Sw. & Tr. 219; 29 L. J., Mat. 59; 8 W. R. 319.

Held, on appeal, that the petitioner was not at liberty to repudiate the agreement, except on the ground of fraud, or of such an error in the terms of the agreement that she ought not to be bound by it. *Hooper* v. *Hooper*, 3 Sw. & Tr. 251; 30 L. J., P. 49.

In 1860 a wife filed a petition for dissolution of marriage, on the ground of adultery and cruelty. When the cause came on for trial, it was withdrawn from the jury by agreement of the parties, the wife undertaking not to institute other proceedings in the divorce court. In 1862 the wife instituted a fresh suit for dissolution of marriage on the ground of adultery and cruelty, the acts of misconduct alleged in the petition being, with the exception of some acts of adultery and cruelty committed prior to the first petition and not included within it, and of some acts of adultery of later date, the same as those charged in the first petition. The respondent pleaded the agreement in bar. Upon an application by the petitioner for directions as to the mode of trial, the court refused to make any order, upon the ground that the institution of the second suit was a gross breach of good faith, and a violation of the agreement by which the petitioner had surrendered irrevocably any legal right to relief in respect of misconduct prior to the first petition:—Held, that the suit could not be sustained, inasmuch as it was founded in part upon acts which had occurred before the date of the first petition, and which were released by the agreement. *Rowley* v. *Rowley*, 35 L. J., Mat. 110; L. R. 1 H. L. 63, *and see* col. 926.

—— **Agreement not made Order of Court.**]—Where by agreement between the parties a petition for dissolution of marriage is dismissed, the court will not allow such agreement to be made an order of court for the purpose of enforcing its terms. *Ryder* v. *Ryder*, 30 L. J., Mat. 164.

—— **Queen's Proctor Intervening.**]—When the queen's proctor objected, the court refused to dismiss the petition on consent, and held that he was entitled to prove the adultery charged by him against the petitioner. *Clapham* v. *Clapham and Guest*, 17 L. T. 554.

Where a husband's petition was dismissed for want of prosecution, the court condemned him in the co-respondent's costs, and declined to sus-

pend its decree until the result of an intervention by the queen's proctor against a decree nisi being made absolute, obtained by the wife in a cross suit, was known. *Whitmore* v. *Whitmore and Brettell*, 13 L. T. 610.

—— **After Decree Nisi.**]—When a decree nisi for the dissolution of a marriage has been pronounced, the court has power to dismiss the petition, as for want of prosecution, unless the petitioner moves to have the decree made absolute within a reasonable time. *Pollack* v. *Pollack, Deane and Macnamara*, 16 W. R. 1130.

After a decree nisi for dissolution of marriage at the suit of a wife had been pronounced, she renewed marital intercourse with her husband, and informed her attorney that she did not wish any further proceedings to be taken in the suit. Upon an application by the husband to dismiss the petition, the court declined to accede to it, but said that, if both parties consented, it would order all proceedings in the suit to be stayed. *Lewis* v. *Lewis*, 2 Sw. & Tr. 494 ; 30 L. J., Mat. 199 ; 7 Jur. (N.S.) 831 ; 4 L. T. 772.

—— **After Verdict.**]—A motion to dismiss a petition after a verdict for a respondent should be supported by an affidavit that no application for a new trial has been lodged in the registry. *Hill* v. *Hill and Wood*, 2 Sw. & Tr. 515 ; 30 L. J., Mat. 198 ; 5 L. T. 120.

When a verdict has been found for the respondent, the court will not dismiss the petition until the month allowed for moving for a new trial has elapsed. *Hitchcock* v. *Hitchcock*, 2 Sw. & Tr. 513 ; 30 L. J., Mat. 198 ; 5 L. T. 120.

Where issues in a suit for dissolution of marriage have been tried by a jury, the court will not dismiss the petition on the application of the petitioner until the time allowed by the rules for moving for a new trial has elapsed. Aliter, if all the parties concur in the application. *Seddon* v. *Seddon and Doyle*, 31 L. J., Mat. 31.

At the trial of issues joined in a suit for dissolution of marriage, on the ground of the wife's adultery, no one appearing on behalf of the husband, the jury returned a verdict that the respondent had not committed adultery with the co-respondent. No application having been afterwards made for a new trial, the court, upon motion of the co-respondent, dismissed the petition and condemned the husband in costs. *Potts* v. *Potts and Bateman*, 32 L. J., Mat. 32 ; 11 W. R. 192.

—— **Upon Payment of Costs.**]—The court will not dismiss a petition by a husband for dissolution of marriage, except upon payment of the wife's taxed costs and the costs of the motion. *Pearce* v. *Pearce*, 30 L. J., Mat. 182.

A wife, pending a suit by her for a judicial separation, returned to cohabitation, no order for the taxation of her costs having been made. The husband, therefore, applied to have the petition dismissed :—Held, that it could be dismissed only upon payment of the wife's costs. *Cooper* v. *Cooper*, 3 Sw. & Tr. 392 ; 33 L. J., Mat. 71 ; 10 L. T. 275.

Withdrawing.]—When a respondent has appeared, the court will not allow a petitioner to withdraw the petition, unless the respondent consents, or has had notice of the motion. *Lutwyche* v. *Lutwyche*, 28 L. J., Mat. 56 ; 5 Jur. 76.

The court will allow a wife to withdraw her petition for judicial separation, and file one for dissolution of marriage, if her proctor has not received from the husband her costs in the former suit. *Ashley* v. *Ashley*, 2 Sw. & Tr. 388 ; 30 L. J., Mat. 175 ; 5 L. T. 139.

Withdrawal of former Petition—Effect of.]—In 1873 a husband presented a petition for dissolution of marriage on the ground of his wife's adultery with the co-respondent. The petition was afterwards dismissed on the application of the petitioner and on payment by him of the costs of the respondent and co-respondent. In 1879 the husband presented another petition for dissolution of marriage on the ground of his wife's adultery with the same co-respondent, and charged various acts of adultery which had been alleged in the first petition as well as other acts of adultery subsequent to the dismissal of that petition :—Held, that the dismissal of the first petition did not estop the petitioner from relying upon the same acts of adultery in support of the second petition. *Hall* v. *Hall*, 48 L. J., P. 57 ; 40 L. T. 525 ; 27 W. R. 664.

k. Delay in Prosecuting Suit.

What is Unreasonable.]—The unreasonable delay in presenting or prosecuting a petition for dissolution of marriage, is delay from which it would appear that the petitioner is insensible to the injury of which he complains. *Pellew* v. *Pellew and Berkeley*, 1 Sw. & Tr. 553 ; 29 L. J., Mat. 44 ; 2 L. T. 89. And see *Beauclerk* v. *Beauclerk*, 60 L. J., P. 20 ; [1891] P. 189 ; 64 L. T. 35—C. A., cols. 760—1.

Effect of.]—Delay in instituting a suit for judicial separation, on the ground of cruelty, is not a bar to the suit ; but it is a material fact for the consideration of the court, as tending to show that there was no serious apprehension of further violence. *Smallwood* v. *Smallwood*, 2 Sw. & Tr. 397 ; 31 L. J., Mat. 3 ; 8 Jur. (N.S.) 63 ; 5 L. T. 324 ; 10 W. R. 65.

Or taken in connection with other circumstances may show that the suit is not instituted for the protection of the wife, but for some collateral purpose. If the court is satisfied that such is the case, the petition will be dismissed. *Matthews* v. *Matthews*, 1 Sw. & Tr. 499 ; 29 L. J., Mat. 118 ; 6 Jur. (N.S.) 659 ; 2 L. T. 472 ; 8 W. R. 591. Affirmed on appeal, 3 Sw. & Tr. 161.

Want of Means.]—A petitioner is not guilty of unreasonable delay in presenting his petition, notwithstanding a long period may have elapsed since the adultery, if he is prevented by poverty from taking earlier steps to obtain a divorce. *Ratcliffe* v. *Ratcliffe and Anderson*, 1 Sw. & Tr. 467 ; 29 L. J., Mat. 171 ; 5 Jur. (N.S.) 714 ; 7 W. R. 726.

A wife left her husband in 1844, on account of his cruelty and adultery. She had not the means of proceeding till shortly before the suit was instituted, in 1863. The husband had been leading a wandering life without employment :—Held, that the wife had not been guilty of unreasonable delay. *Harrison* v. *Harrison*, 3 Sw. & Tr. 362 ; 33 L. J., Mat. 44 ; 10 Jur. (N.S.) 371 ; 10 L. T. 138 ; 12 W. R. 808.

A husband in 1878 obtained a judicial separation, and 50*l.* damages against the co-respondent, but he took no steps to recover the damages. The

wife continued to cohabit with the co-respondent, and in 1882 the husband petitioned for a dissolution of his marriage. The reason which he gave for the delay and for not enforcing the claim for damages was that he had no money, being only in receipt of weekly wages, and that he hoped his wife would come back and live with him:—Held, that the delay was not unreasonable, and that the petitioner was entitled to a decree. *Mason* v. *Mason*, 52 L. J., P. 27; 8 P. D. 21; 48 L. T. 290; 31 W. R. 361—C. A. S. P., *Wilson* v. *Wilson*, L. R. 2 P. 435.

A husband discovered his wife in adultery in September, 1859, and separated from her, but did not present a petition for the dissolution of his marriage until July, 1873. He was a coal hauler, and admitted that, at the time when the petition was presented, he had stock-in-trade of the value of about 600*l.* and nine horses, besides some cottages which he had purchased through a building society. The court refused to accept want of means as a sufficient explanation of the time which he had allowed to elapse before taking proceedings, and dismissed the petition on the ground of unreasonable delay. *Short* v. *Short and Bolwell*, L. R. 3 P. 193.

—— **Co-Respondent Living Abroad.**]—A petition for dissolution had been filed so far back as 1867, and the co-respondent had not answered. He had been living abroad, and was entirely without means. In order that he might be heard as to costs, the court in 1870 allowed him to come in and file an answer, on the condition that he should simply traverse the petition. *Rowland* v. *Rowland and Miles*, 21 L. T. 733.

By a Mistake.]—B., a domiciled Englishman, intermarried with C., a Scotchwoman, at Gretna Green, and at St. George's, Hanover Square, in August, 1837. B. and C. cohabited together in Wales, England, and Scotland, but principally in Scotland, till 1841, soon after which date C. eloped with P., whereupon B. obtained a sentence of divorce in the court of sessions, in Scotland, on the 3rd of July, 1841. On the 26th July, 1841, C. intermarried with P. at Glasgow, and lived with him till his death, in 1855. B. at first supposed the sentence of the Scotch court to be of universal operation, and that supposition was confirmed by opinion of counsel in 1846. In 1854 he obtained the opinion of two counsel, to the effect that the Scotch sentence would have no validity in England; in consequence of which he presented a petition for leave to bring into the House of Lords a bill, declaring his marriage with C. absolutely void since the 3rd of July, 1841, which petition was rejected. In 1858 B. petitioned the court for dissolution of marriage by reason of C.'s adultery in April, 1841, and at other times:—Held, that there was no such lapse of time as to constitute unreasonable delay. *Tollemache* v. *Tollemache*, 1 Sw. & Tr. 557; 30 L. J., Mat. 113; 2 L. T. 87.

When Relief will be Withheld.]—Cohabitation lasted from October, 1872, to March, 1873. The adultery and cruelty were not denied, and, though there had been various attempts to bring the parties together again, and the wife was willing to forgive her husband, the court was satisfied that the wife had done nothing in the interval to forfeit her right to a divorce, and granted a decree nisi. *Pitt* v. *Pitt*, 33 L. T. 136.

Adultery was committed in 1866, and a suit was instituted in 1871. The petitioner was a material witness on the issue of adultery. The inadmissibility of his evidence until after August, 1869, when the Evidence Further Amendment Act was passed, was accepted as sufficient explanation of the delay. Want of means is also sufficient excuse for delay. *Wilson* v. *Wilson*, L. R. 2 P. 435.

A wife separated from her husband in 1850, in consequence of his incestuous adultery with her sister; and in 1868 she presented a petition for a dissolution of marriage on the ground of that adultery. Her explanation of the delay which had occurred in presenting the petition was, that her mother was very anxious to avoid a public exposure of the scandal, and she yielded to her mother's urgent entreaties, and forebore to take proceedings until her mother's death:—Held, to have been guilty of unreasonable delay, but not of such a character as to deprive her of her right to a decree. *Newman* v. *Newman*, 39 L. J., Mat. 36; L. R. 2 P. 57; 22 L. T. 552; 18 W. R. 584.

Undue delay in bringing the suit is no plea, strictly speaking, to a petition for judicial separation, but taken in connection with other circumstances, such as pecuniary motives for instituting the suit, may be a sufficient reason for dismissing the petition. *Cooke* v. *Cooke*, 3 Sw. & Tr. 126; 32 L. J., Mat. 154; 9 Jur. (N.S.) 754; 8 L. T. 644; 11 W. R. 957.

But lapse of time between knowledge of the conduct complained of and the commencement of the suit requires explanation, and may, along with the circumstances of the case, induce the court to withhold the relief sought. In such cases the court will require to be satisfied of the sincerity of the complaint of the petitioner. *Boulting* v. *Boulting*, 3 Sw. & Tr. 329; 33 L. J., Mat. 33; 10 Jur. (N.S.) 182; 9 L. T. 779; 12 W. R. 389.

If a petitioner, with a full knowledge of the facts of the case, does not present his petition for two years, he must give some sufficient reason for the delay, otherwise his petition may be dismissed under 20 & 21 Vict. c. 75, s. 31. *Nicholson* v. *Nicholson*, L. R. 3 P. 53; 29 L. T. 108.

1. Attachment and Sequestration.

See Divorce Rules, 1865, rr. 110—112, 179, 187—203.

Attachment.]—The court will not grant an attachment against a husband for the removal of his wife's property after the dissolution of the marriage, when the property is taken for the purpose of identifying the wife, she having assumed a false name. *Whitmore* v. *Whitmore*, L. R. 1 P. 96; 14 W. R. 352.

The court refused to grant an attachment against a husband for non-payment of certain costs incurred on behalf of the wife in a suit instituted by her for judicial separation, on the ground of his alleged cruelty, where on his uncontradicted answer it appeared that the husband had been compelled to separate from her several months before the institution of the suit in consequence of her drunkenness and violence, and had not the present means of complying with the order for payment. *Holland* v. *Holland*, 4 Sw. & Tr. 78; 34 L. J., Mat. 65; 11 L. T. 750; 13 W. R. 505.

An attachment will not be granted for non-payment of money pursuant to order, unless a copy of the order is annexed to or recited in the

affidavit of service. *Lidmore* v. *Lidmore*, 32 L. J., Mat. 134.

—— **Indorsement on Order to be enforced.**]—By virtue of 20 & 21 Vict. c. 85, s. 52, all decrees and orders of the court of divorce are to be enforced in the same manner as orders, &c., in chancery. Therefore, in spite of Ord. LXVIII. r. 1, which exempts divorce proceedings from the operations of the rules and orders of the supreme court, before a motion can be successfully made for disobedience to an order made in a divorce proceeding, it must be shown that the order it is sought to enforce was indorsed as required by Ord. XLI. r. 5. *Pace* v. *Pace*, 61 L. J., P. 114 ; 67 L. T. 383.

—— **Misnomer of Parties.**]—In a suit for dissolution of marriage, after a decree nisi, with costs against the co-respondent, an attachment for non-payment of those costs was granted. The citation and subsequent proceedings in which the co-respondent was erroneously styled William Abbott, were served upon William Braine Abbot, who took no objection to the irregularity until the attachment was granted. He then applied to have it set aside :—Held, that as he had stood by during the progress of the suit and allowed judgment to go against him in a wrong name, the attachment must stand. *Churchill* v. *Churchill and Abbott*, 37 L. J., Mat. 41 ; L. R. 1 P. 485 ; 17 L. T. 619.

—— **Sufficiency of Service.**]—It is competent to a party to object, on a motion for attachment for non-compliance with an order of the court, to the sufficiency of the service of the order on him. *Parr* v. *Parr and White*, 4 Sw. & Tr. 229.

The proper mode of effecting service of an order, e.g. for payment of alimony, is to leave a copy and at the same time to produce the original office copy. *Ib.*

—— **Personal Demand for Payment.**]—When an order for payment of a sum of money within a specified time is made, and personally served, a personal demand for payment is unnecessary to found a motion for attachment for disobedience to the order. *Nicholls* v. *Nicholls*, 2 Sw. & Tr. 637 ; 31 L. J., Mat. 115 ; 7 L. T. 221.

—— **Suit Dismissed—Power to Enforce.**]—The court has power to enforce an attachment after a suit has been dismissed. *Bremner* v. *Bremner and Brett*, 3 Sw. & Tr. 378 ; 33 L. J., Mat. 202 ; 10 L. T. 99 ; 12 W. R. 444.

Sequestration.]—The court has power to issue a sequestration, although no attachment has previously been issued. *Dent* v. *Dent*, 36 L. J., Mat. 61 ; L. R. 1 P. 366 ; 15 L. T. 635 ; 15 W. R. 591.

The pension of a retired officer in the Indian navy, received solely in respect of past services, is liable to a sequestration for non-payment of costs. *Ib.*

Where the only known property of the husband, who had failed to pay the permanent alimony allotted to his wife on a decree of judicial separation, consisted of an annuity or a rent-charge paid to him by trustees, the court granted a general writ, leaving it to the sequestrator to enforce it as he best could against the trustees. *Clinton* v. *Clinton*, L. R. 1 P. 215 ; 14 L. T. 257 ; 14 W. R. 545.

—— **Application to enforce — Persons not Parties to Suit.**]—A co-respondent was ordered to pay 50*l.* damages into court. He disobeyed the order, and a writ of sequestration was issued against him. The sequestrators applied to the court on motion in the suit that the trustees of his marriage settlement should pay into court certain sums in their hands, to which it was alleged the debtor was entitled. The trustees denied that the debtor had any interest in the fund in question, and further maintained that if the court made the order as prayed it would be ultra vires :—Held, that the court had no power to enforce sequestration against third persons who disputed their liability to the debtor, on motion in a suit to which they were not parties, unless they appeared and made submission to the jurisdiction of the court. *Craig* v. *Craig*, 65 L. J., P. 99 ; [1896] P. 171 ; 75 L. T. 280 ; 45 W. R. 64.

Alimony, to enforce payment of.]—*See* cols. 858, 841.

m. Intervention of Queen's Proctor.

See Divorce Rules, 1865, rr. 68, 69, and Rules of 1877, r. 202.

23 & 24 Vict. c. 144, s. 7.]—This section confers on the queen's proctor the power to intervene in a case of collusion, but in that alone ; and except in such a case, if he institutes proceedings in a suit for divorce, he appears only as one of the public giving information to the court, and under such circumstances the court has no power to award him costs. *Lautour* v. *Queen's Proctor*, 10 H. L. Cas. 685 ; 33 L. J., Mat. 89 ; 10 Jur. (N.S.) 325 ; 10 L. T. 611 ; 12 W. R. 611.

The queen's proctor intervening in a suit under 23 & 24 Vict. c. 144, s. 7, and alleging collusion, is at liberty in the same plea to allege the suppression of material facts or any other matters in opposition to the decree. *Dering* v. *Dering and Blakeley*, 37 L. J., Mat. 52 ; L. R. 1 P. 531 ; 19 L. T. 48.

The same issues being raised by the queen's proctor and by other interveners, the case was conducted by counsel for the queen's proctor, and the court refused to allow counsel for the other interveners to address the jury, although they were allowed to examine and cross-examine the witnesses. *Ib.*

Leave Necessary.]—The queen's proctor cannot, without the leave of the court, intervene in his official capacity to show cause against a decree nisi for dissolution of marriage being made absolute. *Gray* v. *Gray*, 30 L. J., Mat. 96.

It is only when he has evidence of collusion that it is necessary that he should apply to the court for leave to intervene under the latter part of s. 7 of 23 & 24 Vict. c. 144. *Hudson* v. *Hudson and Poole*, 45 L. J., P. 39 ; 1 P. D. 65 ; 33 L. T. 788 ; 24 W. R. 282.

The queen's proctor may move the court by counsel, without affidavit, for leave to intervene in a divorce suit. *Anon.*, 2 Sw. & Tr. 249 ; 30 L. J., Mat. 88 ; 4 L. T. 451.

—— **Application by, for Postponement of Trial.**]—But if he moves to have the hearing of the petition postponed, that he may have time to plead, that part of the motion must be founded on affidavit, and notice given to the other parties. *Anon.*, 2 Sw. & Tr. 249 ; 30 L. J., Mat. 88 ; 3 L. T. 823.

—— **Except as one of the Public.**]—He may,

however, as one of the public, show cause against a decree nisi being made absolute. *Masters* v. *Masters*, 34 L. J., Mat. 7.

If the queen's proctor intervenes, by leave of the court, pleads to the petition, and the petitioner replies, whereby issues are raised on the record, the court will not generally allow such issues to be decided by affidavits; but if the queen's proctor, under the first branch of s. 7, as one of the public, enters an appearance and shows cause against a decree nisi being made absolute, he may proceed to file affidavits, and on those and counter-affidavits, if filed, the question raised may be argued under the direction of the judge. *Boulton* v. *Boulton and Page*, 2 Sw. & Tr. 551; 31 L. J., Mat. 76; 6 L. T. 693; 10 W. R. 863.

If information is given to the queen's proctor of material facts necessary to the due decision of a case before the court during the progress of the cause, he cannot at that time take any steps except to watch the case and see whether such material facts are brought to the notice of the court. If not, he will be entitled, as one of the public, but acting under the direction of the attorney-general, to show cause against the decree being made absolute, in which case he will follow the ordinary practice prescribed by the rules. *Hudson* v. *Hudson and Poole*, 45 L. J., P. 39; 1 P. D. 65; 33 L. T. 788; 24 W. R. 282.

Material Facts not brought before the Court.]—Where specific charges of adultery have been investigated and decided in the affirmative, the queen's proctor is entitled to intervene for the purpose of showing that the finding ought to have been the other way, in consequence of material facts not having been brought before the court; and if he comes to the conclusion, from material facts brought to his notice, that a decree nisi has been obtained contrary to justice, it is his duty to bring such facts to the knowledge of the court. *Crawford* v. *Crawford*, 55 L. J., P. 42; 55 L. T. 304; 34 W. R. 677—C. A. And see *Howarth* v. *Howarth*, col. 901 and col. 772.

—— **Restoration of Co-respondent to Suit.**]—At the trial of a husband's petition for a dissolution of marriage the petitioner deposed to a confession made to him by his wife of the commission of adultery with the co-respondent. The judge granted a decree nisi, but held that there was no evidence against the co-respondent, who was dismissed from the suit, with costs. The co-respondent was not called to disprove the charges of adultery. The queen's proctor afterwards entered an appearance and filed a plea, alleging that the decree was pronounced contrary to the justice of the case by reason of material facts not being brought before the court; that certain witnesses who were known by both parties to be in court, and whose evidence was material, were not called; and that, apart from the alleged confession by the respondent, there was no evidence of adultery:—The court refused to strike out the queen's proctor's plea, and also refused leave to the respondent and the co-respondent to appear on the rehearing of the suit. *Crawford* v. *Crawford*, supra.

—— **Pleading.**]—It is sufficient for the queen's proctor to allege in his plea that the decree was pronounced contrary to the justice of the case by reason of material facts not being brought to the knowledge of the court. *Crawford* v. *Crawford*, 11 P. D. 150; 35 W. R. 31.

—— **Particulars.**]—When the suppression of material facts is averred by the queen's proctor without specifying such facts, the petitioner is entitled to particulars. *Barnes* v. *Barnes and Grimwade*, 37 L. J., Mat. 4; L. R. 1 P. 505; 17 L. T. 268; 16 W. R. 281.

Adultery of Petitioner—Costs.]—B. petitioned for dissolution by reason of his wife's adultery, and on proof of this allegation, neither respondent nor co-respondent appearing, obtained a decree nisi. On motion to make the decree absolute, an affidavit of the respondent, charging B. with bigamy, was before the court, who directed it to be laid before the queen's proctor. The queen's proctor intervened, and pleaded collusion, and the bigamy and subsequent adultery of B. B. replied, denying the collusion, but admitting the bigamy and adultery. The court, on motion on behalf of the queen's proctor, reversed the decree nisi, dismissed the petition, and condemned B. in the costs of the queen's proctor's intervention. *Boulton* v. *Boulton and Page*, 2 Sw. & Tr. 638; 7 L. T. 222.

After a decree nisi had been granted on the ground of a wife's adultery, the queen's proctor intervened, and produced evidence showing that the petitioner had, subsequently to his wife's elopement and adultery, himself been adulterously cohabiting with a woman:—Held, that the decree ought to be rescinded, and the petition dismissed; but that as no case of collusion had been established, the court had no power to condemn the petitioner in the costs of the queen's proctor's intervention. *Lautour* v. *Queen's Proctor*, 10 H. L. Cas. 685; 33 L. J., Mat. 89; 10 Jur. (N.S.) 325; 10 L. T. 198; 12 W. R. 611.

At the petition of a wife the court made a decree nisi to dissolve her marriage by reason of her husband's adultery and cruelty, and therein condemned the respondent in the costs incurred and to be incurred on behalf of the petitioner, and directed the same to be taxed. Subsequently the queen's proctor intervened, and proved that the petitioner had herself been guilty of adultery. The court ordered so much of the decree nisi to be reversed as dissolved the marriage of the parties, and dismissed the petition; but, varying an order previously made, reserved to the petitioner her right to enforce against the respondent the order as to costs contained in the decree nisi. *Whitmore* v. *Whitmore*, 35 L. J., Mat. 52.

In a suit for dissolution of marriage heard before the court and a common jury, a verdict was found against the respondent and co-respondent for adultery, and damages were assessed. A decree nisi was thereupon made, with costs against the co-respondent. The queen's proctor intervened; and ultimately it was proved that the petitioner had also been guilty of adultery. The court reversed the whole decree nisi, including the order for costs, and dismissed the petition. *Ravenscroft* v. *Ravenscroft*, 41 L. J., Mat. 28; L. R. 2 P. 376; 26 L. T. 265; 20 W. R. 448.

Right of Person Charged to Intervene.]—Where the queen's proctor has intervened and alleged adultery on the part of the petitioner in a divorce suit, the court has no power to allow the person with whom such adultery is alleged to have been committed to intervene in the pro-

ceedings. *Grieve* v. *Grieve*, 63 L. J., P. 29; [1893] P. 288; 1 R. 533; 69 L. T. 462.

Where the queen's proctor intervenes in a suit and alleges adultery with a person not a party to the proceedings after the decree nisi, the court has no power to allow the person charged to intervene in the suit. *Grieve* v. *Grieve* (1 R. 533) followed. *Carew* v. *Carew*, 63 L. J., P. 74; [1894] P. 31; 6 R. 662.

Rescission of Decree—Co-respondent's Costs.]—A husband obtained a decree nisi for a dissolution of marriage on the ground of his wife's adultery with the co-respondent, and the court condemned the co-respondent in the costs of the suit. The queen's proctor afterwards intervened, and filed pleas alleging collusion and the petitioner's adultery between the commencement of the suit and the date of the decree nisi. The petitioner filed no answer to the queen's proctor's pleas, and the decree nisi was rescinded. The court rescinded that part of the decree which condemned the co-respondent in costs. *Hechler* v. *Hechler*, 58 L. J., P. 27. *See* cols. 968, 769.

Prevents Withdrawal or Alteration of Petition.]—A wife asked the court to dissolve her marriage, by reason of the adultery and cruelty of her husband. The husband did not appear, but the queen's proctor intervened, and alleged collusion between the wife and the husband, and that the former had been guilty of adultery subsequently to filing her petition. At the hearing evidence of cruelty only was given on behalf of the wife, and a judicial separation applied for; but, on cross-examination, adultery of the wife was clearly proved:—Held, that as the queen's proctor had duly intervened, he could not be stopped from proving his case by the substitution, at the hearing, of a prayer for judicial separation in the place of that for a dissolution of marriage, and that he might bring to the court's notice any facts material to the due decision of the case. *Forth* (*Viscountess*) v. *Forth* (*Viscount*), 7 Jur. (N.S.) 762. *S. C.*, nom. *Drummond* v. *Drummond*, 2 Sw. & Tr. 269; 30 L. J., Mat. 177; 4 L. T. 416.

A wife having obtained a decree nisi for dissolution of her marriage by reason that her husband had, since its celebration, been guilty of bigamy with adultery, the queen's proctor intervened, and pleaded matters to show that the suit had been conducted in collusion between the parties:—Held, that the wife could not be permitted to withdraw her petition. *Gray* v. *Gray*, 2 Sw. & Tr. 263; 30 L. J., Mat. 119; 7 Jur. (N.S.) 472; 4 L. T. 218. Affirmed on appeal, 2 Sw. & Tr. 266; 7 Jur. (N.S.) 783; 4 L. T. 478.

Collusion in former Suit—Motion to Dismiss Petition.]—On motion by the queen's proctor to dismiss a husband's petition for divorce on the ground that in former proceedings he had been found guilty of adultery and collusion, the court held that, although the fact of the petitioner's adultery could not be again disputed, yet it would be open to the petitioner to show such circumstances as would get rid of its effect, and that "collusion" referred to in s. 30 of the Matrimonial Causes Act, 1857, means collusion in the suit pending. *Butler* v. *Butler*, 62 L. J., P. 105; [1893] P. 185; 1 R. 521; 69 L. T. 54.

—— **What amounts to Collusion.**]—Where a husband covenanted with his wife (who was then living in adultery) that in consideration of certain things to be done by her, he would at once sue for a divorce and prosecute his suit to completion, and that he would claim no damages against the co-respondent, and the wife and co-respondent agreed not to defend, the husband agreeing to the terms on condition that 100*l.* was secured to cover his costs; the court held that there was collusion, as the initiation of the suit was procured, and its result as to costs and damages was settled by agreement of which abstention from defence was a term. There may be collusion, although no facts have been falsely dealt with or withheld. Collusion bears the same meaning in s. 30 of the Matrimonial Causes Act, 1857, and in both parts of s. 7 of the Matrimonial Causes Act, 1860. *Churchward* v. *Churchward*, 64 L. J., P. 18; [1895] P. 7; 11 R. 626; 71 L. T. 782; 43 W. R. 380.

Power to direct Papers to be sent to the Queen's Proctor.]—Under s. 19 of the Judicature Act, 1873, the court of appeal has power to direct the papers in a divorce matter to be sent to the queen's proctor, under 23 & 24 Vict. c. 144, s. 5, for the purpose of instructing counsel to argue the case on appeal. *Le Sueur* v. *Le Sueur*, 2 P. D. 80; 36 L. T. 276; 25 W. R. 102—C. A.

But when counsel in accordance with such direction appeared for the queen's proctor, and the appeal was withdrawn by the appellant:—Held, that the court of appeal had no power to allow the queen's proctor his costs. *Ib.*

The petitioner, who was a carpenter, went to New Zealand in 1875, with the object of improving his position. He asked his wife to accompany him, but she refused, and she and the two children of the marriage remained in England. On his arrival in New Zealand the petitioner wrote to his wife asking her to go out to him and to take the children with her, and he offered to nominate her for a free passage. She again refused to go. The petitioner remained some years in New Zealand, earning during that period from 1*l.* to 3*l.* per week. He never sent any money whatever to his wife, nor contributed in any way to her support or that of the two children. In 1884, hearing that his wife was misconducting herself, he returned to England and subsequently instituted these proceedings. The court, upon these facts, granted a decree nisi, but directed that the papers relating to the case should be sent to the queen's proctor, for the latter to make further inquiries and to take further proceedings if he should see fit. *Stevens* v. *Stevens*, 61 L. T. 844.

Sum Due to, for Costs, good Petitioning Creditor's Debt.]—A sum due to the queen's proctor for costs incurred by him in a divorce suit in which he intervened is due to the queen's proctor for the time being, and constitutes a good petitioning creditor's debt, although the queen's proctor who presents the petition is not the same individual who held that office at the time when the costs were incurred. *Rayner, Ex parte, Rayner, In re*, 37 L. T. 38; 25 W. R. 851.

Amendment of Charges—Costs.]—After a decree nisi for a dissolution of marriage, the queen's proctor intervened and charged collusion, suppression of material facts, and adultery. He subsequently applied for leave to amend certain erroneous dates in his charges. The court granted

the application, but ordered him to pay the costs. *Tomkins* v. *Tomkins*, 20 W. R. 497.

Particulars of Pleas.]—When the queen's proctor has intervened after a decree nisi, and filed pleas alleging collusion, and that material facts were not brought to the knowledge of the court, he will be ordered to give particulars of the matters so pleaded. *Gladstone* v. *Gladstone*, 23 W. R. 519.

Such particulars must state whether the facts relied upon are new or not, though such facts need not be given in detail. *Ib.*

If any of the facts disclosed by the particulars have been already determined at the trial, the court will order them to be struck out. *Ib.*

When the queen's proctor has been ordered to give particulars of a plea of collusion, it will be sufficient to state that the collusion consists in the withholding of certain material facts from the court, and that such facts are set out in the particulars given at the same time as to other pleas. *Gladstone* v. *Gladstone*, 44 L. J., Mat. 46; L. R. 3 P. 260; 32 L. T. 404; 23 W. R. 637.

Where the queen's proctor delivered particulars as to pleas of adultery which disclosed fresh charges as well as others which had been already disposed of at the trial, the court allowed the pleas to remain. *Ib.*

The queen's proctor having intervened during the progress of a suit, and pleaded "that the petitioner and respondent had been acting in collusion for the purpose of obtaining a divorce, contrary to the justice of the case," the court ordered him to specify the nature of the collusion charged, but refused to order him to state the facts which he proposed to prove. *Jessop* v. *Jessop*, 2 Sw. & Tr. 301; 30 L. J., Mat. 193; 7 Jur. (N.S.) 609; 4 L. T. 308; 9 W. R. 640.

Where the queen's proctor intervenes and charges the suppression of material facts, without specifying such facts, the petitioner is entitled to particulars. *Barnes* v. *Barnes and Grimwade*, 37 L. J., Mat. 4; L. R. 1 P. 505; 17 L. T. 268; 16 W. R. 28.

—— **Additional—Striking Out.**]—Upon intervention by the queen's proctor, alleging that the petitioner (husband) had committed adultery with A. and B. particulars were ordered and delivered, relating to the said adultery. Subsequently, the queen's proctor delivered additional particulars in which, for the first time, the petitioner was said to have committed adultery with C.:—Held, that the additional particulars were bad, and must be struck out. *Pierce* v. *Pierce*, 66 L. T. 861.

Issue to be Tried by Jury.]—When the queen's proctor intervenes after a decree nisi, and the affidavits filed by him and by the petitioner are contradictory, the court will order the questions of fact in dispute to be tried by a jury. *Harding* v. *Harding*, 34 L. J., Mat. 9.

A wife petitioned for dissolution; the husband made no answer; the hearing of the petition had been adjourned for further proof, pending which the queen's proctor intervened, and alleged the wife's adultery, who took issue thereon, and the court allowed the proof of the original petition to be completed, and the issue as between the petitioner and queen's proctor to be set down for trial by a jury, retaining the same position in the cause list as the original petition. *Gethin* v. *Gethin*, 2 Sw. & Tr. 406; 5 L. T. 363; 10 W. R. 122.

—— **Rights of, at Trial.**]—A petitioner having obtained a decree nisi to dissolve his marriage, the queen's proctor and other parties intervened. The questions for the jury, raised by the latter, were collusion and connivance; by the former, collusion, connivance and misconduct which conduced to the adultery of the respondent:—Held, that although the counsel for the queen's proctor and the other interveners might respectively produce and examine witnesses, and cross-examine the witnesses produced by the petitioner, only one counsel could be heard in reply. *Dering* v. *Dering and Blakeley*, 37 L. J., Mat. 52; L. R. 1 P. 531; 19 L. T. 48.

In a suit for dissolution no issue was raised as to the respondent's adultery, but the queen's proctor intervening, pleaded various pleas, and after the petitioner's case was closed called evidence to prove them. Evidence having been called on behalf of the petitioner:—Held, that although the petitioner had begun, the attorney-general on behalf of the queen's proctor had the right of reply. *Conradi* v. *Conradi, Worrall and Way*, 37 L. J., Mat. 55; L. R. 1 P. 514; 18 L. T. 659; 16 W. R. 1023.

The queen's proctor intervening and alleging collusion and the adultery of the petitioner, is entitled to cross-examine all the witnesses called by the petitioner and the respondent. *Boardman* v. *Boardman*, L. R. 1 P. 233; 14 W. R. 1024.

When the respondent has been examined under 22 & 23 Vict. c. 61, s. 6, the queen's proctor may, therefore, cross-examine him for the purpose of proving the petitioner's adultery. *Ib.*

Where a respondent denied the allegations of the petition, and these issues came on for trial at the same time as an issue raised on a plea of the queen's proctor, "that the petition had been filed by arrangement with the respondent and others acting on his behalf":—Held, that the queen's proctor had nothing to do with the issues raised between the parties, and that his counsel had no right to comment on the evidence relating to them. *Jessop* v. *Jessop*, 2 Sw. & Tr. 301; 30 L. J., Mat. 193; 7 Jur. (N.S.) 609; 4 L. T. 308; 9 W. R. 640. See also *Studholme* v. *Studholme, and Cullum*, 25 W. R. 165.

Evidence in Trial of Issue.]—Upon the trial of an issue of adultery raised by the queen's proctor intervening to show cause against a decree nisi being made absolute, the court does not require such strict proof of the identity of the person charged with adultery as upon the trial of such an issue in a suit between husband and wife. *Hulse* v. *Hulse and Tarenor*, 41 L. J., Mat. 19; L. R. 2 P. 357; 25 L. T. 764; 20 W. R. 447.

In support of a charge of adultery made by the queen's proctor against a petitioner, the only evidence was that a man, calling himself by the name, and using the card, of the petitioner, had committed fornication. Full particulars of the charge having been given, and the petitioner at the hearing not coming forward to deny it:—Held, that there was sufficient proof of identity *Ib.*

A petitioner is not a competent witness in a proceeding by an intervener showing cause against a decree nisi, nor will the court examine him under 20 & 21 Vict. c. 85, s. 43, in support of his

own petition. *Harding* v. *Harding and Lance*, 4 Sw. & Tr. 145; 34 L. J., Mat. 108; 11 Jur. (N.S.) 814; 13 L. T. 195; 13 W. R. 999.

—— **Alleging Adultery pleaded by Respondent.**]—A respondent in her answer to a suit for dissolution of marriage charged the petitioner with adultery, and at the hearing called witnesses in support of the charge, but the issue was found against her. The queen's proctor subsequently intervened, and charged the petitioner with collusion, and also with the adultery pleaded by the respondent:—Held, that he was not barred from setting up such adultery by the respondent having pleaded it, and adduced evidence at the hearing to prove it. *Ib.*

Admissions by or Non-appearance of the Petitioner.]—When the queen's proctor intervenes, and alleges matter which would be ground for reversing a decree nisi for dissolution of marriage, and such allegations are admitted by the petitioner by his replication, the court will act on those admissions without requiring the proof of the facts admitted. *Boulton* v. *Boulton*, 31 L. J., Mat. 115.

In a suit by a husband for dissolution of marriage the queen's proctor intervened after a decree nisi, and filed a plea on which issue was joined. An order was subsequently made, that the petitioner should attend in court on the hearing of the issue, and upon his non-appearance when the case came on for hearing, the court reversed the decree, and dismissed the petition without requiring evidence in support of the plea. *Pollack* v. *Pollack, Deane and M'Namara*, 4 Sw. & Tr. 266; 34 L. J., Mat. 49.

The queen's proctor intervened in a suit for dissolution in which the respondent did not appear, and alleged collusion and the petitioner's adultery. No evidence being tendered in support of the petition when the case came on for hearing, the court dismissed the petition without requiring evidence to be produced in support of the queen's proctor's plea. *Sheldon* v. *Sheldon*, 4 Sw. & Tr. 75; 34 L. J., Mat. 80; 13 W. R. 507.

Attendance of Petitioner.]—Where the queen's proctor intervened after a decree nisi, and pleaded collusion and condonation, on which pleas the petitioner took issue, and the cause was ready to be heard, a motion on behalf of the queen's proctor to order the attendance of the petitioner at the hearing, under 20 & 21 Vict. c. 85, s. 43, was refused, but the proceedings were ordered to be stayed till the petitioner should attend. *Pollack* v. *Pollack*, 2 Sw. & Tr. 648; 8 Jur. (N.S.) 1230; 7 L. T. 395; 11 W. R. 85.

Cross Petitions—Decree Nisi on Wife's Petition—Payment out.]—In cross petitions by the husband and wife for dissolution of the marriage a decree nisi was pronounced on the wife's petition, and the husband was condemned in costs. Subsequently the queen's proctor intervened, and charged the wife with adultery, collusion, and suppression of material facts. The husband, in compliance with an order of the registrar, had paid money into court to meet the wife's costs in both suits:—Held, that the wife was not entitled to have the money in court paid out until the decree nisi had been made absolute. *Butler* v. *Butler*, 58 L. J., P. 71; 14 P. D. 160.

Reconciliation—Motion to Rescind Decree—No Plea Filed.]—Where, after decree nisi the parties had become reconciled and resumed cohabitation, the court, on the motion of the queen's proctor, without requiring him to file a plea, rescinded the decree nisi and dismissed the petition, on being satisfied of the facts. *Flower* v. *Flower*, 63 L. J., P. 28; [1893] P. 290; 1 R. 534; 42 W. R. 204.

Where Court will Order Intervention.]—When, on application to make absolute a rule for dissolution at the suit of a husband, it appeared that affidavits had been filed by the respondent which alleged the husband's bigamy and conviction, the court refused to make the decree absolute, and directed the registrar to inform the queen's proctor that such affidavits had been filed, and permitted the petitioner to file affidavits in answer. *Boulton* v. *Boulton and Page*, 2 Sw. & Tr. 405; 31 L. J., Mat. 27; 5 L. T. 362; 10 W. R. 123.

Where Queen's Proctor fails to prove Allegations—Costs.]—When the queen's proctor intervened, and having alleged collusion, suppression of material facts, and the adultery of the husband, at the hearing, the first two allegations being proved to be abandoned, the court refused to condemn the petitioner in costs where he had been put to great expense in preparing to defend the charge of adultery. *Barnes* v. *Barnes and Grimwade*, 37 L. J., Mat. 4; L. R. 1 P. 505; 17 L. T. 268; 16 W. R. 281.

On motion to make a decree nisi absolute, the attorney-general obtained leave to show cause, on the ground that it had come to the queen's proctor's knowledge that the business of the petitioner's suit had been chiefly conducted by the managing clerk of the attorney who had entered an appearance on behalf of the respondent. Subsequently, on affidavits filed in explanation of the circumstances, the court made the decree absolute, and made no order as to the queen's proctor's costs. *Cox* v. *Cox*, 2 Sw. & Tr. 306; 30 L. J., Mat. 255; 4 L. T. 450; 9 W. R. 924.

n. Other Interveners.

See Divorce Rules, 1865, rr. 23, 24.

Anyone may Intervene.]—Any person, and the queen's proctor as one of the public, may enter an appearance and file affidavits in opposition to a decree nisi being made absolute at any time before it is made absolute. *Bowen* v. *Bowen and Evans*, 3 Sw. & Tr. 530; 33 L. J., Mat. 129; 13 W. R. 109.

At any time before a decree nisi, for dissolution of marriage, is made absolute, it is competent for one of the public to intervene, although three months may have elapsed since the decree was pronounced. *Clements* v. *Clements and Thomas*, 3 Sw. & Tr. 394; 33 L. J., Mat. 74; 10 L. T. 352; 13 W. R. 110.

The court will not act upon affidavits filed in opposition to a decree nisi, unless it is satisfied that an intervener is properly before the court. *Ib.*

An appearance was entered for A., and affidavits were filed in opposition to a decree nisi. Affidavits were then filed by the petitioner, showing that A. had never authorised the intervention. An appearance was then entered for B., and further affidavits were filed. The court refused to take notice of the intervention of B., and being satisfied that A. had never authorised the

intervention in his name, made the decree absolute. *Ib.*

Application by Alleged Adulterer.]—A petition by a husband claiming a divorce from his wife and damages against the co-respondent was dismissed, by consent, before trial. Thereupon the wife filed a petition claiming a judicial separation, and the husband, in his answer, countercharged the adultery which he had alleged in the former suit, but he asked for no relief. The alleged adulterer applied for leave to intervene and defend:—Held, that the practice of the ecclesiastical courts governed the case, and that, as that practice afforded no precedent for allowing an intervention in such circumstances, the application must be refused. *Farrell* v. *Farrell*, 76 L. T. 167.

"Material Facts not Brought before the Court."]—A wife sued for dissolution of marriage on the ground of adultery and cruelty. The husband alleged that the wife had been guilty of adultery. At the trial a decree nisi for dissolution was made. The husband applied for a new trial on the ground that fresh evidence had been discovered to show the wife's adultery before the decree nisi, and filed affidavits alleging facts not known at the trial which went to prove adultery. He obtained a rule nisi, but the rule was discharged on argument. The husband appealed. Immediately afterwards an uncle of the husband entered an appearance as intervener, and filed affidavits which were substantially the same as those used on the application for a new trial. There was nothing to show that he was acting on behalf of or in collusion with the respondent. The wife moved to make the decree for dissolution absolute. This was refused, but leave was given her to move the court to reject the intervention. The husband abandoned his appeal from the refusal of a new trial. After this the motion of the wife to reject the intervention of the uncle was heard by the president and refused. The wife appealed:—Held, by the Court of Appeal, that the act 23 & 24 Vict. c. 144, s. 7, authorises intervention by any person where material facts have not been brought before the court, whether by intention or through accident. Whether, where the petitioner, after the decree nisi, is guilty of conduct disentitling him or her to have the decree made absolute, the right to intervene is confined to the queen's proctor, quære. *Howarth* v. *Howarth*, 9 P. D. 219; 51 L. T. 872—C. A.

The words "not brought before the court" mean, not brought before the court at a time when the court can act upon them for the purpose of seeing whether a decree nisi ought to be made, and that the bringing them before the court on an application for a new trial is not bringing them before the court within the meaning of this clause, so as to prevent an intervention. *Ib.*

Where a respondent is not entitled to a new trial, intervention on the ground of fresh evidence as to acts prior to the decree nisi will not be allowed if the intervener is merely acting on behalf of and in collusion with the respondent; but the fact that he is a near relative of the respondent is no ground for rejecting the intervention:—Held, therefore, that in the present case, the facts alleged being undoubtedly material, and the affidavits making a case which showed that there was ground for investigating them, the intervention had rightly been allowed. *Ib.*

Facts Pleaded but not Proved at Trial.]—A respondent, by pleading in answer to a petition for dissolution of marriage material facts, of which no evidence is given at the hearing, does not bring them before the court, within the meaning of the 23 & 24 Vict. c. 144, s. 7; but such facts may, after a decree nisi has been pronounced, be set up by one of the public as ground for not making the decree absolute. *Masters* v. *Masters*, 34 L. J., Mat. 7.

Condemned in Costs.]—Where an appearance had been entered by a friend of a co-respondent, against whom 5,000*l.* damages had been awarded, for the purpose of showing cause against a decree nisi being made absolute, on the ground that there were material facts which were not brought to the notice of the court, and most of the material facts had been put on record by the parties, and were not established at the trial, and the intervener had not established by affidavit a single fact of importance: the court declined to suspend its decree, and condemned the intervener in the costs occasioned by the intervention. *Forster* v. *Forster and Berridge*, 3 Sw. & Tr. 151; 32 L. J., Mat. 206; 9 L. T. 148.

Intervention of Queen's Proctor—Charge of Adultery against Petitioner—Right of Person charged to Intervene.]—Where the queen's proctor has intervened and alleged adultery on the part of a petitioner in a divorce suit, the court has no power to allow the person with whom such adultery is alleged to have been committed to intervene in the proceedings. *Griere* v. *Griere*, 63 L. J., P. 29; [1893] P. 288; 1 R. 533; 69 L. T. 462.

Damages—Assignee.]—Where a petitioner has assigned his damages the assignee has no right to intervene in the suit. *Hunt* v. *Hunt*, 63 L. J., P. 136; [1894] P. 247; 6 R. 659.

Decree Absolute—Variation of Settlements—Title of Suit.]—In a petition by the wife for dissolution of the marriage on the ground of adultery and cruelty, one of the persons with whom the husband was alleged to have committed adultery obtained leave to intervene, and her name was added to the title of the suit. Subsequently she obtained an order for a commission to examine witnesses abroad, and for the postponement of the trial of the issues affecting her until the return of the commission. The petitioner obtained a decree absolute, on evidence which satisfied the court that the respondent had committed adultery with women other than the intervener; and the issue affecting her was never tried:—Held, on a subsequent petition for variation of settlements, that the name of the intervener must be struck out of all pending and future proceedings. *Connemara* v. *Connemara*, 61 L. J., P. 96; [1892] P. 102; 66 L. T. 592.

o. Evidence.

See Divorce Rules, 1865, r. 129.

i. *Evidence of Petitioner.*

Statute.]—By 20 & 21 Vict. c. 85, s. 43, *the court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-*

examined, on oath, on the hearing of any petition, but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery.

Proof of Marriage—Admission.]—In suits for divorce, the admission of the marriage by the respondent party is not sufficient. In this case there was no distinct admission, but the wife had applied for and obtained alimony pending the suit, and the certificate of the marriage had been put in as an exhibit, and further evidence of the marriage was required in the privy council. *Mellin* v. *Mellin*, 2 Moore, P. C. 493. And see *Revel* v. *Fox*, 2 Ves. 269.

Conduct of Petitioner.]—On proof of a petition for dissolution of marriage by reason of the adultery of the wife, some evidence should be given of the conduct of the husband towards the wife previously to the adultery and what care he took of her. *Boddington* v. *Boddington*, 27 L. J., P. 53.

Oral Evidence.]—Generally the mode in which the petitioner for a dissolution of marriage will be directed to prove her petition when no answer has been filed and 21 days have elapsed, as required by R. 14, is by oral evidence before the court without a jury. There may be cases in which it would not be desirable that the evidence should be taken orally in court. *Norris* v. *Norris and Gyles*, 27 L. J., P. 51. And see *Armitage* v. *Armitage and Macdonald*, 27 L. J., P. 50.

As a general rule, the court will always accede to an application to examine witnesses viva voce. *Campbell* v. *Campbell*, 5 W. R. 519.

Examination of Petitioner.]—Where it appears doubtful whether or not the conduct of a petitioner for dissolution of marriage has been such as to give the court discretionary power under s. 31 of the above act, the court will, for the purpose of satisfying their minds, examine the petitioner adversely under s. 43, but will not, in a suit instituted on the ground of adultery, examine him or permit him to be examined for the purpose of proving his own case. *Haswell* v. *Haswell and Sanderson*, 1 Sw. & Tr. 502; 29 L. J., Mat. 21; 1 L. T. 69; 8 W. R. 76. S. P., *Astrope* v. *Astrope*, 29 L. J., Mat. 27.

After the court has examined the petitioner adversely, his counsel will be permitted to suggest questions to the petitioner, for the purpose of clearing up what the court may have elicited adversely to the case. *Ib.*

Under the above provision, the court has only power to order that the petitioner attend on the hearing of the petition. It cannot, therefore, order his attendance at the hearing of the case of the queen's proctor, if the intervention was after a decree nisi had been pronounced. *Pollack* v. *Pollack*, 32 L. J., Mat. 28.

Under certain circumstances, the court will exercise the power given it, by calling the petitioner and examining him on oath as to some of the facts necessary to establish his petition. *Tatham* v. *Tatham and Nutt*, 3 Sw. & Tr. 411; 33 L. J., Mat. 140; 10 L. T. 725.

The court will, under some circumstances, allow a petitioner in a suit for dissolution of marriage to be called to give evidence, notwithstanding the statute, which provides, that neither of the parties in such a suit is allowed or compellable to give evidence. *Sanderson* v. *Sanderson and Gibson*, 14 W. R. 972.

But the court will not allow the petitioner to be examined for the purpose of explaining his conduct, where the matter requiring explanation is one as to which the respondent, if a competent witness, would have been able to give evidence. *Baylis* v. *Baylis, Tevan and Cooper*, 36 L. J., Mat. 130; L. R. 1 P. 395.

The court has power under 20 & 21 Vict. c. 85, s. 43, to order a petitioner in a suit for judicial separation, by reason of adultery, to attend at the hearing of the petition. *Ross* v. *Ross*, 38 L. J., Mat. 33; L. R. 1 P. 629; 20 L. T. 232; 17 W. R. 577.

In a suit for dissolution, when the respondent did not appear, the court allowed the petitioner to be examined, and to give evidence upon the issue of his own adultery raised by the queen's proctor. *Conradi* v. *Conradi, Worrall and Way*, 37 L. J., Mat. 55; L. R. 1 P. 514; 18 L. T. 659; 16 W. R. 1023.

—— **When Collusion is Established.**]—When collusion has been established, a petitioner cannot be examined for the purpose of contradicting or explaining the evidence of such collusion. *Lloyd* v. *Lloyd and Chichester*, 1 S. & T. 567; 30 L. J., Mat. 97.

Cross-Examination.]—A respondent cannot, in the first instance, and without the permission of the court, cross-examine a petitioner who is in attendance at the hearing, in pursuance of an order made on the application of the respondent, but must treat the petitioner as his witness, unless the court thinks fit to allow him to cross-examine. *Studdy* v. *Studdy*, 28 L. J., Mat. 105.

A wife, the petitioner, was called as a witness in support of the allegation of cruelty. On cross-examination by the respondent, she denied certain acts of adultery with which he charged her, but declined to answer as to others. The court, notwithstanding, made the usual decree, she having proved her case, and no evidence having been produced in support of the counter-charges by the husband. *Mawford* v. *Mawford*, 15 L. T. 217.

Where, at the hearing of a suit for dissolution of marriage, the petitioner, in pursuance of an order under s. 43, is present; if the court allows counsel of the respondent to call him, he must be treated as the witness of the respondent; he cannot be cross-examined by the respondent; and before he is sworn, the respondent's case must be opened. *Giles* v. *Giles and Quartley*, 32 L. J., Mat. 209; 12 W. R. 20.

—— **As to Adultery.**]—A party to a cause, who is produced as a witness on his own behalf, and in his examination in chief denies the truth of some of the charges of adultery contained in the pleadings, and is asked no questions as to others, is liable to be asked, and is bound to answer, questions in cross-examination respecting all the charges contained in the pleadings. *Brown* v. *Brown and Paget*, 43 L. J., Mat. 33; L. R. 3 P. 198; 30 L. T. 767; 22 W. R. 759.

A witness cannot be cross-examined as to any act of adultery respecting which he or she has not been examined in chief, although such adultery may not be a question in issue in the cause. *Babbage* v. *Babbage and Manning*, L. R. 2 P. 222.

—— **Husband's Petition—Counter-charge of Adultery—Rebutting Evidence.**]—At the hearing of a petition by the husband for dissolution of marriage on the ground of his wife's adultery, in which the wife made a counter charge of adultery against him :—Held, that the petitioner might, as part of the case opened by him, give his own evidence and call his witnesses in answer to the respondent's charge, or that he might in the alternative reserve his answer to the charge until the respondent's witnesses in support of it had been examined, but that he was not entitled to divide his case by giving his own evidence in the opening, and afterwards calling his witnesses in reply to the respondent's charge. *Jackman* v. *Jackman*, 58 L. J., P. 72 ; 14 P. D. 62 ; 60 L. T. 936 ; 37 W. R. 624.

Irish Divorce Bill — Evidence.]—It is not necessary for the first reading of an Irish divorce bill that a definitive sentence of divorce a mensâ et thoro should have been pronounced in the Irish courts. Where in the proceedings upon an Irish divorce bill it appears that no action for criminal conversation has been brought against a co-respondent who was not domiciled and could not be served in Ireland, the House of Lords may allow the bill for divorce to be received. Where there is no means of enforcing the warrant of the House of Lords to take evidence in parts of India, the evidence as taken and used in a previous suit in the English court of divorce may be allowed to be used quantum valeat. *Sinclair's Divorce Bill*, [1897] A. C. 469 —H. L. (Ir.)

ii. *Documentary.*

See Divorce Rules, 1865, rr. 118—120.

Judge's Notes.]—Semble, upon a second trial of the same issues, the judge's notes of evidence of deceased witnesses who were examined on the first trial are not admissible except by consent. *Conradi* v. *Conradi, Worrall and Way*, 37 L. J., Mat. 55 ; L. R. 1 P. 514 ; 18 L. T. 659 ; 16 W. R. 1023.

Discovery—Infant Respondent.]—A husband petitioned for a divorce from his wife who was an infant, and applied for an order upon her for an affidavit of documents. The sole issue in the suit was adultery :—Held, that discovery ought not to be required from parties in a divorce suit for the purpose of proving adultery. Whether in a divorce suit any special protection is granted to infants in matters of discovery, quære. *Redfern* v. *Redfern* (No. 1), 60 L. J., P. 9 ; [1891] P. 139 ; 64 L. T. 68 ; 39 W. R. 212.

—— **Limited Order.**]—In a complex suit, the wife was ordered to file an affidavit and to give discovery of documents, limited to her counter-charges other than that of adultery. *Schooleraft* v. *Schooleraft*, 65 L. T. 794.

Notice to Produce.]—Where a husband had been served with a citation in England, and had not appeared, the court refused to decide whether the wife's evidence of the contents of letters written by her to him after he had left her was admissible, no notice to produce having been served, but made a decree on the other evidence given in the case, independently of the supposed contents of the letters. *Case* v. *Case*, 2 Sw. & Tr. 65 ; 29 L. J., Mat. 127 ; 2 L. T. 391 ; 8 W. R. 532.

Inspection and Production of.]—A wife petitioning for judicial separation on the ground of cruelty, moved for an order on the husband to deliver to her or to her attorney certain documents and papers alleged to have been taken from her by the husband, and to be material to the conduct of her petition, especially to enable her to comply with an order of the court for particulars of dates. The husband objected to give up the papers, but was willing to allow copies to be taken. The court ordered the papers to be produced by his attorney to her attorney, the latter to be at liberty to take copies, and reserved the question of costs of the motion ; no application having been made to the husband before notice of motion given. *Shaw* v. *Shaw*, 2 Sw. & Tr. 642 ; 31 L. J., Mat. 95 ; 7 L. T. 254.

A husband petitioned for dissolution of marriage and for assessment of damages. The judge, on summons, at the instance of the co-respondent, ordered the petitioner to bring into the registry letters written by the respondent to him, or to file an affidavit that he had no such letters, or that they contained no such matters as suggested by the affidavits in support of the summons. *Pollard* v. *Pollard and Hemming*, 3 Sw. & Tr. 613 ; 11 L. T. 749.

Admission of Wife — Diary.] — Entries in a private diary kept by the wife, detailing acts of adultery committed by her with the co-respondent, are evidence against her as an admission or a confession, though not as against the co-respondent. *Robinson* v. *Robinson and Lane*, 1 Sw. & Tr. 362 ; 27 L. J., Mat. 91 ; 5 Jur. (N.S.) 392.

iii. *Proof of Adultery.*

Admission by Wife.]—Admissions of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided the court is satisfied that the evidence is trustworthy, and that it amounts to a clear, distinct, and an unequivocal admission of adultery ; but where, on a consideration of a diary, the wife appeared to indulge unfounded imaginations and exaggerated statements as regarded her intercourse with the other sex, the court refused to add anything by way of inference, as it would have done if similar facts had been established by independent evidence, to the actual statements of the diary ; and as these fell short of a direct confession of the act of adultery, dismissed the petition, but without condemning the husband in costs, on the understanding that the wife had a separate income. *Robinson* v. *Robinson and Lane*, 1 Sw. & Tr. 362 ; 27 L. J., Mat. 91 ; 5 Jur. (N.S.) 392.

The admissions or confessions of the respondent are not admissible evidence against the co-respondent. *Ib.*

The only evidence of the respondent's adultery was admissions made by her. The court being satisfied that the admissions were genuine, and that there was no ground to suspect collusion, dissolved the marriage. *Williams* v. *Williams and Padfield*, 35 L. J., Mat. 8 ; L. R. 1 P. 29 ; 13 L. T. 610.

Where it appeared that the wife had become pregnant while living away from her husband in the service of the co-respondent, and after her confinement had sent to the co-respondent for money, claiming it from him on the ground that he was the father of the child, and he sent the

money, though denying that he was the father:—Held, that this admission of the wife, coupled with the circumstances under which it was made, was, in the absence of explanation or of denial, sufficient evidence of her having committed adultery with the co-respondent. *Tippet* v. *Tippet and Meredith*, 35 L. J., P. 41; L. R. 1 P. 54; 14 W. R. 410.

On the hearing of a petition by a husband for dissolution on the ground of his wife's adultery, as evidenced by her having become pregnant after the husband had ceased to have access to her, semble, that the court would exclude proof of an admission by the wife at a former trial to the effect that she had ceased to cohabit with her husband at such a time as to render it impossible that he could be the father, on the authority of *Goodwright* v. *Moss* (Cowper, 594), and on the principle that such admissions are contrary to public decency, and tending to bastardise children. *Inglis* v. *Inglis and Allen*, 16 L. T. 775; 15 W. R. 1093.

In a suit for dissolution of marriage promoted by the husband, the evidence adduced at the hearing of the case in proof of the adultery charged against the wife and co-respondent consisted exclusively of confessions by the wife, but on a subsequent day counsel for the co-respondent stated that he was instructed to admit the adultery charged against him. The court being satisfied that both the confession of the wife and the admission of the co-respondent, which was against interest, were bonâ fide, acted upon them, and pronounced a decree for dissolution of the marriage. *Le Marchant* v. *Le Marchant and Radcliffe*, 45 L. J., P. 43; 34 L. T. 367; 24 W. R. 374.

Declarations of Wife.]—Evidence tendered by a co-respondent of declarations by the wife to a third person, when the husband was not present, with regard to the conduct of the husband during cohabitation, is not admissible. *Plumer* v. *Plumer and Bygrave*, 4 Sw. & Tr. 257.

Unsatisfactory Evidence of.]—In support of a petition by a wife for a judicial separation, direct evidence was given of several acts of adultery committed by the husband; but, in consequence of the improbability of that evidence, of the discrepancies in the statements of the witnesses, and of the improper manner in which it had been got up by the private detective employed by the petitioner, the court refused to act upon it, and dismissed the petition. *Sopwith* v. *Sopwith*, 4 Sw. & Tr. 243.

Incestuous Adultery — Going behind Certificate of Conviction.]—Upon a wife's petition, charging the respondent with incestuous adultery with his own child, a girl of thirteen years of age, it appeared that a jury in a criminal court had acquitted the respondent of the more serious charge, but convicted him of an attempt to carnally know the child. The court, notwithstanding the certificate of conviction, allowed evidence to be given to prove that incestuous adultery had, in fact, taken place, and, finding this as a fact, pronounced a decree nisi dissolving the respondent's marriage with the petitioner. *Virgo* v. *Virgo*, 69 L. T. 460.

By Affidavit — Undefended Action — Witnesses Abroad—Poverty.]—The court, in an undefended action for dissolution of the marriage at the wife's suit, gave her leave to prove the bigamy, adultery and identity of her husband at the hearing by affidavit where the witnesses were resident in America, and the expense of a commission was beyond the wife's means. *Burslem* v. *Burslem*, 1 R. 497; 67 L. T. 719.

—— **Hearing—Absence of Petitioner.**]—The court, in the absence of the petitioner, the husband, after hearing evidence, made a decree nisi for the dissolution of the marriage on the ground of his wife's adultery. *Nicolson* v. *Nicolson and Fairley*, 1 R. 498; 68 L. T. 28.

Written Statements of Patient to Medical Man.]—Statements in writing by a patient to a medical man, describing the symptoms of the illness upon which the medical man has advised the patient, are not admissible. *Witt* v. *Witt and Klindworth*, 3 Sw. & Tr. 143; 32 L. J., Mat. 179; 9 Jur. (N.S.) 207; 8 L. T. 175; 11 W. R. 154.

Verdict against Co-respondent — Examination of Respondent by Court—Costs.]—In a petition by the husband for dissolution of the marriage on the ground of adultery, the respondent filed no answer and did not appear. The jury found a verdict against the co-respondent, and assessed the damages against him at 50*l*. The court, not being satisfied with the evidence against the wife, directed her to be summoned, and having heard her evidence, on which she was cross-examined, to the effect that she had been forced, came to the conclusion that the charge of adultery had not been established against her, and dismissed the petition against her, but gave judgment against the co-respondent for the damages with costs. *Long* v. *Long*, 60 L. J., P. 27; 15 P. D. 218.

Evidence of Prostitute.]—The only evidence in support of a charge of adultery against a husband in a suit for judicial separation was the testimony of the alleged paramour, a woman of loose character. The court declined to decide, upon this evidence, whether or not adultery had been committed, but held that the charge had not been established with sufficient certainty to enable it to pronounce a decree, and dismissed the petition. *Ginger* v. *Ginger*, 35 L. J., Mat. 9.

Bigamy — No Evidence of Subsequent Cohabitation — Affidavit.] — At the hearing of a wife's petition for divorce on the ground of her husband's desertion and adultery, the desertion was proved, and also the fact that the respondent had gone through the ceremony of marriage with another woman in America, but there was no evidence of any subsequent cohabitation between the parties to the bigamous marriage:—Held, that the mere proof that the ceremony of marriage had been gone through was insufficient to satisfy the words "bigamy with adultery" used in s. 27 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and that there must be substantive evidence of the adultery. Proof of the adultery was allowed to be completed by affidavit, under the special circumstance of the case. *Ellam* v. *Ellam*, 58 L. J., P. 56; 61 L. T. 338.

Sufficient to Obtain a Dissolution.]—Where

a wife had obtained a decree of judicial separation on the ground of the husband's cruelty, and continued to live separately from him, and he subsequently committed adultery, upon proof of such adultery, and of the decree for judicial separation, the court made a decree nisi for the dissolution of the marriage. *Bland* v. *Bland*, 35 L. J., Mat. 104; L. R. 1 P. 237; 15 W. R. 9.

—— **Direct Evidence.**]—A husband, who petitioned for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent, produced evidence at the hearing to show that he and a sergeant of police traced the respondent and co-respondent to the house of the latter's sister, and that in the presence of all five persons questions were put to the respondent, and admissions made by her, that incriminating allegations were made against her and the co-respondent by the landlady, and that the co-respondent said nothing in reply:—Held, that this was not sufficient legal proof that adultery had, in fact, been committed at that house, and that the case must stand over for direct evidence to be given by the landlady. *White* v. *White*, 62 L. T. 663.

—— **Witness negativing Adultery not Called.**]—Upon a wife's petition for divorce on the ground of desertion and adultery, the adultery was not established, and judicial separation only was decreed on the ground of desertion. Upon a rehearing the court refused to take notice of evidence given at the former hearing, and refused to grant a decree of divorce unless a witness, who negatived adultery, was subpœnaed. *Chambers* v. *Chambers*, 60 L. T. 514.

Admissibility of Acts not Charged.]—A wife was charged in a petition with adultery, to which she pleaded condonation. Counsel for the husband, in order to repel this plea by showing that at the time of the condonation the husband was not cognisant of the whole of the wife's adultery, tendered evidence of acts of adultery not laid in the petition, and which were committed prior to, but were unknown to him at the time of, the alleged condonation. The judge ruled hæsitanter, that, as the petition contained no averment of the acts of adultery, the evidence was inadmissible. *Keats* v. *Keats and Montezuma*, 1 Sw. & Tr. 334; 28 L. J., Mat. 57; 5 Jur. (N.S.) 176; 7 W. R. 377.

Evidence of acts of adultery not charged in the petition are inadmissible. *Keats* v. *Keats and Montezuma*, 29 L. J., Mat. 169, n.

But evidence of acts of adultery subsequent to the date of the latest act charged in a petition is admissible, for the purpose of showing the character and quality of previous acts of improper familiarity. *Boddy* v. *Boddy and Grover*, 30 L. J., Mat. 23.

A co-respondent cannot prove anything which he has not pleaded. *Plumer* v. *Plumer and Bygrave*, 1 Sw. & Tr. 149; 29 L. J., Mat. 63.

—— **Respondent found Guilty of Adultery as Co-Respondent in previous Suit and condemned in Costs—Decree as Evidence of Adultery in subsequent Suit.**]—A respondent in a suit for dissolution had previously been a co-respondent in another suit. The decree in the previous suit stated that the jury had found that the respondent had committed adultery with him (the co-respondent), and that he had been condemned in costs. As, however, the decree did not state that the jury had found that he (the co-respondent) had committed adultery with the respondent:—Held, that such decree was not evidence in the subsequent suit of the fact that he had previously committed adultery. *Ruck* v. *Ruck*, 65 L. J., P. 87; [1896] P. 152.

—— **Divorce Bill—Deceased Witness—Judge's Note of Evidence—Admissibility.**]—A certified copy of the judge's notes of the evidence of a witness called by the petitioner at the hearing of a petition for divorce a mensâ et thoro cannot, in case of the death of the witness, be received as proof of the matters deposed to by him upon the second reading of a bill for divorce presented by the petitioner. *Griffin's Divorce Bill*, [1896] A. C. 133—H. L. (Ir.)

iv. *Identity.*

Sufficiency of Proof.]—In support of a charge of adultery made by the queen's proctor against a petitioner, the only evidence was, that a man, calling himself by the name, and using the card, of the petitioner, had committed fornication. Full particulars of the charge having been given, and the petitioner at the hearing not coming forward to deny it:—Held, that there was sufficient proof of identity. *Hulse* v. *Hulse and Tavenor*, 4 Sw. & Tr. 232; 41 L. J., Mat. 19; L. R. 2 P. 357; 25 L. T. 764; 20 W. R. 447.

Photograph.]—It may be laid down as a fixed rule of practice that the court in a matrimonial suit, will not accept a photograph as evidence of identification except where no better evidence can be obtained, and even then the court will be guided, as to whether it will act on the evidence of a photograph or not, by the special circumstances of each case. *Frith* v. *Frith*, 65 L. J., P. 53; [1896] P. 74.

Confrontation of Parties.]—The court has no power to decree confrontation in a suit for dissolution of marriage for the purpose of identification. *Hooke* v. *Hooke*, 4 Sw. & Tr. 236; 28 L. J., Mat. 29.

The court will follow the practice of the ecclesiastical court in making a decree of confrontation in fit cases in suits for nullity. *Enticknap* v. *Rice*, f. c. *Enticknap*, 4 Sw. & Tr. 136; 34 L. J., Mat. 110; 13 L. T. 211.

Where it was necessary for the witnesses of a husband to be confronted with the wife (the petitioner) to enable him to establish his defence, and the husband was unable to ascertain her address, the court ordered the wife to supply to him her address within three days or to attend at the hearing. *Lloyd* v. *Lloyd*, L. R. 1 P. 222; 15 W. R. 287.

A respondent was allowed to appear and answer, after the expiration of the time for entering an appearance, on condition that she would allow herself to be confronted with the witnesses for the petitioner, for the purpose of being identified. *Hindmarsh* v. *Hindmarsh and Hussey*, 35 L. J., Mat. 31; L. R. 1 P. 24.

When a co-respondent charges the petitioner with adultery in a suit for dissolution of marriage, the court has power to order the petitioner and the co-respondent to attend the trial for the

purpose of being identified. *Sykes* v. *Sykes and Smith*, 38 L. J., Mat. 12 ; 19 L. T. 611 ; 17 W. R. 265.

Of Respondent—Evidence of Petitioner Uncorroborated.]—The court will not act upon the evidence of the petitioner as to the identity of the respondent without some corroboration. *Harris* v. *Harris and Milton*, 39 L. J., Mat. 86 ; L. R. 2 P. 77.

Of Co-respondent.]—In undefended divorce suits the co-respondent must at the trial be proved to be the person served with the citation. *Duff* v. *Duff*, 58 L. T. 389 ; 52 J. P. 232.

v. *Proof of Cruelty.*

Evidence of Wife.]—Before 22 & 23 Vict. c. 61, s. 6, a wife who prayed for judicial separation, and in her petition alleged adultery and cruelty, was not a competent witness to prove the charge of cruelty. *Hudson* v. *Hudson*, 3 Sw. & Tr. 314 ; 33 L. J., Mat. 5 ; 9 Jur. (N.S.) 1302 ; 9 L. T. 579 ; 12 W. R. 216.

—— **After Trial—Further Acts of.**]—After the case had been heard, and the court taken time to consider its decision, the petitioner (the wife) applied to be allowed to give evidence of further acts of cruelty, which she alleged took place at a date later than that to which she deposed at the trial. The court refused the application, the petitioner having repeatedly stated, in the course of her examination, that the last act of cruelty took place at Easter, 1863, and that also being the latest date given in the petition. *Topper* v. *Topper*, 38 L. J., Mat. 36 ; 20 L. T. 279.

—— **When Estopped from Proving.**]—A petitioner, whose petition for judicial separation, on the ground of cruelty, has been dismissed for defect of proof, is estopped from setting up the same charges of cruelty in a suit for dissolution of marriage on the ground of adultery and cruelty. *Finney* v. *Finney*, 37 L. J., Mat. 43 ; L. R. 1 P. 483 ; 18 L. T. 489.

General Conduct.]—A petition by a husband for dissolution of marriage, claimed damages. The co-respondent traversed the adultery, and charged the petitioner with cruelty. At the trial the petitioner called witnesses as to his general conduct towards his wife, and on the part of the co-respondent evidence was given of specific acts of cruelty :—Held, that, in reply, the petitioner might call witnesses to contradict the evidence of specific acts of cruelty, but not to prove his general conduct. *Narracott* v. *Narracott and Hesketh*, 3 Sw. & Tr. 408 ; 33 L. J., Mat. 61 ; 10 Jur. (N.S.) 640 ; 10 L. T. 389 ; 12 W. R. 1064.

A respondent who in his answer simply denies the cruelty charged in a petition, may cross-examine the petitioner, if called, as to her general conduct, for the purpose of impeaching her credit, but her answer as to any matters not bearing upon the issue cannot be contradicted. *Baker* v. *Baker*, 3 Sw. & Tr. 213 ; 32 L. J., Mat. 145 ; 9 L. T. 117 ; 11 W. R. 502.

Cruelty Pleaded only Admissible.]—Evidence to prove a species of cruelty not pleaded in the petition, is not admissible ; though evidence of violent demeanour and language not pleaded, but leading up to and making probable acts of violence pleaded, may be admissible. *Jewell* v. *Jewell*, 2 Sw. & Tr. 573 ; 6 L. T. 369 ; 10 W. R. 672. S. P., *Squires* v. *Squires*, 3 Sw. & Tr. 541 ; 33 L. J., Mat. 172 ; 10 Jur. (N.S.) 756 ; 12 W. R. 1028.

General Charge — Particulars.] — Evidence of an act of actual violence is not admissible where only a general allegation of cruelty has been made in a petition. Where evidence was offered that the husband had struck his wife a blow, and no such specific charge had been made in the petition, the court allowed the hearing to be adjourned in order that particulars might be furnished. *Brook* v. *Brook*, 56 L. J., P. 108 ; 12 P. D. 19 ; 57 L. T. 425 ; 35 W. R. 351.

vi. *Competency of Witnesses.*

16 & 17 Vict. c. 83, s. 1.]—On the trial of an issue of collusion, arising on the queen's proctor's intervention, in a petition to which the husband has not appeared, statements by him, not in the presence of the wife, are inadmissible as evidence on the issue before the jury. *Gray* v. *Gray*, 2 Sw. & Tr. 554 ; 31 L. J., Mat. 83 ; 6 L. T. 336 ; 10 W. R. 863.

Held, that the wife cannot be called as a witness, either under 14 & 15 Vict. c. 99, or under 16 & 17 Vict. c. 83. *Ib.*

A wife brought a suit for restitution of conjugal rights ; the husband pleaded her adultery, and prayed a judicial separation. At the hearing he gave evidence in support of his own plea :—Held, that he thereby waived his right to press for a judicial separation. *Burroughs* v. *Burroughs*, 2 Sw. & Tr. 544 ; 31 L. J., Mat. 124 ; 8 Jur. (N.S.) 624 ; 5 L. T. 771.

A petitioner is not a competent witness in support of his own case in an issue joined with an intervener after a decree nisi. *Harding* v. *Harding and Lance*, 4 Sw. & Tr. 145 ; 34 L. J., Mat. 108 ; 11 Jur. (N.S.) 814 ; 13 L. T. 195 ; 13 W. R. 999.

In a suit instituted by a wife for dissolution of her marriage by reason of her husband's adultery, coupled with wilful desertion, the wife was not a competent witness to prove the desertion. *Pyne* v. *Pyne*, 1 Sw. & Tr. 178 ; 27 L. J., P. 54.

In answer to a petition for dissolution of marriage on the ground of adultery, the wife pleaded counter-charges of cruelty and desertion, and prayed for a judicial separation :—Held, that her evidence was inadmissible to prove cruelty and desertion. *Whittal* v. *Whittal and Hunt*, 30 L. J., Mat. 43.

—— **22 & 23 Vict. c. 61, s. 6.**]—If a wife, in a suit by her for dissolution of marriage on the ground of adultery and cruelty, gives evidence in support of the charge of cruelty, she cannot in cross-examination be asked questions tending to show that she has been guilty of adultery. *Fisher* v. *Fisher*, 30 L. J., Mat. 24.

A petitioner and a respondent in a suit for dissolution of marriage, who are examined under 22 & 23 Vict. c. 61, s. 6, upon an issue of cruelty or desertion, may be cross-examined upon issues of their own adultery, and of each other's adultery. *Boardman* v. *Boardman*, L. R. 1 P. 233 ; 14 W. R. 1024.

An answer to a petition for dissolution of marriage on the ground of adultery contained a

charge of cruelty and a prayer for a judicial separation :—Held, that the evidence of the respondent was inadmissible to prove the cruelty. *Bland* v. *Bland and Stormont*, 37 L. J., Mat. 74 ; L. R. 1 P. 513 ; 18 L. T. 535 ; 16 W. R. 893.

To a petition by a husband for restitution of conjugal rights, the wife answered, alleging adultery, and prayed for a judicial separation. At the trial the petitioner desired to abandon the suit, and offered no evidence. The respondent adduced evidence, and pressed for a decree of judicial separation :—Held, that it was still a suit instituted for restitution of conjugal rights, and not a suit or proceeding instituted in consequence of adultery ; and that the parties were competent witnesses on the question of adultery. *Blackborne* v. *Blackborne*, 37 L. J., Mat. 73 ; 18 L. T. 450.

32 & 33 Vict. c. 68, s. 3.]—A witness who is called to prove adultery with one of the parties to a suit may claim the protection of the proviso in the 32 & 33 Vict. c. 68, s. 3, and the judge will not allow such witness to be interrogated on the subject of his or her adultery : but unless the protection of the proviso is claimed by the witness, the evidence is admissible, and it is not competent to counsel for either party to exclude it. *Hebblethwaite* v. *Hebblethwaite*, 39 L. J., Mat. 15 ; L. R. 2 P. 29 ; 21 L. T. 732.

A petition which sought to establish a claim on the ground that a certain person was illegitimate by reason of the adultery of his mother, who had since been divorced :—Held, not to be "a proceeding instituted in consequence of adultery," within the 32 & 33 Vict. c. 68, s. 3, so as to make the husband competent to give evidence tending to prove the fact of non-access. *B.'s Trusts, In re*, 39 L. J., Ch. 192 ; L. R. 10 Ch. 41.

Held, also, that independent evidence showing that on the only occasion when the husband visited the place where his wife was residing, he was engaged in collecting evidence with a view to a divorce, would be sufficient to raise a presumption of non-access. *Ib.*

Calling Co-Respondent as a Witness—21 & 22 Vict. c. 108, s. 11.]—Before this enactment, the co-respondent, so long as he remained a party to the record, was not a competent witness. *Robinson* v. *Robinson and Lane*, 1 Sw. & Tr. 362 ; 27 L. J., Mat. 91 ; 5 Jur. (N.S.) 392.

Where a petitioner's case depended on alleged confessions contained in the wife's diary, uncorroborated by independent evidence, the court exercised its discretion, under the above provision, and dismissed the co-respondent who was thereupon examined for the respondent. *Ib.*

Right of Co-Respondent to cross-examine Respondent on her Evidence against him—Misdirection—New Trial.]—Evidence given by one party affecting another party in the same litigation cannot be made admissible against that other party unless there is a right to cross-examine. Where the evidence of a respondent is adverse to the co-respondent, and the counsel for the co-respondent is not allowed to cross-examine the respondent, it is the duty of the judge to direct the jury to disregard the respondent's evidence when considering the case of the co-respondent, and the omission to do so is good ground for a new trial on the ground of misdirection. But, semble, such cross-examination should be allowed. *Glennie* v. *Glennie* (3 Sw. & Tr. 109) disapproved. *Allen* v. *Allen and Bell*, 63 L. J., P. 120 ; [1894] P. 248 ; 6 R. 597 ; 70 L. T. 783 ; 42 W. R. 549—C. A.

vii. *Commission and Requisition to Take.*

See Divorce Rules, 1865, rr. 132—137, 198.

When Granted.]—As a general rule, a commission to examine witnesses will not be granted before issue joined. *Shaw* v. *Shaw*, 2 Sw. & Tr. 642 ; 31 L. J., Mat. 95 ; 7 L. T. 254.

When the parties in a suit for dissolution of marriage are at issue, a motion for direction as to the mode of trial may be made at the same time as a commission to examine witnesses is applied for. *Graham* v. *Graham and Griffith*, 31 L. J., Mat. 96, n.

Witnesses Living in Brothel.]—Where the only witnesses to the acts of adultery relied upon are resident in a brothel, and there is consequently a risk of their evidence being lost, the court will allow a commission to issue for their immediate examination. *Cooke* v. *Cooke and Quaile*, 2 Sw. & Tr. 50 ; 28 L. J., Mat. 37.

Illness of Witness.]—In a suit for dissolution of marriage, the court, before the time for entering an appearance by the co-respondent had expired, allowed the petitioner to examine a proposed witness who was dangerously ill. *Stone* v. *Stone and Appleton*, 31 L. J., Mat. 136.

Witness going Abroad.]—When a petition had been filed, the court will allow witnesses who are about to go abroad to be examined before service of the citation. *Brown* v. *Brown*, 33 L. J., Mat. 203.

In Cross Suits.]—The court will not order that the evidence taken under a commission in a cross-suit may be used at the hearing of a suit between the same parties. *Hill* v. *Hill*, 30 L. J., Mat. 197.

Where the same issues are raised in cross-suits, and an order is made for a commission to examine witnesses, it will be drawn up in such a form that the evidence will be admissible in both suits. *Osborne* v. *Osborne and Martelli*, 3 Sw. & Tr. 327 ; 33 L. J., Mat. 38 ; 10 Jur. (N.S.) 80 ; 9 L. T. 456.

Witness Abroad—Contents of Affidavit.]—The court will grant a commission for the examination of a witness abroad, on an affidavit of the solicitor of the party applying that the witness is material and necessary, unless it is proved that the witness's evidence cannot possibly be material or necessary, or that there has been unreasonable delay in applying for the commission. *Stone* v. *Stone and Appleton*, 13 W. R. 414.

Joint Commission—Advance of Expenses by Husband—Commission to examine Witnesses.]—The court having, with the consent of husband and wife, made an order for a joint commission to issue for the examination of witnesses at Rome, directed the husband to advance to the wife a sum (the amount to be settled by the registrar) to enable her to defray the expenses of the commission. *Baily* v. *Baily and Della Rocca*, 2 Sw. & Tr. 112 ; 30 L. J., Mat. 47.

Nomination of Commissioner.]—When a com-

mission to examine witnesses is granted in a suit in which no appearance has been entered the commissioner is nominated in the registry and not by the petitioner. *Lodge* v. *Lodge and Smythe*, 32 L. J., Mat. 93.

In the absence of the respondents, the court, and not the petitioner, should select the commissioner before whom the evidence is to be taken. *Cook* v. *Cook and Quaile*, 2 Sw. & Tr. 50; 28 L. J., Mat. 37.

Direction and Return of Commission.]—Commissions for the examination of witnesses in France should be sent to and returned through the Foreign Office. *Mills* v. *Mills*, 31 L. J., Mat. 95, n.

Re-opening Commission.]—It is in the discretion of the court to re-open a commission, so as to enable a witness, who has been already examined, to be examined again: but it is a discretion to be sparingly exercised. *Bevan* v. *M'Mahon and Bevan*, 2 Sw. & Tr. 55; 28 L. J., Mat. 40.

Where a witness had been examined, re-examined, and cross-examined before a commissioner, the court refused to re-open the commission in order to enable him to supply important facts omitted in his evidence, although he deposed that it was in consequence of the respondent's personal observations and interruptions during the examination that he forgot to mention them at that time. *Ib.*

If the commissioner had reported that the respondent had so conducted himself during the examination as to disturb the mind of the witness, the court would have acceded to the application. *Ib.*

Admissibility of Depositions taken under.]—Proof to satisfy the court that a witness whose evidence has been taken abroad under a commission is out of the jurisdiction when the evidence is tendered may be less stringent when he is resident abroad than when the evidence has been taken of a witness going out of the jurisdiction for a temporary purpose. *Mills* v. *Mills*, 2 Sw. & Tr. 310; 30 L. J., Mat. 183; 4 L. T. 479.

Where in an affidavit to found an order for a commission it was stated that the object was to examine A., resident abroad, and the summons was served on the co-respondents:—Held, that the presumption was that the witness continued abroad, unless the contrary was shown, and the court allowed the evidence to be used. *Ib.*

A requisition was issued to the judges of a foreign court to take the evidence of certain witnesses residing within their jurisdiction. Interrogatories and cross-interrogatories were attached to the requisition, and were before the judge who examined the witnesses, but he only put such questions and in such form as he thought proper. The agents on both sides were present at the examination, and did not object or ask that further questions should be put to either of the witnesses:—Held, that the deposition might be read. *Hitchins* v. *Hitchins*, 35 L. J., Mat. 62; L. R. 1 P. 153; 14 L. T. 258.

Deposition of a Deceased Witness.]—The deposition of a deceased witness is admissible on condition, not only of its having been taken under the sanction of an oath, but also of sufficient notice having been given to the party against whom it is tendered to have enabled him to attend and cross-examine the witness. *Fitzgerald* v. *Fitzgerald*, 33 L. J., Mat. 39; 9 L. T. 580; 12 W. R. 696. Affirmed on appeal, 3 S. & T. 400; 10 L. T. 510.

Where, therefore, notice was given about 2 p.m. on a Saturday, to a respondent's solicitor in London, that a witness was to be examined at Bath on Monday, under an order of the court, obtained by the petitioner:—Held, that the notice was insufficient to enable the respondent's solicitor to attend and cross-examine, and that the evidence so taken without cross-examination was inadmissible. *Ib.*

Depositions in extinct Ecclesiastical Court.]—Where there had been a decree of one of the extinct ecclesiastical courts, and depositions taken in the cause in which such decree was made:—Held, that those depositions could not be used in evidence in a cause before the court, except so far as they were embodied in a decree, and therefore part of the proceedings of a court, and documents of a public nature, of which the court would receive in evidence a certified copy. *Linzee* v. *Linzee*, 29 L. J., Mat. 128.

Costs of.]—*See* col. 954.

viii. *Affidavits.*

See Divorce Rules, 1865, rr. 138—146, *and* Rules, 1875, r. 188.

Verifying Petition sworn by Solicitor.]—A petitioner in a divorce suit being on military service, and unable to make the usual affidavit verifying the petition, the court allowed the petition to be filed if verified by the affidavit of his solicitor, but ordered that the petitioner's affidavit should also be filed as soon as possible. *Bruce, Ex parte*, or *Bruce* v. *Bruce and Laing*, 50 L. J., P. 64; 6 P. D. 16; 29 W. R. 474.

—— **Entitling.**]—An affidavit to verify a petition, and filed with it, should not be headed in the cause, but in the matter of the petition. *Steed* v. *Steed*, 36 L. J., Mat. 50; L. R. 1 P. 364; 16 L. T. 125.

An affidavit verifying the petition should be headed, "In the matter of the petition of A. B." *Gapp* v. *Gapp and Leverson*, 4 Sw. & Tr. 273.

Affidavits in a cause must be entitled strictly as the cause itself is entitled. *Sutherland*, f. c. *Croomie* v. *Croomie*, 3 Sw. & Tr. 210; 32 L. J., Mat. 125; 9 L. T. 23.

In a suit of nullity by a wife, an affidavit entitled S. *v.* C., instead of S., falsely called C. *v.* C., was rejected. *Ib.*

An affidavit, in which the addition or place of abode of a deponent is not inserted, will not be received. *Bernard, In goods of*, 31 L. J., P. 89.

When a joint affidavit was made by A. and B., and B.'s addition was not inserted therein, the court treated the affidavit as that of A. only. *Woodburne, In goods of*, 31 L. J., P. 89, n.

An affidavit which does not comply with the rule must be resworn. *Bernard, In goods of*, 31 L. J., P. 89.

Form and Admissibility of.]—The court will take no notice of an affidavit which contains an interlineation in the jurat. *Manton* v. *Manton*, 28 L. J., Mat. 32.

The court will take no notice of an affidavit, if it is not duly stamped. *Hyatt* v. *Hyatt*, 28 L. J., Mat. 32.

In a suit for a dissolution of marriage, the

judge rejected an affidavit of service of the citation sworn before a notary at Massachusetts for want of affidavits, that there was not at Massachusetts one of the British officers empowered by 18 & 19 Vict. c. 42, s. 1, to take affidavits, and that a notary public had by the law of the place authority to take an affidavit. *Comyn* v. *Comyn and Humphreys*, 31 L. J., Mat. 89, n.

—— **Petitioner absent.**]—The court will not allow the affidavit verifying a petition for divorce to be sworn by another person when the petitioner is absent from the country of his own free will. *Bruce, Ex parte* (6 P. D. 16) distinguished. *Tartt, Ex parte*, 34 W. R. 368.

—— **"Knowledge and Belief."**]—The affidavit of a petitioner may speak "to the best of his knowledge and belief," as well as to matters absolutely within his personal cognisance. *Tourle* v. *Tourle*, 1 Sw. & Tr. 165; 27 L. J., Mat. 52; 6 W. R. 544.

—— **Description of Deponent.**]—The affidavit of a married woman must state the description of her husband, and that of an unmarried woman should give the description of her parents in order to comply with the rules. *Ellam* v. *Ellam*, 62 L. T. 331.

Not Usable as Evidence.]—Affidavits filed with a petition and an answer cannot, at the hearing, be referred to as evidence by either party. *Studdy* v. *Studdy*, 28 L. J., Mat. 105.

An affidavit filed in verification of a petition should not go into a detailed statement of the history of the parties. The court may have no power to order an affidavit to be removed from the file of the court; but on a question of taxation of costs, the costs of such an affidavit would not be allowed against the other party. *Forster* v. *Forster*, 1 Sw. & Tr. 167.

The affidavit of the petitioner required by 20 & 21 Vict. c. 85, s. 41, will not be taken as evidence at the hearing, but the parties must produce sufficient evidence to prove the petition independently of such affidavit. The court is bound by the rules of evidence as observed at common law. *Deane* v. *Deane*, 1 Sw. & Tr. 90; 4 Jur. (N.S.) 268.

—— **Petitioner a British Consul—Solicitor.**]—Where the petitioner was resident abroad as British consul, and as such was himself the only authority in the place where he resided before whom the affidavit in support of his petition for dissolution could be sworn, and by r. 142 he was not competent to swear his own affidavit, the petitioner's solicitor was allowed to verify the petition to the best of his knowledge and belief. *Russell* v. *Russell*, or *Russell, Ex parte*, 59 L. J., P. 13; 62 L. T. 186; 54 J. P. 167.

Filing.]—In a suit for dissolution of marriage, triable upon affidavits, in which there was no appearance, a motion for further time to file affidavits was granted, notwithstanding the rule of court, which directs that, "in cases to be tried upon affidavit, the petitioner and respondent shall file their affidavits within eight days from the filing of the last proceeding." *Davis* v. *Davis*, 33 L. J., Mat. 139.

An affidavit of non-payment of taxed costs and alimony to the person to whom they are ordered to be paid, cannot be read on a motion for an attachment if filed subsequently to the notice of motion. *Symons* v. *Symons and Pike*, 30 L. J., Mat. 215.

Proof by—Where Evidence Disgusting.]—In an undefended petition, the wife's evidence, being to establish cruelty of a most disgusting character against her husband, was allowed to be taken on affidavit, the rest of the case being proved orally before the court. *Laxton* v. *Laxton*, Inderwick, 47.

—— **Witnesses at Long Distance.**]—A husband was convicted of bigamy in 1852. The wife petitioned for a dissolution of their marriage on the ground of his bigamy and adultery. The witnesses to the facts to be proved were resident at Oldham and Huddersfield:—The judge directed that the petition might be proved by affidavit. *March* v. *March*, 2 Sw. & Tr. 49; 28 L. J., Mat. 30.

In a suit for dissolution of marriage, no appearance having been entered by the respondent or co-respondent, the court made an order that the petitioner at the hearing should be at liberty to prove, by affidavits, the marriage, which had taken place in Scotland, where all the persons who could prove it resided. *M'Kechnie* v. *M'Kechnie*, 1 Sw. & Tr. 550; 28 L. J., Mat. 31.

The court will allow bigamy to be proved by affidavit where there has been a conviction, if the witnesses who would prove it reside at a distance from London, and oral proof would be expensive. *Macartney* v. *Macartney*, 36 L. J., Mat. 38; L. R. 1 P. 259; 15 L. T. 193; 15 W. R. 229.

In a husband's suit for dissolution, when the petitioner was resident in Australia, the court allowed the preliminary facts of the cohabitation and separation to be proved by affidavit. *Adams* v. *Adams and Guest*, 29 L. T. 699; 22 W. R. 192.

The marriage law of Virginia, and a marriage there, allowed to be proved by affidavit. *Rooker* v. *Rooker and Newton*, 3 Sw. & Tr. 526; 33 L. J., Mat. 42; 9 Jur. (N.S.) 1329; 12 W. R. 807.

In Suit for Nullity.]—In a suit for nullity of marriage by a woman, the court, with the consent of the respondent, allowed the petitioner's evidence to be given on affidavit. *B.*, f. c. *C.* v. *C.*, 32 L. J., Mat. 135.

Order allowing Use of, must be Filed.]—When leave is granted to prove a petition by affidavit, the order granting such leave must be drawn up before hearing, and should be filed with the other papers. *Webb* v. *Webb*, 32 L. J., Mat. 63; 11 W. R. 112.

Action of Crim. Con.]—A. had obtained a divorce a mensâ et thoro, and had recovered in an action of crim. con. a verdict for nominal damages. The court refused to allow the case to be heard on affidavit, and directed it to be heard on oral evidence. *Potts* v. *Potts*, 1 Sw. & Tr. 181; 27 L. J., Mat. 59; 6 W. R. 860.

But in a similar case, the judge, on the consent of the other parties, directed A.'s petition for dissolution to be heard on affidavit. *Ling* v. *Ling and Croker*, 1 Sw. & Tr. 180; 27 L. J., Mat. 58; 6 W. R. 674; 6 W. R. 736.

Other Evidence—Proof of Marriage in Colony.]

—Proof of the solemnisation of a marriage in a British colony by a clergyman of the Church of England, according to the rites of that church, is sufficient evidence of a marriage for the purpose of a divorce. *Limerick (Countess)* v. *Limerick (Earl)*, 4 Sw. & Tr. 252; 32 L. J., P. 92; 4 W. R. 503. *See* col. 652.

Offer to Return to Cohabitation.]—At the hearing of a petition by a wife for a judicial separation on the ground of desertion, it was attempted to show that offers to return had been made by the husband. No charge of adultery appeared on the pleadings. The respondent was asked in cross-examination whether, at the time of the alleged offers, he was not living in adultery:—Held, that such question was material to the issue, as it went to show the bona fides of such offers. *Mallinson* v. *Mallinson*, L. R. 1 P. 93; 14 W. R. 353.

Privileged Communications between Solicitor and Client.]—In a suit by a wife for judicial separation on the ground of cruelty, the wife was asked, on cross-examination, whether she had not originally instructed her attorney to institute a suit for restitution of conjugal rights. The question was objected to, and the objection was overruled. *Maccann* v. *Maccann*, 3 Sw. & Tr. 142; 32 L. J., Mat. 29; 8 L. T. 175; 11 W. R. 112.

ix. *Proof of Decree.*

By 20 & 21 Vict. c. 85, s. 13, *all decrees and orders, or copies of decrees or orders, of the court, sealed with the seal of the court, shall be received in evidence.* *See* Divorce Rules, 1865, rr. 118—120.

When Admissible as Evidence.]—In an action for necessaries supplied by a tradesman to a wife whilst living apart from her husband, in order to establish his wife's adultery, the husband produced in evidence the record in the divorce court, in a suit by him against his wife for a dissolution of marriage on the ground of adultery, in which it was found that his wife had been guilty of adultery; but as the husband was found to have been also guilty of adultery, the judge ordinary had dismissed the suit:—Held, that such evidence was admissible under the plea of never indebted; but that, as the judgment in the divorce court had not altered the status of the wife, it was not conclusive evidence of the adultery in the action. *Needham* v. *Bremner*, 1 H. & R. 731; 35 L. J., C. P. 313; L. R. 1 C. P. 583; 12 Jur. (N.S.) 434; 14 L. T. 437; 14 W. R. 694.

When Inadmissible.]—The principle on which the common-law doctrine of estoppel rests is applicable to matrimonial suits, and, therefore, a judgment of the court upon a matter directly in issue is conclusive upon the same matter between the same parties in another suit. *Sopwith* v. *Sopwith*, 2 Sw. & Tr. 160; 30 L. J., Mat. 131; 7 Jur. (N.S.) 554; 4 L. T. 256.

B. petitioned for restitution of conjugal rights; C., in answer, alleged B.'s adultery between certain dates. B. replied, by way of estoppel, that the same charges of adultery had been put in issue in a suit for judicial separation brought by C. against him, in which she had failed to prove the adultery:—Held, that C. was not entitled, in answer to the petition for restitution, to allege the same facts of adultery which she had failed to establish in the previous suit. *Ib.*

A wife petitioned for judicial separation by reason of cruelty and desertion, and a decree was made in her favour on a verdict finding cruelty and desertion against the husband. He subsequently petitioned for dissolution of marriage by reason of her adultery, and she answered charging cruelty and desertion, as in her original petition. Issue was joined, and at the trial a certified copy was tendered, as evidence under seal, of the decree of judicial separation in proof of the cruelty and desertion; the judge refused to let it go to the jury, on the ground that it would be indirectly making use of evidence which was directly inadmissible. *Stoate* v. *Stoate*, 2 Sw. & Tr. 223; 30 L. J., Mat. 102; 3 L. T. 756.

A decree founded on the evidence of the parties does not estop them from controverting, in another suit in which such evidence is inadmissible, a fact found by the decree. *Bancroft* v. *Bancroft and Rumney*, 34 L. J., Mat. 14.

Queen's Proctor Intervening.]—The queen's proctor, intervening in a suit for dissolution of marriage, alleged in his answer, collusion; that in a previous suit by the petitioner against the respondent, the court found that the petitioner had committed adultery, and dismissed his petition, and adultery of the petitioner. Quære, whether the finding in the previous suit is admissible as evidence of the petitioner's adultery, and if admissible, whether it is conclusive:—Held, that, whether admissible for that purpose or not, it is a material fact for the consideration of the court. *Conradi* v. *Conradi*, 36 L. J., Mat. 68; L. R. 1 P. 391; 16 L. T. 392; 15 W. R. 881.

p. Co-Respondent.

Joinder of.]—By 20 & 21 Vict. c. 85, s. 28, *upon a petition presented by a husband [praying that his marriage may be dissolved on the ground that his wife has since the celebration thereof been guilty of adultery, s. 29], the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the court, he shall be excused from so doing;*

And on every petition presented by a wife for dissolution of marriage, the court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent;

And the parties or either of them may insist on having the contested matter of fact tried by a jury. *See* Divorce Rules, 1865, rr. 4—7.

Unless a petitioner can satisfy the court on affidavit that he cannot or ought not to make a co-respondent, the 20 & 21 Vict. c. 85, s. 28, is imperative that he should do so. *Quicke* v. *Quicke*, 2 Sw. & Tr. 419; 31 L. J., Mat. 28; 5 L. T. 690; 10 W. R. 448.

The court will not, upon an affidavit of the petitioner only, allow him to proceed without making a co-respondent. *Leader* v. *Leader*, 32 L. J., Mat. 136.

If a petition alleges adultery with persons unknown the order of the court must be obtained dispensing with making them co-respondents, notwithstanding that there are already other co-respondents who have been served with process. *Penhy* v. *Penhy*, 51 L. J., P. 24; 7 P. D. 19; 47 L. T. 131; 30 W. R. 384.

A petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-respondent, unless he is excused from so doing by the court on special grounds. *Carryer* v. *Carryer and Watson*, 4 Sw. & Tr. 94 ; 34 L. J., Mat. 47 ; 11 Jur. (N.S.) 352 ; 13 L. T. 250 ; 13 W. R. 507.

A petition, by a husband, charged adultery with A. and also with divers other persons, and afterwards, in pursuance of an order of the court, particulars of the general charge were given, alleging adultery with B. After an order had been obtained by the respondent for a commission to examine B., who was abroad, the petitioner applied for leave to make B. a co-respondent. The court refused the application, on the ground that it was not bonâ fide, but solely for the purpose of excluding B.'s evidence. *Codrington* v. *Codrington and Anderson*, 3 Sw. & Tr. 368 ; 33 L. J., Mat. 62 ; 10 L. T. 139.

Adultery of Husband — Joining alleged Adulteress.]—In a suit by a wife for dissolution of marriage, the court, upon application on behalf of the person with whom it was alleged that the husband had committed adultery, directed that she be made a respondent. *Bell* v. *Bell*, 8 P. D. 217.

When Application to excuse Joining should be made.]—An application to dispense with making a co-respondent should be made at an early stage of the suit ; but, except under special circumstances, it will be allowed even after the respondent has filed her answer to the petition. *Jeffers* v. *Jeffers*, 46 L. J., P. 80 ; 2 P. D. 90 ; 25 W. R. 513.

Power of Court to Dismiss before Hearing.]—The court has power to dismiss a co-respondent from a suit before the hearing without his consent. *Wilson* v. *Wilson and Howell*, 41 L. J., Mat. 33 ; L. R. 2 P. 353 ; 26 L. T. 139 ; 20 W. R. 372.

On a petition for dissolution of marriage by a husband, the respondent appeared absolutely and the co-respondent under protest. The co-repondent filed an act on petition, in which he set out facts to show that the court had no jurisdiction to entertain the suit. The petitioner filed an answer thereto, and there was a replication, and the act on petition was set down for hearing. The petitioner then applied to the court to be allowed to withdraw his answer to the act on petition, and that the co-respondent should be dismissed from the suit on the payment of his costs. The court granted the application, notwithstanding the opposition of the co-respondent. *Ib.*

But when the alleged adultery was of old date, the petitioner poor, and the proceedings had advanced to the motion for instructions as to the mode of trial, the court dispensed with the application required by r. 5, and made an order for trial. *Pitt* v. *Pitt*, 37 L. J., Mat. 24 ; L. R. 1 P. 464 ; 17 L. T. 671.

Adultery of Petitioner after Decree Nisi—How Co-Respondent affected by.]—The adultery of a petitioner after the date of the decree nisi, although ground for reversing the decree so far as it dissolves the marriage, is not ground for reversing that part of it which condemns the co-respondent in costs. *Hulse* v. *Hulse and Tavernor*, 41 L. J., Mat. 19 ; L. R. 2 P. 357 ; 25 L. T. 764 ; 20 W. R. 447.

A husband obtained a decree nisi, with costs. Damages were also assessed against the co-respondent, but no order was made on him for their payment. On intervention by the queen's proctor, it was proved that the husband after his marriage had led a profligate life. The court reversed the decree nisi, including that part of it which condemned the co-respondent in costs, and dismissed the petition. *Ravenscroft* v. *Ravenscroft*, 41 L. J., Mat. 28 ; L. R. 2 P. 376 ; 26 L. T. 265 ; 20 W. R. 448.

With respect to the damages the court declined to make an order on the co-respondent for payment ; at the same time expressing the opinion that it was never intended that a petitioner should be entitled to damages where the petition is dismissed, and that even where a decree is made dissolving the marriage, the petitioner has no definite or legal right to the damages, unless an order for payment to him be made by the court. *Ib.*

See also *Youell* v. *Youell*, 33 L. T. 578 ; 24 W. R. 59.

Leave to Dispense with Co-Respondent—Evidence.]—It is an invariable rule of practice that the court will not give leave to dispense with making a co-respondent on the uncorroborated affidavit of the petitioner only. *Barber* v. *Barber*, 65 L. J., P. 58 ; [1896] P. 73.

A wife who had been delivered of a child of which her husband was not the father confessed to having committed adultery with two men, either of whom she stated might have been the father of her child. It appeared that the husband had no evidence against either of the men, beyond the wife's confession and the birth of the child :—The court refused the husband, petitioner, leave to proceed without making a co-respondent. *Jones* v. *Jones*, 65 L. J., P. 101 ; [1896] P. 165 ; 75 L. T. 190.

"Alleged Adulterer" — Discretion.] — The words "alleged adulterer" in s. 28 of the Matrimonial Causes Act, 1857, and r. 4 of the rules of 1865, mean only the person alleged by the petitioner in the petition to be the adulterer. *Saunders* v. *Saunders*, 66 L. J., P. 57 ; [1897] P. 89 ; 76 L. T. 330 ; 45 W. R. 583—C. A.

Where a petitioning husband is informed of the name of some person said to have committed adultery with his wife, but does not desire to proceed against him, and applies to the court for leave to dispense with a co-respondent, the court must exercise its discretion and decide each case on its special circumstances. There is not, and there cannot be, any settled rule applicable to all cases. *Jones* v. *Jones* (65 L. J., P. 101 ; [1896] P. 165) overruled. *Ib.*

The mere belief of a petitioner, founded on the evidence then before him, that a person accused of being the adulterer is not guilty, is not in itself sufficient to excuse him from making that person a co-respondent. If, however, the court is satisfied that no evidence can be obtained against the accused person, it may exercise its discretion under s. 28 of the Matrimonial Causes Act, 1857, and allow the petitioner to proceed without joining him as co-respondent. *Jones* v. *Jones* (65 L. J., P. 101 ; [1896] P. 165) and *Saunders* v. *Saunders* (66 L. J., P. 57 ; [1897] P. 89) considered and explained. *Edwards* v. *Edwards*, 67 L. J., P. 1 ; [1897] P. 316 ; 77 L. T. 406.

—— **Out of Jurisdiction dismissed from Suit—Costs.**] — A co-respondent, after entering an appearance, unconditionally, filed an answer alleging that his domicil was German; that the adultery charged, if committed at all, was committed in Germany, and that the citation had been served on him in the United States, and claiming to be dismissed from the suit:—Held, that the co-respondent might be dismissed from the suit; but that as he had not taken the earliest opportunity of disputing the jurisdiction, he was entitled only to his costs of appearance. *Grange* v. *Grange*, 61 L. J., P. 125; [1892] P. 245; 67 L. T. 360.

—— **Dead or Unknown.**]—Where the alleged adulterer is dead or unknown, the petitioner should apply at once for an order to be excused from making him a co-respondent. *Tollemache* v. *Tollemache*, 28 L. J., Mat. 2.

—— **One of two Alleged Adulterers Dying before Proceedings taken.**]—Where an alleged adulterer has died before proceedings for a divorce have been commenced, it is necessary, if it is desired to charge such adultery against the wife, to obtain leave to dispense with making such deceased person a co-respondent, notwithstanding the fact that adultery is also charged with another person who is alive and has been made a co-respondent in the suit. *Slaytor* v. *Slaytor*, 66 L. J., P. 97; [1897] P. 85; 77 L. T. 141.

—— **Wife's Confession only Evidence.**]—In a petition by a husband for divorce, it appeared that the address and occupation of the alleged adulterer were known to the petitioner, but there was no evidence against him except the respondent's confession:—Held, that the petitioner could not be excused from making the adulterer a co-respondent, and that the citation must be personally served upon him as such co-respondent. *Cornish* v. *Cornish*, 59 L. J., P. 84; 15 P. D. 131; 62 L. T. 667.

Where no evidence was obtainable against the man whom the respondent had indicated as the father of one of her illegitimate children, and who was believed to be in America, the court gave the petitioner leave to proceed without citing the alleged adulterer as a co-respondent. *Bagot* v. *Bagot*, 62 L. T. 612.

The court will allow a petitioner to proceed without making the alleged adulterer a co-respondent where no evidence can be obtained against him, the only evidence that he is the adulterer being the wife's confession. *Jinkings* v. *Jinkings*, 36 L. J., Mat. 48; L. R. 1 P. 330; 15 L. T. 512.

A husband presented a petition to the court praying for a dissolution of his marriage on the ground of his wife's adultery with two men, R. and E., both of whom were mentioned by name in the petition. The charge against E. was made on the strength of certain rumours which reached the petitioner, and which were confirmed by a statement made to the petitioner's solicitor by the respondent, to the effect that E. was the father of her illegitimate child. The man E. positively denied the truth of the respondent's statement, and, upon the petitioner and his solicitor making inquiries into the matter, no satisfactory evidence was forthcoming to support the respondent's confession. The petitioner was thereupon advised to apply to the court for leave to proceed without citing any co-respondent in respect of the adultery which resulted in the birth of the respondent's illegitimate child:—Held, that the respondent having given the name of E. as the father of her child, and his name having been inserted in the petition, he must be made a co-respondent and be served with the usual citation. *Payne* v. *Payne*, 60 L. T. 238.

A husband moved for leave to dispense with citing a certain man as co-respondent. The name of the alleged adulterer had been inserted in the husband's petition for divorce, on the strength of admissions made by the wife as to the paternity of her illegitimate child. No other evidence as to her adultery was forthcoming. The court, while expressing dissatisfaction with the practice adopted in the case of *Jinkings* v. *Jinkings* (L. R. 1 P. 330), gave the petitioner leave to proceed without citing the co-respondent. *Gill* v. *Gill*, 60 L. T. 712; 37 W. R. 623.

—— **Name of Adulterer Unknown.**] — Where a petition alleged that "in July, 1857, the respondent, at Birkenhead, committed adultery with a man whose name is to the petitioner unknown," the judge refused to excuse the petitioner from making a co-respondent, on an affidavit simply that the petitioner was unable to learn the name of the adulterer, but subsequently granted the application, on an affidavit that the petitioner had been informed by A. that the respondent and a man had taken furnished apartments and slept together in her house, and that she had not since seen the man, and did not know his name, though she had made efforts to discover it. *Evans* v. *Evans*, 28 L. J., Mat. 20.

A petition alleged that the wife had committed adultery with A., who was made a co-respondent, and in a fifth paragraph charged her with having committed adultery with a person unknown. On motion that the petitioner might be excused from making such unknown person a co-respondent, or be allowed to strike the fifth paragraph out of the petition:—Held, that either might be done. *Hunter* v. *Hunter*, 28 L. J., Mat. 3.

A husband petitioning for a divorce must obtain leave to proceed without making a co-respondent, although the petition charges adultery with a person unknown. *Pitt* v. *Pitt*, 37 L. J., Mat. 24; L. R. 1 P. 464; 17 L. T. 671. And see *Grose* v. *Grose*, 78 L. T. 89.

—— **Countercharge by Husband against Wife.**] — In a wife's petition for divorce, her husband, in his answer, made a countercharge of adultery against his wife, and prayed for a divorce. On an application made on behalf of the husband, by direction of the registrar, to be allowed to proceed without making a co-respondent, the court granted the application, but reserved the question whether it has power to make a man a co-respondent in such a suit. *Curling* v. *Curling*, 58 L. J., P. 20; 14 P. D. 13; 59 L. T. 899.

Wife a Prostitute.]—An application to proceed without making a co-respondent, granted, on the ground that the wife was living in a brothel. *Hooke* v. *Hooke*, 1 Sw. & Tr. 183; 27 L. J., M. C. 61; 6 W. R. 868.

But in a subsequent case the fact that the wife was a common prostitute was held insufficient to induce the court to dispense with a co-respondent. *Quicke* v. *Quicke*, 2 Sw. & Tr. 419; 31 L. J., P. 28; 5 L. T. 690.

Where the wife was alleged to be leading the life of a common prostitute and to have committed adultery with several persons, who were necessary witnesses to enable the petitioner to establish the charges of adultery, he was allowed to proceed without making a co-respondent. *Peters* v. *Peters and Willett*, 3 Sw. & Tr. 264.

Other Special Grounds for excusing Joinder of.]—The fact of a husband having brought an action of crim. con., and recovered damages against the adulterer, does not form special grounds on which the court will excuse the husband from making the adulterer a co-respondent. *Armitage, In re*, 1 Sw. & Tr. 71 ; 27 L. J., Mat. 4 ; 4 Jur. (N.S.) 56 ; 6 W. R. 222.

A husband had obtained a sentence of divorce a mensâ et thoro, in the ecclesiastical court, by reason of his wife's adultery, and had recovered damages in an undefended action of crim. con. from B., who was at the Cape of Good Hope, he was allowed to proceed without making B. a co-respondent. *Tomkin* v. *Tomkin*, 1 Sw. & Tr. 182 ; 27 L. J., P. 54.

—— **Affidavits in support.**]—Upon a motion to dispense with citation of any person as a co-respondent, an affidavit by the petitioner is indispensable. *Drinkwater* v. *Drinkwater*, 60 L. T. 398.

—— **Names of Co-Respondents omitted from Daily List and from Term List—Duty of Solicitor.**]—It is the duty of the petitioner's solicitor to see that the cause is correctly described in the official term list and in the daily cause list, and the court refused to allow the case to proceed where the names of the co-respondents were omitted ; but the case being undefended, allowed it to proceed on the following day, the correct description of the case being given in the list for that day. *Onslow* v. *Onslow*, 60 L. T. 680.

—— **Former Petition still on File.**]—The court refused to pronounce a decree where it appeared that a former petition of the same petitioner, which had been struck out some time previously, still remained on the files of the court. *Ib.*

Dying during Pendency of Suit.] — Semble, that when a co-respondent dies pending a suit for dissolution of marriage, a motion should be made for leave to strike his name out of the proceedings. *Sutton* v. *Sutton*, 32 L. J., Mat. 156.

Answer of Co-Respondent.]—A co-respondent may set up, in answer to a petition for dissolution of marriage by reason of the adultery of a wife, conduct of the petitioner, which, under the proviso to s. 31 of 20 & 21 Vict. c. 85, would give the court a discretionary power to dismiss the petition, but he cannot give evidence of it unless it is pleaded. *Seddon* v. *Seddon and Doyle*, 30 L. J., Mat. 12 ; 7 Jur. (N.S.) 147.

He is not precluded by that section from pleading it by the insertion in the petition of a claim for damages, though such a defence could not have been pleaded to an action for criminal conversation, the meaning of that section being that in such a case the question of damages is to be dealt with, not that the record is to be framed in the same manner as in an action for criminal conversation. *Ib.*

Omitting to put in Answer — Position at Trial.]—A co-respondent who puts in no answer and yet appears is not entitled to address the jury in mitigation of damages, or to cross-examine with that view. *Lyne* v. *Lyne and Blackney*, 37 L. J., Mat. 9 ; 17 L. R. 1 P. 508 ; L. T. 29 ; 16 W. R. 159.

A co-respondent, if he has put in no answer to the petition, is no party to the issue to be tried by the jury. *Tourle* v. *Tourle*, 1 Sw. & Tr. 176.

Calling Co-Respondent as a Witness—12 & 22 Vict. c. 108, s. 11.]—Before this enactment, the co-respondent so long as he remained a party to the record was not a competent witness. *Robinson* v. *Robinson and Lane*, 1 Sw. & Tr. 362 ; 27 L. J., Mat. 91 ; 5 Jur. (N.S.) 392. *See* col. 913.

Right of Co-Respondent to Cross-examine.]—As to right of co-respondent to cross-examine respondents who have given evidence against him. See *Allen* v. *Allen and Bell*, 63 L. J., P. 120 ; [1894] P. 248 ; 70 L. T. 783; 42 W. R. 549—C. A. And cols. 934, 908–9.

Husband's Answer Countercharging Adultery—Permission to alleged Adulterer to intervene.]—Where in a wife's suit for dissolution of marriage the husband in his answer charged his wife with having committed adultery with a specified person, but did not pray for a dissolution of the marriage, the court allowed the alleged adulterer to intervene and file an answer. *Wheeler* v. *Wheeler*, 58 L. J., P. 65 ; 14 P. D. 154 ; 61 L. T. 306.

Proof of Identity of Co-respondent — Undefended Action.]—In undefended divorce actions the co-respondent must at the trial be proved to be the person served with the citation, unless an order has been obtained for leave to proceed without making a co-respondent. *Duff* v. *Duff*, 58 L. T. 389 ; 52 J. P. 232. *See* col. 911.

Contempt by.]—*See* col. 951.

Damages against.]—*See* DAMAGES, ante, col. 781.

Costs of.]—*See* COSTS, col. 968.

—— **Against.**]—*See* col. 970.

q. Compromise of Suit.

Capacity of Wife.]—A wife as party to a matrimonial suit may bind herself by a compromise. *Hooper* v. *Hooper*, 30 L. J., P. 49.

Court will Enforce.]—Where a wife has instituted a suit for a divorce, an agreement between husband and wife alone for compromise of suit will be supported, provided it contains no stipulations which the court cannot enforce. In this case, provisions as to custody of children :—Held, incapable of being enforced, and demurrer to bill for specific performance allowed. *Vansittart* v. *Vansittart*, 4 Kay & J. 63 ; 27 L. J., Ch. 222; 4 Jur. (N.S.) 276; 6 W. R. 238. Affirmed, 2 De G. & J. 249 ; 27 L. J., Ch. 289; 4 Jur. (N.S.) 519; 6 W. R. 389.

Not against Public Policy.]—An agreement to put an end to a suit for nullity of marriage, on the ground of impotency, is not void as against public policy. *Wilson* v. *Wilson*, 14 Sim. 405. Affirmed, 1 H. L. Cas. 538. And see *Hart* v. *Hart*, 50 L. J., Ch. 697 ; 18 Ch. D. 670 ; 45 L. T. 13 ; 30 W. R. 8.

—— **Agreement for Separation.**]—The court

will enforce the due performance of a deed for separation and arrangement between husband and wife; and the discontinuance of a suit for a divorce by her, held a sufficient consideration; nor would a stipulation for his performance of the deed, and acting "according to the spirit and intention of the deed," and partaking of certain benefits in the establishments proposed, render it void for uncertainty. *Jodrell* v. *Jodrell*, 9 Beav. 45; 15 L. J., Ch. 17; 9 Jur. 1022.

—— **Incomplete Agreement—Release of Jointure.**]—A married woman was entitled by an ante-nuptial settlement to a jointure rent-charge after her husband's death secured upon his real estates in Ireland. The wife having left him, the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up and signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document, with a qualification that no further steps were to be taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise and was executed by the husband, but the wife refused to execute it or to return to her husband, and the husband afterwards died:—Held, that the wife was not, when she signed the document, in all respects in the same position as a feme sole, and that even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4, c. 92, ss. 68, 71; and that specific performance of the agreement to release her jointure could not be decreed against her. *Hunt* v. *Hunt* (4 De G. F. & J. 221) and *Besant* v. *Wood* (12 Ch. D. 605) commented on. *Cahill* v. *Cahill*, 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861.—H. L. (Ir.)

Filing Terms.]—In an undefended suit for judicial separation, terms were signed before the case came into the list, the parties agreeing "to an order of the court staying proceedings . . . upon the terms hereinbefore contained, except for the purpose of carrying out and enforcing such terms." Upon the case coming into the day's cause list and being called on, counsel for the petitioner asked that the proceedings be stayed, and that the terms be filed with the object of making them a rule of court thereafter, if it should become necessary to do so:—Held, that the court had jurisdiction. *Howard* v. *Howard*, 77 L. T. 140.

Payment to Petitioner to Withdraw.]—An agreement by a petitioner in a suit for dissolution of marriage to withdraw from the suit, in consideration of a sum of money paid and to be secured by the co-respondent, is a fraud on 20 & 21 Vict. c. 85, and void as against public policy. *Gipps* v. *Hume*, 2 John. & H. 517; 31 L. J., Ch. 37; 7 Jur. (N.S.) 1301: 5 L. T. 307; 10 W. R. 38.

Institution of Fresh Proceedings—Breach of Faith.]—In 1860 a wife filed a petition for dissolution of marriage, on the ground of adultery and cruelty. When the cause came on for trial, it was withdrawn from the jury by agreement of the parties, the wife undertaking not to institute other proceedings in the divorce court. In 1862 the wife instituted a fresh suit for dissolution of marriage on the ground of adultery and cruelty, the acts of misconduct alleged in the petition being, with the exception of some acts of adultery and cruelty, committed prior to the first petition and not included within it, and of some acts of adultery of later date, the same as those charged in the first petition. The respondent pleaded the agreement in bar. Upon an application by the petitioner for directions as to the mode of trial, the court refused to make any order, upon the ground that the institution of the second suit was a gross breach of good faith, and a violation of the agreement by which the petitioner had surrendered irrevocably any legal right to relief in respect of misconduct prior to the first petition:—Held, that the suit could not be sustained, inasmuch as it was founded in part upon acts which had occurred before the date of the first petition, and which were released by the agreement. *Rowley* v. *Rowley*, L. R. 1 H. L. 63.

Compromise in France.]—Where an Englishman married a Frenchwoman and they resided in France, where their children were born, and suits were instituted between them in both countries, and were compromised by an agreement, of which part was that the wife would facilitate proceedings for a divorce, and another part was that one of the children should remain with his mother, and a third part related to the payment of an allowance to the wife:—Held, that even supposing the parties to be domiciled in France, and the agreement to be governed by French law, and to be valid according to that law and to have been performed as to the parts which were invalid according to English law, it could not be enforced here as to any part of it. *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L. J., Ch. 417; 3 Jur. (N.S.) 444; 5 W. R. 387.

Powers of Registrar—Agreement to Separate—Marriage Contract under French Law—Deed drawn by Registrar—Variation of Conditions of Contract.]—In a suit by the wife for dissolution of marriage, the parties at the hearing agreed on certain terms of separation which were made an order of court, and it was referred to the registrar to draft a deed of separation embodying these terms, with the usual clauses, and with full power to determine all questions as to the form of the deed, and all questions arising out of the terms of the settlement. The parties, being English subjects, had been married in Paris, and the marriage contract declared that they adopted the French law as ruling the civil conditions of their marriage. The contract stipulated that the parents of the petitioner, as her dowry, should pay various sums to the husband, the wife, and the children, under certain circumstances; and also contained various conditions as to the investment and devolution of property acquired by the wife at and after her marriage, the power of disposing of property movable and immovable by the husband and wife, mutually in each other's favour, the mutual liability for debts contracted by either:—Held, that, under the terms of the agreement, the registrar had power to determine the questions arising under the French law as to whether a separation of bodies effected a separation of goods, or whether a separation of goods was brought about by the agreement, even though a contrary effect might be inferred from its terms, and, also, whether an intention that separation of goods should not take place could be gathered from the agreement:—But, held,

further that the parties, on signing the agreement, could only be taken to have intended that the deed should embody and carry out the modifications of the marriage contract relating to the respective proportions of the income to be paid to the husband and wife, and to the giving up by the husband of all articles belonging to the wife—and that the registrar had exceeded his powers in dealing with the pecuniary relations of the parties under the other terms of the marriage contract. *De Ricci* v. *De Ricci*, [1891] P. 378.

Costs—Agreement to Pay—Power to make Agreement an Order of Queen's Bench Division.]—An action for judicial separation in the divorce division was compromised by the parties, and an agreement of compromise signed by them which provided that a separation deed should be executed; that the agreement might be made a rule of the high court, and that the respondent should pay the petitioner's taxed costs. A separation deed was afterwards executed, but the respondent refused to pay the taxed costs, and the agreement was made an order of the queen's bench division for the purpose of enforcing payment:—Held, that there was power to make the agreement an order of court in the queen's bench division, and that as the agreement of compromise had been reduced to an agreement to pay costs, the discretion of the court to make the order had been rightly exercised. *Smythe* v. *Smythe*, 56 L. J., Q. B. 217; 18 Q. B. D. 544; 56 L. T. 197; 35 W. R. 346.

"Costs of Suit"—Judicial Separation—Agreement for Compromise—Separation Deed—Costs of Preparation of Deed.]—An agreement for the compromise of a suit for judicial separation provided (inter alia) for the execution of a separation deed, and that the respondent should pay the costs of the petitioner's suit:—Held, that the costs of the preparation, &c., of the separation deed were not included. *Lancaster* v. *Lancaster*, 65 L. J., P. 34; [1896] P. 118; 74 L. T. 64; 44 W. R. 450—C. A.

Suit remaining on Court Book.]—So long as the suit remains on the court book the court cannot consider as binding any agreement to compromise made by counsel of parties in a matrimonial suit, but is bound to hear such suit if either party desires it after such agreement made. *Hayward* v. *Hayward*, 1 Sw. & Tr. 333. *And see* col. 886.

r. Trial.

See Divorce Rules, 1865, rr. 40, 44—47.

Setting down Cause for.]—Where five months had elapsed since the court had directed that a cause should be tried without a jury, and the petitioner had not set down the cause for trial, the court, on the application of the respondent, gave him leave to set it down for trial if the petitioner should not do so within a fortnight. *Hare* v. *Hare*, 3 Sw. & Tr. 218; 32 L. J., Mat. 7; 8 L. T. 703.

If a petitioner delays filing the record and setting down the cause as ready for trial for the space of one month from the final settling of the record, the respondent may file the record and set the cause down as ready for trial; or the respondent may take a rule to show cause why the petition should not be dismissed. *Stuart* v. *Stuart*, 3 Sw. & Tr. 219; 32 L. J., Mat. 110; 8 L. T. 703; 11 W. R. 463.

Notice—Sufficiency of Letter.]—A letter to the respondent's solicitor that a cause has been set down for trial is a sufficient notice of trial within Divorce Rule 44, although no formal notice may have been given. *Fluister* v. *Fluister and Hutton*, 66 L. J. P. 33; [1897] P. 22—C.A.

—— **Filing Minutes.**] — If the minutes, required by the practice of the court to be filed before the hearing, are not so filed, the cause will be struck out of the list. *Murphy* v. *Murphy*, 31 L. J., Mat. 162.

Mode of—Generally.]—Where issue has been joined, the court will not refuse to give directions as to the mode of trial, as such refusal is tantamount to a dismissal of the petition, and cannot be appealed from to the house of lords. *Rowley* v. *Rowley*, 34 L. J., Mat. 97; 12 L. T. 315.

In a suit by a husband for dissolution of marriage, the respondent and co-respondent traversed the adultery, and the respondent further countercharged adultery and cruelty. The petitioner having allowed the time for filing a replication to the respondent's answer to expire without replying or obtaining further time, the respondent moved the court to order the trial of this cause:—Held, that the pleadings being incomplete, the court could not order the mode of trial. *Broadwood* v. *Broadwood and St. Alban's*, 34 L. J., Mat. 10.

Where a respondent has failed to enter an appearance within the time named in the citation, the court may be moved, after the lapse of such period, for directions as to the mode of trial. *Wood* v. *Wood and Hutchins*, 36 L. J., Mat. 48; L. R. 1 P. 266; 15 L. T. 418.

When the pleadings are complete, the court will, upon the application of a petitioner, direct the mode of trial, although he may not have complied with an order to furnish particulars of a charge in the petition. *Gough* v. *Gough and Baynton*, 32 L. J., Mat. 128.

A citation must be returned into and filed in the registry, even where personal service has been dispensed with, before the court will give directions as to the mode of trial. *Cook* v. *Cook and Quaile*, 2 Sw. & Tr. 50; 28 L. J., Mat. 37; 5 Jur. (N.S.) 103.

Before a petitioner applies to the court to direct the mode of hearing, an affidavit should be filed that search has been made for an appearance by the respondent, although service of a citation and copy of a petition upon him may have been dispensed with. *Cooke* v. *Cooke and Lucy*, 28 L. J., Mat. 56.

When the parties in a suit for dissolution of marriage are at issue, and a commission to examine witnesses has been obtained, the court will direct the mode of trial without waiting for the return of the commission. *Graham* v. *Graham and Griffith*, 31 L. J., Mat. 96, n.

By Jury — Discretion of Court.] — Though neither of the parties desires a jury, the court may still direct the issues to be tried before one. *Ratcliffe* v. *Ratcliffe*, 1 Sw. & Tr. 217; 27 L. J., Mat. 60; 6 W. R. 866.

Where facts are in dispute before a full court, it is the most convenient mode of trial; but where the principal issues were addressed to the discretion of that court, it directed the petition to be heard without a jury. *Ib.*

The 20 & 21 Vict. c. 85, ss. 28, 36, leave it in

the discretion of the court to direct the issues in a suit for judicial separation to be tried by a jury; but the court will generally make such order at the prayer of either party, and in a particular case did so on the undertaking of the respondent not to interfere with or annoy the petitioner pending the suit. *Marchmont* v. *Marchmont*, 1 Sw. & Tr. 228; 27 L. J., Mat. 59; 6 W. R. 870.

The power given to the court to direct questions of fact arising in proceedings under the act, to be tried before a jury, does not extend to issues raised between the parties, on matters which, under the proviso to s. 31, give the court a discretion as to dissolving a marriage, though the petitioner's case may have been proved. *Kretzschmar* v. *Kretzschmar and Reinecker*, 28 L. J., Mat. 128.

Although in a suit for judicial separation the court may in its discretion refuse to direct that questions of fact be tried by a jury, it will generally, at the request of either of the parties, allow a jury. The circumstance that cruelty is in issue is no ground for refusing a jury. *Taylor* v. *Taylor*, 32 L. J., Mat. 126; 9 L. T. 24.

In suits other than those for dissolution of marriage, the court may, in its discretion, refuse to order the cause to be tried by a jury. *Ricketts* v. *Ricketts*, 35 L. J., Mat. 92; 13 L. T. 761.

The answer to a petition for restitution of conjugal rights alleged the impotence of the petitioner, and prayed for a decree of nullity of marriage. The court refused to allow the issue joined on the answer to be tried by a jury, although the respondent asked for one. *Ib.*

The determination of issues of fact raised by pleas to the discretion of the court under the proviso to 20 & 21 Vict. c. 85, s. 31, rests solely with the court. Where a cause is tried by a jury, a jury may be asked for a verdict upon such issues as an assistance to the court in forming its opinion, but their verdict may be dispensed with. There is no identity in legal effect between the written statement of questions of fact to be tried, prepared under 20 & 21 Vict. c. 85, s. 38, and the nisi prius record in an action. *Narracott* v. *Narracott and Hesketh*, 3 Sw. & Tr. 408; 33 L. J., Mat. 132; 10 Jur. (N.S.) 640; 10 L. T. 389; 12 W. R. 1064.

—— **No one Appearing.**]—Where a jury has been sworn to try issues, and neither of the parties appears, the court will discharge the jury. *Haydon* v. *Haydon and Cooke*, 30 L. J., Mat. 112.

Of Issue in another Court—Wishes of Husband.]—The court will not direct the issues of fact in a matrimonial suit to be tried in another court against the wishes of the husband, at whose cost the litigation is carried on. *Snowball* v. *Snowball*, 40 L. J., Mat. 56; L. R. 2 P. 263; 24 L. T. 673; 19 W. R. 787.

Two Co-Respondents — Issues Tried Separately.]—A petition alleged adultery between a respondent and co-respondent A. A. appeared to the citation served upon him, but did not file any answer. The petition was subsequently amended by alleging adultery with co-respondent B. B. appeared and denied the charge. The questions at issue were directed to be tried before the court and a special jury. On the application of B., and on the condition that he should pay any extra costs to which the petitioner might be put by the order, the court ordered that the questions at issues against B. should be tried separately from and before those against A. *Cox* v. *Cox, Reade and Tobin*, 40 L. J., Mat. 23; L. R. 2 P. 201; 24 L. T. 237; 19 W. R. 512.

By Full Court.]—The judge will not, except for some sufficient reason, order a suit which he is empowered by 23 & 24 Vict. c. 144, to hear alone, to be heard before the full court. The desire of one of the parties that it may be so heard, and the probability that difficult questions of law may arise at the hearing, do not constitute a sufficient reason. *Bevan* f. c. *McMahon* v. *McMahon*, 30 L. J., Mat. 23.

Where the papers required by the practice of the court to be delivered to the judges of the full court three days before the hearing of a cause have not been delivered, the court will order the cause to be struck out of the list. *Evans* v. *Evans*, 29 L. J., Mat. 53.

At Assizes.]—When an issue is ordered to be tried at the assizes, it should be framed as an issue sent by the court of chancery. *Hogg* v. *Hogg*, 32 L. J., Mat. 209.

Upon a petition for dissolution of marriage, it appearing that by far the greater part of the witnesses to the facts in the suit resided at a great distance from London, the court directed issues upon the charges and counter-charges of adultery and cruelty to be tried at the assizes. *Richardes* v. *Richardes and Jones*, 30 L. J., Mat. 48.

Hearing Suits in Camerâ.]—In every matrimonial suit, which before the Divorce Act (20 & 21 Vict. c. 85) might have been determined in an ecclesiastical court, the judge may, if he considers the circumstances of the case to require it, direct that the hearing shall take place in private. *A.* v. *A.*, or *Anstey* v. *Anstey*, 44 L. J., Mat. 15; L. R. 3 P. 230; 31 L. T. 801; 23 W. R. 386.

The court has power to hear suits for restitution of conjugal rights in camerâ. *Ib.*

In a wife's suit for restitution of conjugal rights, the husband filed an answer involving charges of unnatural offences. The court ordered the cause to be heard in camerâ, but intimated that if in the course of the inquiry it should turn out that the matters involved were not of such a nature as to make it necessary that the case should be heard in private, it would order the public to be admitted. *Ib.*

As to contempt for publishing proceedings heard in camerâ, *see* col. 951.

Staying Proceedings—Costs of former Trial Unpaid.]—A petitioner, having failed in a suit for dissolution on the ground of his wife's adultery with A., instituted another suit of a similar nature, on the ground of her adultery with B. The court held the causes of action to be different, and refused an application to stay proceedings in the second suit until the costs of the former should have been paid. *Yeatman* v. *Yeatman and Rummell*, 39 L. J., P. 37; 21 L. T. 647; 18 W. R. 232.

—— **In Cross Suits.**]—Where cross-suits had been instituted by a husband for dissolution and by the wife for judicial separation, in which the same issues were raised, the court stayed the proceedings in the wife's suit, which had been commenced after that of the husband, until after the hearing of his suit. *Osborne* v. *Osborne and*

Martelli, 3 Sw. & Tr. 327; 33 L. J., Mat. 38; 10 Jur. (N.S.) 80; 9 L. T. 456.

There being cross-issues of adultery in a husband's petition for dissolution standing for trial before a jury, the judge suspended his judgment until these issues were disposed of. *Burroughs* v. *Burroughs*, 2 Sw. & Tr. 544; 5 L. T. 771.

—— **To obtain Evidence.**]—In a suit promoted by the husband, by reason of the adultery of the wife, the proof of the guilt of the wife was conclusive, and she had also in terms admitted it. An application on her behalf to stay the proceedings, to enable her to examine witnesses resident in India and Australia, to prove condonation on the part of the husband, was rejected, and sentence of separation pronounced. *Campbell* v. *Campbell*, 3 Jur. (N.S.) 845; 5 W. R. 519.

Where on evidence in support of an undefended petition for dissolution of marriage by reason of the husband's adultery, cruelty, and desertion, a doubt arose as to whether the parties had not voluntarily separated, the court ordered the case to be adjourned to have further evidence produced. *Ward* v. *Ward*, 1 Sw. & Tr. 185; 27 L. J., P. 63; 6 W. R. 867.

When a petitioner at the trial opened evidence which was admissible on the record but took the other parties by surprise, the court adjourned the trial and, as the adjournment was made necessary by the conduct of both parties, refused to make any order as to the costs of such adjournment. The jury was dismissed by consent of all parties. *Bancroft* v. *Bancroft and Rumney*, 3 Sw. & Tr. 610; 11 L. T. 515; 13 W. R. 506.

Where an adjournment was granted on the ground of surprise, at the instance of the respondent, in respect of a charge of adultery with a person other than the co-respondent, it was granted on the understanding that the co-respondent should not be prejudiced as to costs by such adjournment. *Codrington* v. *Codrington and Anderson*, 4 Sw. & Tr. 63.

The court will not postpone the trial of a cause on the application of one of the parties, if no notice of the motion has been given to the other party. *Hepworth* v. *Hepworth*, 2 Sw. & Tr. 514; 30 L. J., Mat. 198; 5 L. T. 120.

Omitting to put in Answer—Position at Trial.]—A co-respondent who puts in no answer and yet appears is not entitled to address the jury in mitigation of damages, or to cross-examine with that view. *Lyne* v. *Lyne and Blackney*, 37 L. J., Mat. 9; L. R. 1 P. 508; 17 L. T. 29; 16 W. R. 159.

Allegations Untraversed.] — A respondent's counsel may not, in a suit by a husband against his wife by reason of her adultery, controvert allegations of a petition not denied by the answer; but, on the assumption that such allegations are true, he may cross-examine the witnesses and address the court for the purpose of showing that a decree ought not to be pronounced for a dissolution. *Tollemache* v. *Tollemache*, 1 Sw. & Tr. 557; 30 L. J., Mat. 113.

Settling Questions of Fact for Jury.]—By 20 & 21 Vict. c. 85, s. 38, *when any question of fact shall be ordered to be tried by a special or common jury* (s. 36), *such question shall be reduced into writing in such form as the court shall direct.*

What Issues will be Tried.]—On a petition for dissolution of marriage, when a record is drawn up in order that the case may be tried before a jury, only the issues stated on the record are to be proved at the trial before the jury, by either party. *Tourle* v. *Tourle*, 1 Sw. & Tr. 176.

A co-respondent, if he has put in no answer to the petition, is no party to the issue to be tried by the jury. *Ib.*

Where the questions of fact raised by the pleadings have been stated in the form of a record, the issues to be tried by the jury must be taken to be those stated in the record, although they may not be identical with those raised in the pleadings. *Cherry* v. *Cherry*, 1 Sw. & Tr. 319; 28 L. J., Mat. 36.

Rehearing.]—By r. 62 of the Rules in Divorce and Matrimonial Causes, an application for the rehearing of a cause should be made to a divisional court. *Heyes* v. *Heyes*, 36 W. R. 527.

—— **Ordered as to One Charge.**]—A wife having charged her husband with cruelty by the communication of disease, and also by personal violence, the court found that the charge of communication of disease was not proved, and that the charge of personal violence was proved. On the application of the husband, a rule for the rehearing of the issue which had been found against him was made absolute, on the ground of surprise: but the rehearing was ordered to be confined to the charge of personal violence, and not to extend to the charge of infection. *Lee* v. *Lee*, 41 L. J., Mat. 85; L. R. 2 P. 409; 27 L. T. 324.

Conduct of Cause—Right of Beginning.]—Where a respondent in her answer to a petition for dissolution of marriage has not traversed the adultery alleged in the petition, but sets up counter-charges of adultery, cruelty, and misconduct, upon which counter-charges issue has been joined, upon a trial of these issues before a jury, it is for the respondent to begin. *Bacon* v. *Bacon and Bacon*, 2 Sw. & Tr. 53; 29 L. J., Mat. 61.

When these issues have been disposed of by the jury, it is not competent to the respondent to cross-examine the witnesses called to establish the allegations in the petition, either as to these allegations or as to the counter-charges contained in the answer. *Ib.*

A husband petitioned for dissolution of marriage, by reason of his wife's adultery. She denied the adultery, alleged nullity of marriage by reason of incurable impotency of the husband, and prayed for a decree of nullity. At the hearing, the wife's counsel claimed to go into the question of nullity first:—Held, that as the wife had traversed, though argumentatively, the marriage alleged, the petitioner had a right to begin. *Serrell* v. *Serrell and Bamford*, 2 Sw. & Tr. 422; 31 L. J., Mat. 55; 5 L. T. 691.

Order of addressing Jury.]—The counsel for the respondent is entitled to address the court before the counsel for the co-respondent, but this may be varied by arrangement between the counsel. *Robinson* v. *Robinson and Lane*, 1 Sw. & Tr. 362; 27 L. J., Mat. 91; 5 Jur. (N.S.) 392.

Where, by such arrangement, the co-respondent's counsel first addressed the court, and examined the witnesses, the counsel for the

respondent was not allowed to cross-examine such witnesses. *Ib.*

Examining and Cross-examining Witnesses, and Addressing Court.]—The co-respondent's counsel cannot cross-examine a witness upon such part of his evidence as is not evidence as against the co-respondent. *Pearman* v. *Pearman and Burgess*, 29 L. J., Mat. 54.

The co-respondent's counsel, by examining the witnesses of the respondent, adopts them as his own. *Glennie* v. *Glennie and Bowles*, 3 Sw. & Tr. 109; 32 L. J., Mat. 17; 7 L. T. 696; 11 W. R. 28.

But if he calls no witnesses, he should address the court after the opening speech of the respondent's counsel. *Ib.*

A co-respondent from whom damages are claimed, who has appeared, but has not filed an answer, cannot at the hearing cross-examine the petitioner's witnesses, nor address the jury upon the question of damages. He is, however, entitled to be heard upon the question of costs, recall and cross-examine the petitioner's witnesses, and address the court. *Lyne* v. *Lyne and Blackney*, 37 L. J., Mat. 9; L. R. 1 P. 508; 15 L. T. 512.

After a cause has been heard, and before judgment given, the court will not allow either party to introduce additional evidence, except by the consent of the other party. *Gipps* v. *Gipps and Hume*, 3 Sw. & Tr. 116.

Where, in a suit for a judicial separation by a wife against her husband on the ground of cruelty, the husband conducts his own case, the most convenient course is that he should at once call his witnesses without making an opening speech, then give his evidence, and reserve any comments on the case for his summing up. *Curtis* v. *Curtis*, 27 L. J., Mat. 73.

Dismissing from Suit.]—The court has no power to dismiss a co-respondent from a suit on the ground of delay in prosecuting the suit. The application in such a case should be for a rule nisi for the dismissal of the petition. *Hancock* v. *Hancock and Smith*, 36 L. J., Mat. 86; L. R. 1 P. 334. *See* col. 888.

Judge's Notes.]—Semble, upon a second trial of the same issues, the judge's notes of evidence of deceased witnesses who were examined on the first trial are not admissible except by consent. *Conradi* v. *Conradi, Worrall and Way*, 37 L. J., Mat. 55; L. R. 1 P. 514; 18 L. T. 659; 16 W. R. 1023.

Withdrawing Record.]—When issues raised in a suit for dissolution of marriage come on for trial by a jury, a petitioner will not be allowed to withdraw the record, but on his application, if there is no opposition by the other parties, the petition will be dismissed. *Ryder* v. *Ryder*, 30 L. J., Mat. 164.

s. New Trial.

See Divorce Rules, 1865, rr. 62, 62A.

Motion for.]—An application to the judge ordinary for a new trial of issues of fact tried by a jury, or for a rehearing of a cause, may be made by motion within fourteen days from the day on which the issues were tried or the cause was heard, if the judge ordinary be then sitting to hear motions; if not, on the first day appointed for hearing motions in this court after the expiration of the fourteen days. Divorce Rules, 1865, r 62.

By the word "application" in this rule, notice of application is probably meant. *Walker* v. *Walker, Nicoll and Craig*, 4 Sw. & Tr. 264; 31 L. J., Mat. 26.

When a petitioner in a suit for dissolution has obtained the verdict of a jury, it is no ground for refusing to make a decree nisi that notice of an intended application for a new trial has been given. *Stone* v. *Stone and Appleton*, 3 Sw. & Tr. 212; 32 L. J., Mat. 117; 9 L. T. 24; 11 W. R. 809.

—— **To What Court.**]—A motion for rehearing of a divorce cause which has been tried by a judge without a jury must (notwithstanding s. 1 of the Judicature Act, 1890) be made to a divisional court of the probate, divorce and admiralty division, and not to the court of appeal. *Smith* v. *Smith*, 66 L. J., P. 151; [1897] P. 293; 77 L. T. 206; 46 W. R. 24—C. A.

—— **When Granted.**]—Whether the rules as to granting a new trial on the ground of fresh evidence discovered showing misconduct in the petitioner are the same as in a case between ordinary litigants, quære. *Howarth* v. *Howarth*, 9 P. D. 219; 51 L. T. 872—C. A.

—— **Enlargement of Time—Court of Appeal—Jurisdiction.**]—Section 1 of the Supreme Court of Judicature Act, 1890, which requires every motion for a new trial in any cause or matter in the high court to be heard by the court of appeal, applies to divorce suits; consequently, motions for a new trial in divorce suits are now governed by the rules of the supreme court. *Wilkins* v. *Wilkins*, 65 L. J., P. 55; [1896] P. 108; 74 L. T. 62; 44 W. R. 305—C. A.

A married woman, believing her husband to be dead, went through the ceremony of marriage with another man and had several children by him. She afterwards obtained a decree for judicial separation against her second husband, the jury having found—first, that he had committed adultery; and secondly, that the first husband was dead at the time of the second marriage. The second husband, having subsequently ascertained that the first husband was alive, instituted a suit for nullity of marriage, and applied to the court of appeal for a new trial of the wife's suit, notwithstanding the expiration of the time limited for that purpose by the rules of the supreme court:—Held, that the court had jurisdiction to extend the time, but that such extension ought not to be granted except upon the terms of the applicant making a suitable provision for his supposed wife. *Ib.*

Application—Misdirection—Grounds in Notice of Motion.]—Ord. XXXIX. r. 3—which requires that when a new trial is applied for on the ground of misdirection the particulars of the alleged misdirection should be specifically stated in the notice—is applicable to proceedings in a divorce suit. *Murfett* v. *Smith* (12 P. D. 116), followed. *Taplin* v. *Taplin*, 57 L. J., P. 79; 13 P. D. 100; 58 L. T. 925; 37 W. R. 256; 52 J. P. 406.

—— **Verdict against Weight of Evidence.**]—The court will not grant a new trial on the ground that the verdict is against the weight of

evidence, unless it is dissatisfied with the verdict. That it might, on the same evidence, have come to a different conclusion itself, is not sufficient. *Miller* v. *Miller and Hicks*, 2 Sw. & Tr. 427; 31 L. J., Mat. 73; 5 L. T. 850.

That other evidence could be produced to the jury on a new trial is not sufficient, if such evidence could with reasonable diligence have been obtained before. *Ib.*

A rule for a new trial upon the ground that a verdict is against the weight of evidence will not be granted, unless the court is satisfied with reasonable certainty that there has been error or miscarriage. *Scott* v. *Scott*, 3 Sw. & Tr. 320; 33 L. J., Mat. 1; 9 Jur. (N.S.) 1251; 9 L. T. 454; 12 W. R. 126.

The full court granted a new trial, on the ground that the verdict was against evidence, although the judge ordinary, who tried the cause, was not dissatisfied with the verdict. *Stone* v. *Stone and Appleton*, 3 Sw. & Tr. 608; 34 L. J., Mat. 33; 13 W. R. 414.

Where there is a conflict of evidence upon an issue of adultery (the queen's proctor intervening), the court will not grant a new trial on the ground that the verdict is contrary to the evidence unless it is dissatisfied with the verdict. *Gethin* v. *Gethin*, 2 Sw. & Tr. 560; 31 L. J., Mat. 57; 5 L. T. 721; 10 W. R. 266.

The court will not grant a new trial on the ground that witnesses called upon the first trial have wilfully suppressed material facts. *Ib.*

—— **Mistake made in Evidence.**]—On trial of an issue of adultery, the jury found a verdict against the petitioner. On an affidavit by a witness called on his behalf, that she had made a mistake in an important date in giving her evidence, the court directed a new trial, the error, if there were one, being likely, in the opinion of the court, to have disturbed the judgment and misled the minds of the jury. *Jago* v. *Jago and Graham*, 3 Sw. & Tr. 103; 32 L. J., Mat. 10; 8 Jur. (N.S.) 1081; 7 L. T. 645; 11 W. R. 86.

—— **Evidence Withheld by Mistake.**] — A wife petitioned against her husband for a judicial separation by reason of his cruelty, and he took issue thereon. He signed a letter consenting to a decree on the suggestion of his solicitor, that if he did so, no evidence in support of the petition need be taken in court. The issue came on for trial before a special jury, who found a verdict for the petitioner. The respondent's letter was put in. The court affirmed the refusal of the judge ordinary to grant a rule for a new trial on the representation that the respondent was led by the mistaken suggestion of his solicitor to withhold evidence contradictory of the petitioner's evidence, by which his character as a gentleman and a man of honour was affected. *Hill* v. *Hill*, 2 Sw. & Tr. 407; 31 L. J., Mat. 193; 7 Jur. (N.S.) 1206; 5 L. T. 363; 10 W. R. 194.

—— **Surprise.**] — A wife petitioned for a dissolution of marriage by reason of her husband's adultery and cruelty. The cruelty consisted of divers acts of personal violence, and also the communication of venereal disease, and the charge of adultery rested on the same evidence as the charge of cruelty by infection. The court found that the charge of infection was not proved, and that the charge of personal violence was proved. On the application of the husband, a rule for the rehearing of the issue which had been found against him was made absolute, on the ground of surprise; but the rehearing was ordered to be confined to the charge of personal violence, and not to extend to the other charge of cruelty. *Lee* v. *Lee*, 41 L. J., Mat. 85; L. R. 2 P. 409; 27 L. T. 324.

A rule for a new trial will not be granted upon affidavits which do not show surprise, but merely state that during the trial, and after the close of the applicant's case, material evidence had come to his knowledge. *Scott* v. *Scott*, supra.

Jury Disagreeing on One Issue only.] — In a suit for dissolution of marriage by a wife by reason of the cruelty and adultery of her husband, the jury gave a verdict for her on the question of cruelty, but was unable to agree to a verdict on that of adultery, and was discharged. The court refused to allow the question of adultery only to be referred to a new jury, but gave the wife the alternative, either to have a rule, calling upon the husband to show cause why a decree of judicial separation should not be made on the ground of his cruelty, or to set down all the questions at issue, both adultery and cruelty, for a second trial. *Godrich* v. *Godrich*, 41 L. J., Mat. 45; L. R. 2 P. 392; 26 L. T. 855; 20 W. R. 616.

Petition depending on Two Points—Judge dissatisfied with Verdict on One.]—Where it is necessary for a petitioner to establish two points in order to obtain the prayer of the petition, the court would not, even if dissatisfied with the verdict of a jury on one point, send that down for a new trial, because, if a different verdict was found on that point it would not be sufficient to ground the relief prayed. *Fitzgerald* v. *Fitzgerald*, 3 Sw. & Tr. 400; 10 L. T. 510.

Issues Tried Separately.]—When there was reason to suppose that, on the trial of the husband's petition, evidence applicable to the respondent alone affected the minds of the jury against the co-respondent, the court, in making absolute the rule for a new trial, ordered that the issues should be severed, so that the charges against the co-respondent might be charged separately from those against the respondent. *Barnes* v. *Barnes and Beaumont*, 38 L. J., Mat. 9; 19 L. T. 526; 17 W. R. 75.

Inconsistent Verdict.]—An inconsistent verdict is not necessarily a ground for a new trial. It would be so if it prevented the court from ascertaining the substantial opinion of the jury. *Ellaytt* v. *Ellaytt, Taylor and Halse*, 3 Sw. & Tr. 503; 33 L. J., Mat. 137; 10 Jur. (N.S.) 1035; 11 L. T. 44.

Conduct of Judge in Summing Up.]—It is no ground for a new trial that the judge in his summing up did not give as much weight to some parts of the evidence as they might have deserved. *Codrington* v. *Codrington and Anderson*, 34 L. J., Mat. 60; 11 Jur. (N.S.) 286; 13 W. R. 527.

As to Co-Respondents—Jury Mistaking Evidence.]—On a motion for a new trial, it was urged that the jury had been unfairly affected as against the co-respondent, by the production

of a draft or a duplicate of a letter in the handwriting of the respondent, and found in her custody, there being no proof that the original or duplicate had been sent to or reached the co-respondent. The judge held, that the ground for a new trial should have been founded on an affidavit from the co-respondent that he had not in fact received such original or duplicate. *Codrington* v. *Codrington and Anderson*, 4 Sw. & Tr. 63.

—— **Verdict against Two—New Trial as to Both.**]—If a verdict has been found against two co-respondents in a suit for dissolution of marriage, and the court afterwards, on an application of one of them, grants a new trial on the ground that the verdict against him was contrary to the weight of evidence, there must be a new trial as to both, and, pending that application, the petitioner is not entitled to a decree absolute as to the other. *Walker* v. *Walker, Nicoll and Craig*, 4 Sw. & Tr. 264; 31 L. J., Mat. 26.

—— **Sets Aside Assessment of Damages.**]—Where damages were assessed against a co-respondent, who had not entered an appearance, and a new trial was granted on the application of the respondent, who had appeared and answered, on the ground that the verdict was against evidence, the rule for the new trial sets aside the assessment of damages against the co-respondent, as well as the finding that the respondent was guilty of adultery. *Stone* v. *Stone and Appleton*, 34 L. J., Mat. 33; 13 W. R. 414.

—— **Co-respondent Abroad — Non-Appearance.**]—A rule for a new trial having been made absolute at the instance of a respondent, the co-respondent, who had not appeared and answered, was allowed to enter an appearance, and file an answer upon satisfying the court that he had received no notice of the suit until after the verdict had been delivered: he was resident abroad, and he was ordered to give security for costs. He continued abroad when the cause came on for hearing a second time, and did not find security for costs. The court thereupon ordered his appearance and answer to be taken off the file. *Ib.*

Verdict on Two Issues—New Trial as to One.]—Semble, that where in a suit by a wife for dissolution of marriage, on the ground of adultery and cruelty, she obtains a verdict upon both issues, and a new trial as to one of them is afterwards applied for, she may abandon that issue and ask for a judicial separation upon the ground of the other charge. *Curtlidge* v. *Curtlidge*, 3 Sw. & Tr. 406; 32 L. J., Mat. 126; 9 Jur. (N.S.) 552; 8 L. T. 334; 11 W. R. 750.

Filing Affidavits in Reply.]—Where a rule nisi for a new trial has been granted on affidavits, and affidavits have been filed in answer, the party obtaining the rule will not be allowed to file affidavits in reply until the rule is argued. *Nicholson* v. *Nicholson and Ratcliffe*, 32 L. J., Mat. 135; 11 W. R. 686.

Terms and Conditions.]—Where a new trial is granted on the application of a wife, the court cannot impose upon her the terms of payment of costs, if she has no means, but the husband must pay the costs of both parties. *Nicholson* v. *Nicholson and Radcliffe*, 3 Sw. & Tr. 214; 32 L. J., Mat. 127; 9 L. T. 118.

Appeal on Granting or Refusing Rule.]—The court has no power to extend the time (fourteen days) limited by 23 & 24 Vict. c. 144, s. 2, for appealing against a decision of the judge ordinary granting or refusing a rule for a new trial. *Boulting* v. *Boulting*, 33 L. J., Mat. 81.

Upon an appeal from an order discharging a rule nisi for a new trial, the appellant must begin. *Yeatman* v. *Yeatman*, 3 Sw. & Tr. 361; 33 L. J., Mat. 54; 10 L. T. 138; 12 W. R. 696.

Upon such an appeal, where notice has been given to the other side, the question for the court is, not whether a rule nisi should be granted, but whether such rule should be made absolute or discharged. *Ib.*

—— **Time for Appealing.**]—An appeal from a decision of a judge of the probate division granting or refusing a new trial in the divorce court must be made within fourteen days in accordance with the Divorce Court Act, 1860 (23 & 24 Vict. c. 144), s. 2. *Ahier* v. *Ahier*, 54 L. J., P. 70; 10 P. D. 110; 52 L. T. 744; 33 W. R. 770—C. A.

The court has no power to extend the time for appealing limited by statute. *Ib.*

t. The Decree Nisi.

i. *Generally.*

Suspending.]—It is no ground for suspending a decree nisi after a verdict for a petitioner in a suit for dissolution of marriage that the respondent has given notice of an application for a new trial. *Stone* v. *Stone and Appleton*, 3 Sw. & Tr. 212; 32 L. J., Mat. 117; 9 L. T. 24; 11 W. R. 809.

Ends the Lis.]—A decree nisi for dissolution of marriage, if not appealed from, puts an end to the lis between the parties. *Latham* v. *Latham*, 2 Sw. & Tr. 299; 30 L. J., P. 163; 7 Jur. (N.S.) 219; 4 L. T. 308; 9 W. R. 680.

Affidavits Opposing.]—Where affidavits have been filed in opposition to a decree nisi, the petitioner cannot in answer file an affidavit made by himself. *Stoate* v. *Stoate*, 32 L. J., Mat. 120.

Amending or Varying.]—A decree nisi misstated, by mistake, the place where the marriage was solemnised, and the court ordered it to be amended. *Skeats* v. *Skeats and White*, 35 L. J., Mat. 47.

In a suit for dissolution of marriage by a husband, the respondent and co-respondent denied the adultery, and the co-respondent pleaded connivance. The cause was heard by the court, who pronounced a decree, the minute of which in the court book was "the judge ordinary having deliberated, by his final decree dismissed the petition," the ground of dismissal not being stated. Upon an application of the husband, the court afterwards varied the decree, by stating therein that the court was of opinion that the adultery was proved, but that the petitioner had connived at it, and thereupon dismissed the petition. *Gipps* v. *Gipps and Hume*, 32 L. J., Mat. 179; 11 W. R. 1063.

Application to shorten Interval before Decree

Absolute.]—In the absence of special circumstances the court will not shorten the interval between the decree nisi and the decree absolute even by a few days, although such refusal should have the effect of delaying the decree absolute for three months, and the application may have only been rendered necessary from the fact that during a whole term the court had been unable to sit to take cases in the list in which the suit had been entered. *Rippingall* v. *Rippingall and Lockhart*, 48 L. T. 126.

The court refused, in the absence of special circumstances, to exercise the discretionary power vested in it, and to fix a shorter period than that within which, according to the statute and the rules of the court, the decree nisi in a suit for dissolution of marriage is to be made absolute. *Shelton* v. *Shelton and Campbell*, 38 L. J., Mat. 34; 20 L. T. 232; 17 W. R. 401.

The court having directed a decree nisi to issue for dissolution of marriage, to be made absolute at the end of six months, under special circumstances allowed such decree to be varied by the introduction of the word "three" instead of the word "six," and in its discretion reduced to three months the time fixed for making such decree absolute. *Fitzgerald* v. *Fitzgerald*, 43 L. J., Mat. 13; L. R. 3 P. 136; 31 L. T. 270; 22 W. R. 267.

Appeal direct to the House of Lords on Stay of Proceedings.]—A respondent appealed from a decree nisi direct to the house of lords, on the ground that it was against the weight of evidence. When the appeal was still undisposed of, the decree nisi was, after the requisite lapse of time, pronounced absolute, notwithstanding the appeal. The latter being an improper course, is not to be allowed to operate as a stay of the proceedings in the court below. *Robertson* v. *Robertson and Facagrossa*, 44 L. T. 253.

Marrying before Time for Appealing against.]—After a decree nisi in a suit for dissolution of marriage, but before such decree had been made absolute, the petitioner went through a form of marriage, and cohabited, with a female; the court, being satisfied that he did so in ignorance of the law, and in the bonâ fide belief that his first marriage was finally dissolved, determined that it was a case in which it could exercise the discretion given to it by 20 & 21 Vict. c. 85, s. 31, and made the decree absolute, notwithstanding such adultery of the petitioner. *Noble* v. *Noble and Goodman*, 38 L. J., Mat. 52; L. R. 1 P. 691; 20 L. T. 1016.

After a decree of dissolution of marriage on the ground of the adultery of the wife had been pronounced, but before the time allowed for appealing against the decree had elapsed, the wife married again:—Held, that such marriage was void. *Chichester* v. *Mure*, f. c. *Chichester*, 3 Sw. & Tr. 223; 32 L. J., Mat. 146; 9 Jur. (N.S.) 779; 8 L. T. 676; 11 W. R. 990.

Not made Absolute—Re-Marriage of Petitioner.]—The petitioner (the wife) obtained a decree nisi for dissolution of her marriage with the respondent. The decree was pronounced on the 17th of June, 1868, but was not made absolute, owing to inadvertence or neglect on the part of the petitioner's solicitor, who had undertaken to do all that was necessary in the matter. In the belief that the decree had been made absolute, the petitioner went through a ceremony of marriage with D. S., on the 17th of September, 1871. She afterwards lived with him as his wife and had children by him, and did not discover until May, 1880, that the decree for the dissolution of her marriage with the respondent had not been made absolute. She now applied to have the decree made absolute. No opposition was offered by the queen's proctor, and the court granted the application. *Wickham* v. *Wickham*, 49 L. J., P. 70; 6 P. D. 11; 43 L. T. 445.

Delay in Moving to make the Decree Absolute—Power to Dismiss Petition.]—In a suit by the wife for dissolution of the marriage, the petitioner obtained a decree nisi, but allowed more than a year to elapse without taking any further step to make such decree absolute:—Held, on an application by the respondent to make the decree absolute or to dismiss the petition for want of prosecution, that the petition must be dismissed unless within a week the petitioner applied to make the decree absolute. *Lewis* v. *Lewis*, 61 L. J., P. 95; [1892] P. 212; 67 L. T. 358.

Motion to Dismiss for Want of Prosecution—No Application to make Decree Absolute—Proceedings pending for Maintenance—Excuse or Delay.]—The wife obtained in February, 1889, a decree nisi for the dissolution of her marriage. She afterwards petitioned for permanent maintenance, and that petition was still pending, the registrar not having as yet reported thereon. In April, 1889, the husband applied to have the divorce suit dismissed for want of prosecution, in that the petitioner had not applied to have the decree nisi made absolute. The court held that the pendency of the proceedings for maintenance was a valid excuse for the delay, and dismissed the motion. *Southern* v. *Southern*, 62 L. T. 668.

Effect of.]—The status of the married woman is not affected by the pronouncing of a decree nisi for the dissolution of the marriage. She continues to be subject to all the disabilities of coverture until the decree is made absolute. *Norman* v. *Villars*, 46 L. J., Ex. 579; 2 Ex. D. 359; 36 L. T. 788; 25 W. R. 780—C. A.

Action for taking goods of the plaintiff. Plea: coverture of the plaintiff at the time of the alleged taking and of plea pleaded. Prior to the alleged taking a decree nisi had been pronounced for the dissolution of the plaintiff's marriage, which was made absolute after plea and before the trial:—Held, that the plaintiff was still a married woman notwithstanding the decree nisi, and that the plea was proved. *Ib.*

The court of chancery may dispense with the presence of the husband of a woman who has obtained a decree nisi for divorce against him, although the decree may not yet have been made absolute. *Stephenson* v. *Strutt*, 26 L. T. 690; 20 W. R. 745.

Maintenance of Children—Jurisdiction.]—The court has jurisdiction after a decree for divorce to order maintenance for children up to the age of twenty-one. *Blandford* v. *Blandford* ([1892] P. 148) overruled. *Thomasset* v. *Thomasset*, 63 L. J., P. 140; [1894] P. 295; 6 R. 637; 71 L. T. 148; 42 W. R. 658—C. A.

Injunction to restrain Dealing with the Property.]—A petitioner had obtained a decree

nisi for dissolution of his marriage. Before an order could be obtained to vary the post-nuptial settlement, the respondent was about to sell or otherwise dispose of some of the property. The court granted an injunction to restrain her from dealing with it. *Noakes* v. *Noakes*, 47 L. J., P. 20; 4 P. D. 60; 37 L. T. 47; 26 W. R. 284.

Reversing.]—A decree nisi having been pronounced with costs against the co-respondent, the decree was rescinded on the ground of the petitioner's adultery committed subsequently to the date of the decree; but the order condemning the co-respondent in costs was not rescinded. *Hulse* v. *Hulse and Tavenor*, 41 L. J., Mat. 19; L. R. 2 P. 357; 25 L. T. 764; 20 W. R. 447. S. P., *Holt* v. *Holt*, 21 L. T. 401.

When the queen's proctor appeared to show cause against a decree nisi, pronounced upon the wife's cross petition, being made absolute, and filed affidavits charging adultery at other dates and places than the acts charged in the husband's petition, and affidavits were filed in answer which denied such charges, the court refused to reverse the decree upon the affidavits, but directed an issue to be settled for trial by a jury. *Studholme* v. *Studholme and Cullum*, 25 W. R. 165.

A husband in a dissolution suit had obtained a decree nisi, with costs. On the intervention of the queen's proctor he was proved to have been guilty of profligate adultery, and the court reversed the decree nisi, including that portion which condemned the co-respondent in costs. *Youell* v. *Youell, Terrass and Burleigh*, 33 L. T. 578; 24 W. R. 59.

In a suit for dissolution of marriage heard before the court and a common jury, a verdict was found against the respondent and co-respondent on the ground of adultery, and damages were assessed. A decree nisi was thereupon made, with costs against the co-respondent. The queen's proctor intervened; and ultimately it was proved that the petitioner had also been guilty of adultery. The court reversed the whole of the decree nisi, including the order for costs, and dismissed the petition. *Ravenscroft* v. *Ravenscroft*, 41 L. J., Mat. 28; L. R. 2 P. 376; 26 L. T. 265; 20 W. R. 448.

Enforcing.]—The 20 & 21 Vict. c. 85, s. 52, does not empower the court to enforce its decrees, or orders for payment of money, by charging orders under 1 & 2 Vict. c. 110, ss. 14, 18. *Clarke* v. *Clarke and Clarke*, 42 L. J., Mat. 72; L. R. 3 P. 57; 28 L. T. 911; 21 W. R. 776.

Rescission — Reconciliation.]—In a suit for dissolution at the instance of the wife, a decree nisi had been pronounced, but subsequently the parties came together again, and on the wife's application the decree nisi was rescinded on proof that notice had been given to the husband. *Troward* v. *Troward*, 32 W. R. 864.

—— **Reconciliation—Motion to Rescind Decree—No Plea filed.**]—Where, after decree nisi, the parties had become reconciled and resumed cohabitation, the court, on the motion of the queen's proctor, without requiring him to file a plea, rescinded the decree nisi and dismissed the petition, on being satisfied of the facts. *Flower* v. *Flower*, 63 L. J., P. 28; [1893] P. 290; 1 R. 534.

Condonation and Agreement to Conceal—Collusion — Subsequent Adultery — Decree Rescinded.]—A petitioner having obtained a decree nisi for the dissolution of her marriage was subsequently visited by the respondent. There was a mutual agreement to keep these visits from the knowledge of the court. The respondent was at the time cohabiting with another woman:—Held, that the subsequent adultery of the respondent would revive the condoned offences, but that the agreement to conceal the condonation amounted to collusion, and therefore the decree nisi must be rescinded. *Rogers* v. *Rogers*, 63 L. J., P. 97; [1894] P. 161; 6 R. 650; 70 L. T. 699.

—— **Death of Petitioner after—Revivor.**]—A husband who had obtained a decree nisi for dissolution of his marriage died before the time for making it absolute had arrived:—Held, that the legal personal representative of the husband could not revive the suit for the purpose of applying to make the decree absolute. *Stanhope* v. *Stanhope*, 55 L. J., P. 36; 11 P. D. 103; 54 L. T. 906; 34 W. R. 446; 50 J. P. 276—C. A.

ii. *Making Absolute.*

29 & 30 Vict. c. 32, s. 3.]—By 29 & 30 Vict. c. 32, s. 3, *no decree nisi for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the court shall, under the power now vested in it, fix a shorter time. And see* Divorce Rules, 1865, rr. 80, 194, 207.

A petitioner obtained a decree for the dissolution of his marriage by reason of the misconduct of his wife, unless sufficient cause was shown to the contrary within three months. After this decree had been made, the above enactment came into operation:—Held, that the enactment applied to all suits in existence at the time it came into operation; but that, as the court had in all decrees nisi granted before that time fixed a shorter period than six months (namely, three months), at the termination of which they should be made absolute, such decrees would come under the exception contained in the above section. *Watton* v. *Watton and Oastler*, 35 L. J., Mat. 95; L. R. 1 P. 227; 14 L. T. 742; 15 W. R. 288.

An application to make absolute a decree nisi for dissolution of marriage should be supported by affidavits of search for appearance by any person, and of non-appearance; and, if an appearance has been entered, that no affidavits in opposition to the decree have been filed. *Boddy* v. *Boddy and Grover*, 30 L. J., Mat. 95.

An affidavit to found a motion to make absolute a decree nisi for dissolution of marriage should show that search was made in the registry at a recent date. *Stone* v. *Stone and Brownrigg*, 2 Sw. & Tr. 113; 32 L. J., Mat. 7; 7 L. T. 757.

Upon a motion to make a decree of dissolution of marriage absolute, a copy of the decree nisi should be filed. *Fowler* v. *Fowler*, 31 L. J., Mat. 31.

The power given by 23 & 24 Vict. c. 144, s. 7, to show cause why a decree should not be made absolute "by reason of material facts not brought before the court," is not limited to cases in which the facts occurred before the decree nisi; and a material fact, such as the adultery of the peti-

tioner, although it occurred after the decree nisi, is a ground for refusing to make the decree absolute. *Hulse* v. *Hulse and Tavenor*, 40 L. J., Mat. 51 ; L. R. 2 P. 259 ; 24 L. T. 847 ; 19 W. R. 880.

The 23 & 24 Vict. c. 144, s. 7, does not empower the court to withhold a decree of dissolution of marriage on the ground of the suppression of material facts by a petitioner, when it appears upon all the facts being disclosed to the court that the petitioner is entitled to a decree. *Alexandre* v. *Alexandre*, 39 L. J., Mat. 84 ; L. R. 2 P. 164 ; 23 L. T. 268 ; 18 W. R. 1087.

A petition contained two charges of adultery, and alleged that neither of them had been condoned. The queen's proctor intervened, and proved condonation of one adultery, but not of the other, and the court made a decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of the condonation of the other adultery. *Ib.*

Application, by whom made.] — The court will not upon the application of the respondent make a decree nisi absolute for nullity of marriage by reason of the impotence of the respondent. *Halfen* or *Halpin* (otherwise *Boddington*) v. *Boddington*, 50 L. J., P. 61 ; 6 P. D. 13 ; 44 L. T. 252 ; 29 W. R. 444.

Where a decree nisi had been pronounced on the husband's petition, and the queen's proctor had intervened on information furnished by the wife, but had subsequently withdrawn his intervention, the court declined to suspend the decree absolute on the wife's application :—Held, that if the wife was dissatisfied with the verdict, she should have procured its review, not by setting the queen's proctor in motion, but by moving for a new trial. *Pattenden* v. *Pattenden and Herzfield*, 19 L. T. 612.

A petition having been presented for a dissolution of marriage on the ground of the adultery of the wife, and a decree nisi made, the husband failed to apply to the court within reasonable time to have such decree made absolute. On an application to that effect on behalf of the respondent :—Held, that the power of the court in dissolving a marriage can only be exercised on the application of an innocent party. *Ousey* v. *Ousey and Atkinson*, 45 L. J., P. 33 ; 1 P. D. 56 ; 33 L. T. 789 ; 24 W. R. 436.

As the application for a decree absolute is a material step in the cause, if the petitioner fails to take it within reasonable time, it would seem that the respondent may call upon him to do so, or show cause why the decree nisi should not be revoked and the petition be dismissed for want of prosecution. *Ib.* And see *Lewis* v. *Lewis*, col. 942.

Showing Cause — Affidavits.] — When affidavits filed by a person showing cause against a decree being made absolute, and the affidavits in answer raise issues not proper to be decided on affidavits, the court will order the issues to be tried by a jury. They cannot be tried by the court itself on oral evidence. *Masters* v. *Masters*, 34 L. J., Mat. 7. *And see* Divorce Rules, 1865, r. 70.

—— **Who may show Cause.**]—A respondent, against whom a decree nisi for dissolution of marriage has been pronounced, cannot show cause against the decree being made absolute under 23 & 24 Vict. c. 144, s. 7. *Stoate* v. *Stoate*, 2 Sw. & Tr. 384 ; 30 L. J., Mat. 173 ; 5 L. T. 138.

Time shortened for making Decree absolute.] —A decree nisi having been dissolved on the intervention of the queen's proctor, on the ground of collusion, a fresh decree nisi was obtained on the ground that the original misconduct had been revived by subsequent adultery, and the court held that there were "special circumstances" in the case, and allowed the time to be reduced for making the decree absolute. *Rogers* v. *Rogers*, 6 R. 589.

Where Court will Suspend.] — The court cannot, after the time limited by the statute, suspend a decree absolute on the ground that the petitioner has not paid his proctor's taxed costs. *Patterson* v. *Patterson and Graham*, 40 L. J., Mat. 4 ; L. R. 2 P. 192 ; 23 L. T. 631 ; 19 W. R. 233.

The court refused to make a decree nisi absolute, after the expiration of three months from the time when it was pronounced, in order to enable the queen's proctor to make inquiries and to lay a case before the attorney-general for his directions, upon an affidavit being filed by the queen's proctor, to the effect that he had received information of material facts and that he intended to take the directions of the attorney-general. *Palmer* v. *Palmer*, 4 Sw. & Tr. 143 ; 34 L. J., Mat. 110.

Dart v. *Dart*, 32 L. J., P. 125 ; 9 Jur. (N.S.) 474 ; 11 W. R. 551.

Where the queen's proctor has intervened after the decree nisi, and the attendance of the petitioner at the hearing is necessary for the purpose of proving his identity, the court will order the proceedings to be stayed until his appearance. *Pollack* v. *Pollack, Dean and Macnamara*, 4 Sw. & Tr. 266 ; 34 L. J., P. 49.

The court refused to make a decree nisi absolute, although the six months had expired, when the queen's proctor applied for postponement on affidavits that he had a case for intervention but that he had not been able to take the directions of the attorney-general. *Hamilton* v. *Hamilton and Riding*, 33 L. T. 462.

After the trial by a jury of issues arising from an intervention, the court will not make a decree absolute immediately after a verdict in favour of the petitioner, but will postpone it until the time has expired for an application for a new trial. *Dering* v. *Dering and Blakeley*, L. R. 1 P. 531 ; 19 L. T. 48 ; 16 W. R. 1176.

The court made a decree absolute, notwithstanding a suggestion supported by affidavits, that the respondent and co-respondent were dead ; the evidence before it not being sufficient to enable it to arrive at a conclusion whether they were dead or alive. *Ib.*

In a suit for dissolution, the court, having reason to suspect the husband of connivance or conduct conducing to adultery, suspended the decree, and directed the queen's proctor to make inquiries into the bonâ fides of the petitioner's case. *Richards* v. *Richards and Cook*, 21 L. T. 598 ; 18 W. R. 152.

Previous Decrees—22 & 23 Vict. c. 61—Res judicata.]—A wife petitioned for dissolution of marriage, on the ground of adultery, cruelty, and desertion ; at the hearing, which took place before 22 & 23 Vict. c. 61, by which in such a suit she

is made competent to give evidence as to cruelty or desertion, the court, for want of proof of cruelty or desertion, refused to dissolve the marriage, but granted a judicial separation. After the passing of that act, she having applied for leave to file a fresh petition for dissolution of marriage on the same grounds, the judge granted the application on the ground that he had not power to refuse it; but expressed his opinion that such a suit could not be sustained, the matter being res judicata. *Bevan* v. *Bevan*, 4 Sw. & Tr. 265; 29 L. J., Mat. 45.

A spouse, who has obtained a decree for a divorce a mensâ et thoro in an ecclesiastical court, cannot maintain a suit for judicial separation on the same grounds. *Ciocci* v. *Ciocci*, 29 L. J., Mat. 30, 60.

A husband brought a suit against his wife by reason of adultery, in the arches court: at the hearing, that court pronounced that the husband had failed to prove the charge made, and dismissed the wife:—Held, that the previous sentence was no bar to a petition for dissolution of marriage brought by the husband against the wife on the same alleged facts of adultery. *Evans* v. *Evans and Robinson*, 1 Sw. & Tr. 173; 27 L. J., Mat. 57.

On a petition for a dissolution of marriage by reason of the adultery and cruelty of the respondent, the second charge was established by the production of a previous decree for a judicial separation on account of cruelty and by proof of the identity of the parties. *Bland* v. *Bland*, 35 L. J., Mat. 104; L. R. 1 P. 237; 15 W. R. 9.

First Petition Dismissed—Second Petition—Decree in First.]—A petitioner in a previous suit asked for a dissolution of his marriage by reason of the adultery of his wife, and the co-respondent in that suit alleged incestuous adultery against the petitioner. The adultery of the petitioner and the respondent having been proved in that suit, the petition was dismissed. The petitioner filed a second petition with the same prayer, but the acts of adultery charged against the wife were with other men than the co-respondent of the first suit. The queen's proctor intervened and pleaded the incestuous adultery of the petitioner, and that by reason of such incestuous adultery having been proved, the previous petition had been dismissed. The petitioner demurred to the last part of the answer of the queen's proctor, on the ground that he would not be debarred from proceeding in this suit, or from contending for his innocence of the incestuous adultery charged by reason of the judgment given in the first suit. The court overruled the demurrer. *Conradi* v. *Conradi*, 36 L. J., Mat. 68, L. R. 1 P. 391; 15 W. R. 881.

The questions whether the decree in the former suit was admissible in evidence in this, and, if so, whether such evidence would be conclusive, cannot be decided on demurrer, but must be determined at the hearing when the evidence is tendered. *Ib.*

A petitioner established his wife's adultery in a suit for dissolution of marriage, but the co-respondent established the petitioner's adultery, and on that ground his petition was dismissed. He afterwards presented a fresh petition, alleging subsequent adultery with other co-respondents. The queen's proctor intervened, and alleged the judgment against the petitioner in the previous suit, and further alleged the fact of the petitioner's adultery. The jury found that the petitioner was not guilty of the adultery charged:—Held, that the judgment in the former suit was conclusive evidence of the fact of such adultery having been committed. *Conradi* v. *Conradi, Worrall and Way*, 37 L. J., Mat. 55; L. R. 1 P. 514; 18 L. T. 659; 16 W. R. 1023.

A wife petitioned for a judicial separation on the ground of cruelty, and the charges of cruelty being traversed by the husband, the court found that they were not proved and dismissed the petition:—Held, that she was estopped from setting up the same charges of cruelty coupled with adultery in a subsequent petition for dissolution. *Finney* v. *Finney*, 37 L. J., Mat. 43; L. R. 1 P. 483; 18 L. T. 489.

New Trial — Second Decree.] — A husband obtained a decree nisi for the dissolution of his marriage, but the court afterwards directed a new trial. More than six months after the original decree nisi the case was tried a second time, and the court again pronounced a decree nisi. After the expiration of the period for moving for a new trial, the queen's proctor having stated that he did not think it necessary to intervene, and notice of the application having been given to the respondent's solicitor, the court made the original decree absolute, without waiting till the expiration of six months from the date of the second trial, but directed that both decrees nisi should be recited in the order. *Sheffield* v. *Sheffield and Paice*, 29 W. R. 523.

u. Appeal.

To Court of Appeal.]—*See* 44 & 45 Vict. c. 68, ss. 9, 10, and Divorce Rules, 1865, rr. 77—79.

Court of Appeal to House of Lords—Time.]—Since the Judicature Act of 1881, an appeal to the house of lords in a matrimonial cause (where an appeal lies) can only be from a decision of the court of appeal, and such an appeal must be brought within one month after the decision appealed against is pronounced by the court of appeal, if the house of lords is then sitting, or if not, within fourteen days after the house of lords next sits. *Cleaver* v. *Cleaver*, 9 App. Cas. 631—H. L. (E.)

From Judge Ordinary—Before 44 & 45 Vict. c. 68, s. 9.]—An application for the dismissal of an appeal by the appellant should be made to the full court, and not to the judge ordinary. *March* v. *March and Palumbo*, L. R. 1 P. 437.

The court of appeal has no jurisdiction to entertain an appeal from an order of the judge ordinary of the divorce court refusing or granting a rule to show cause for a new trial; but the appeal must be brought to the full court of divorce. *Westhead* v. *Westhead and Gordon*, L. R. 2 P. 1; 25 W. R. 35—C. A. S. P. *Robinson* v. *Robinson*, L. R. 2 P. 77; 36 L. T. 122; 25 W. R. 388—C. A.

An appeal from an order as to the custody of children made under 22 & 23 Vict. c. 61, s. 4, after a final decree for dissolution of the marriage of the parents, must be brought to the full court of divorce, and not to the court of appeal. *Gladstone* v. *Gladstone*, 2 P. D. 143; 25 W. R. 387—C. A.

The court of appeal has no jurisdiction to en-

tertain an appeal from an order of the judge ordinary of the divorce court granting alimony, though the appeal was presented before the passing of the Appellate Jurisdiction Act, 1876; but the appeal must be brought to the full court of divorce. *Wallis* v. *Wallis*, 2 P. D. 141; 36 L. T. 161; 25 W. R. 387—C. A.

——**Evidence to be given to Full Court.**]—On an application to the full court for a decree of dissolution of marriage on the verdict of a jury, the marriage must be proved if it was not put in evidence at the trial before the jury. *Evans* v. *Evans*, 1 Sw. & Tr. 328.

On appeal from an interlocutory matter not touching the main issue in a cause, and resting in the judicial discretion of the court below, the appellant must satisfy the court of appeal that the discretion of the court below was altogether wrongly exercised. *Thompson* v. *Thompson and Sturmfells*, 2 Sw. & Tr. 402; 31 L. J., P. 213; 7 Jur. (N.S.) 1207; 5 L. T. 325; 10 W. R. 96.

On an appeal, the court will only look at the same evidence and circumstances as were before the judge appealed from. *Hill* v. *Hill*, 2 Sw. & Tr. 407; 31 L. J., Mat. 193; 7 Jur. (N.S.) 1206; 5 L. T. 363; 10 W. R. 194.

It is not competent to a court of appeal to consider whether or not the jury has arrived at a proper conclusion upon a question of fact submitted to them. *Ryves* v. *Att.-Gen.*, 37 L. J., Mat. 75; 19 L. T. 217—H. L.

Any objection to the verdict, on the ground of the rejection or improper reception of evidence, must be raised by a bill of exceptions or by a motion for new trial. *Ib.*

Where a decree contains nothing more by way of recital than the findings of the jury, the only duty of the court of appeal, when this decree is brought before it, is to ascertain whether the verdict has been properly applied. *Ib.*

On appeal from the decree of the judge ordinary, in a suit for judicial separation, the cause will not be reheard, but the facts will be assumed to be those appearing in the judge's notes. *Curtis* v. *Curtis*, 28 L. J., Mat. 8.

Where a case has been in part heard before the judge ordinary, and stands over for further proof and argument before the full court, the facts proved before the judge ordinary must be proved again before the full court. *Brodie* v. *Brodie*, 2 Sw. & Tr. 259; 4 L. T. 307; 9 W. R. 815.

—— **Within what Time.**] — An appellant lodged an instrument of appeal in the registry within three months from the time the decree was pronounced, but allowed one term to elapse without bringing the matter before the full court:—Held, that he was still entitled to be heard. *Ginger* v. *Ginger*, 35 L. J., Mat. 93.

Demurrer to Answer—Interlocutory Matter.]—A demurrer to part of an answer to a petition for dissolution of marriage, which put in issue the validity of the marriage, the other parts of the answer remaining to be determined, is not a final but an interlocutory matter, and one which falls within the cognizance of the judge ordinary, and his judgment on such demurrer is the subject of appeal to the full court and not to the house of lords. *Pagani* v. *Pagani and Vining*, 35 L. J., Mat. 87; L. R. 1 P. 223; 14 L. T. 706; 15 W. R. 23.

For what an Appeal lies.]—By 20 & 21 Vict. c. 85, s. 56, and 23 & 24 Vict. c. 144, s. 3, an appeal lies from the judge ordinary, discharging the functions of the full court, by deciding on any petition for dissolution to the house of lords; and where the judge ordinary had in substance disposed of an important question in a suit for dissolution, by refusing to give directions for the mode of trial of certain issues from which refusal no appeal would lie to the house of lords, the full court on appeal varied the order, so as to enable the party aggrieved to appeal to the house of lords. *Rowley* v. *Rowley*, 4 Sw. & Tr. 137; 12 L. T. 315.

An appeal lies to the house of lords only from a decree for dissolution properly so called, not from a part of such decree not relating to the dissolution. *Sidney* v. *Sidney*, 36 L. J., Mat. 73; 15 W. R. 1094.

—— **Discovery of New Evidence.**]—After the sentence of the arches court, in a suit for separation by reason of a wife's adultery, and pending the hearing of an appeal to the judicial committee, new facts were alleged to have been discovered. An allegation by the wife, pleading the commission of acts of adultery by the husband, which, if proved, would entitle her to a sentence, admitted, upon motion, by the appellate court, and the cause retained. *Anon.*, 9 Moore, P. C. 434.

Practice on.]—When a petition of appeal for the reversal of a decree nisi has been presented to the house of lords, and the court is afterwards moved to make the decree absolute, the appeal having been withdrawn, that fact should appear by affidavit. *Baily* v. *Baily and Della Rocca*, 31 L. J., Mat. 163.

Where such an affidavit had not been filed, but the defendant's counsel admitted that the fact was so, the court made the decree absolute. *Ib.*

A decree made by the house of lords, on appeal, will be recorded on the files of the court upon a copy of such decree, verified by affidavit, being deposited in the registry. *Ib.* S. P. *Lewis*, f. c. *Hayward* v. *Hayward*, 36 L. J., Mat. 76; L. R. 1 P. 293; 15 L. T. 299; 15 W. R. 319.

When the judgment on a demurrer from the state of the pleadings decides the whole suit, an appeal lies direct to the house of lords. *Pagani* v. *Pagani and Vining*, 35 L. J., Mat. 87; L. R. 1 P. 223; 14 L. T. 706; 15 W. R. 23.

A wife's petition for nullity was dismissed by the court, and no order was made as to costs. On appeal, the house of lords pronounced a decree of nullity, but made no order as to costs:—Held, that the court had no power to make an order as to costs. *Lewis*, f. c. *Hayward* v. *Hayward*, supra.

v. Registrar.

Jurisdiction—Husband's Suit—Order to deliver up Property to Wife.]—In a husband's suit for dissolution the registrar made an order directing the husband to deliver up to the wife certain articles, which she claimed as her property:—Held, that the registrar had no jurisdiction to make such an order, and that it must be discharged, and the registrar directed to inquire and report as to the property in the articles in question. *Wood* v. *Wood*, 58 L. J., P. 68; 14 P. D. 157; 61 L. T. 338; 38 W. R. 208.

w. Contempt of Court.

Publication of Advertisements.]—A co-respondent in a suit for divorce, immediately after the service of the citation, caused advertisements to be published denying the charges made in the petition, and offering a reward for information which would lead to the discovery and conviction of the authors of them:—Held, that these advertisements constituted a contempt of court. *Brodribb* v. *Brodribb*, 55 L. J., P. 47; 11 P. D. 66; 56 L. T. 672; 34 W. R. 580; 50 J. P. 407.

In a suit for divorce on the wife's petition on the grounds of adultery and cruelty, the husband caused to be printed and published about the district in which the wife and her family resided a notice purporting to be signed by him, offering a reward of 25*l.* for evidence of the confinement of a young married woman of a female child, "probably not registered":—Held, that this was a contempt of court as tending to prejudice the petitioner, and discrediting her in the assertion of her rights, and a writ of attachment ordered to issue. *Pool* v. *Sacheverel* (1 P. Wm. 675) questioned. *Butler* v. *Butler*, 57 L. J., P. 42; 13 P. D. 73; 58 L. T. 563.

But semble, a bonâ fide attempt to procure evidence in a suit even by an advertisement offering a reward is not a contempt of court. And see *Plating Co.* v. *Farquharson*, 50 L. J., Ch. 406; 17 Ch. D. 55; 44 L. T. 389; 29 W. R. 510—C. A. and *Coats* v. *Chadwick*, 63 L. J., Ch. 328; [1894] 1 Ch. 347; 70 L. T. 228; 42 W. R. 328.

Proceedings Heard in Camerâ.]—It is a contempt of court to publish any account, however meagre, whether accurate or inaccurate, of proceedings heard in camerâ, whether for the protection of a ward of court or for any other reason. It is also contempt for a party to the proceedings to furnish information for the purposes of such publication. *Martindale, In re*, 64 L. J., Ch. 9; [1894] 3 Ch. 193; 8 R. 729; 71 L. T. 468; 43 W. R. 53.

Where the publication took place in one newspaper, and was copied by others in the belief that the proceedings were in open court, an application to commit the publishers of the newspapers so copying it was held to be vexatious, and dismissed with costs. An application to commit the writer of the paragraph complained of was also dismissed with costs on the same grounds. *Ib.*

x. Parliamentary Bills of Divorce.

Raising Funds for.]—A. provided a fund for defraying the expenses of obtaining an act of parliament to dissolve the marriage of B. and C., who was A.'s illegitmate daughter:—Held, that the transaction was not illegal. *Moore* v. *Usher*, 7 Sim. 384.

Proceedings for Obtaining.]—Divorce bills, though in form legislative, are substantially of a judicial character. *Wyndham's Divorce Bill*, 3 Macq. H. L. 43.

Proxies are not used on divorce bills. *Ib.*

In general a legislative bill drops with the session of parliament in which it is introduced, and the measure, if persisted in, must be renewed by a fresh bill in the ensuing session; but an Indian divorce bill, proceeding on 1 Geo. 4, c. 101, continues effective from session to session, so as to give a reasonable opportunity to make use of the materials returned under the commission awarded by the house of lords. *Ib.*

—— **Production of Record of Judgment—Action for Crim. Con.**]—In suing out a divorce bill, the standing order requiring the petitioner to produce a record of a judgment in an action for criminal conversation against the adulterer will be dispensed with where it is shown that such action was impracticable. *Coode's Divorce*, 6 Cl. & F. 567.

The production of the record of a judgment at law for criminal conversation, was also dispensed with where, during a voluntary separation of the petitioner and his wife, she committed adultery, of which he was not informed until after the death of the adulterer. *Lardner's Divorce*, 6 Cl. & F. 569.

—— **Husband not bringing Action against Adulterer.**]—A petitioner for a divorce bill was excused for not having brought an action for damages against the adulterer, upon the statement of his witnesses that they did not find him until three years after the discovery of the adultery, and that the petitioner was not able to pay the expenses of an action. *Martin's Divorce*, 1 H. L. Cas. 79.

The wife's general bad conduct admitted as an excuse for the husband omitting to bring an action against the adulterer. *Brooks' Divorce Bill*, 1 H. L. Cas. 159.

—— **Petitioner presenting himself at Bar.**]—The enforcement of the standing order of the house, requiring the petitioner in a divorce bill to present himself for examination at the bar, may be dispensed with on account of the state of his health. *Heneage's Divorce Bill*, 1 H. L., Cas. 496.

What is a Bar to the Bill.]—The acceptance, by the petitioner in a divorce bill, of an offer of a sum upon a writ of inquiry to assess the damages, after judgment by default in an action of crim. con. against the wife's paramour, is not a bar to the bill. *Ib.*

—— **Delay.**]—A husband, immediately after his wife's elopement, brought an action and obtained a verdict for damages against the adulterer, and also proceeded against the wife in the ecclesiastical court, and obtained a divorce there, but did not, for five years from the elopement, apply for a divorce in parliament. The delay was held to be sufficiently accounted for by the absence of the wife in America, and by the inability of the husband, in consequence of his affliction, to attend to any business. *Heaviside's Divorce Bill*, 12 C. & F. 333.

A lapse of nine years from the admitted discovery, and of nineteen years from the fact of the wife's adultery, was not a bar to the petitioner's right to divorce à vinculo, he having shown that he was not able, for want of funds, to apply to parliament sooner. *Ib.* S. P., *Martin's Divorce*, 1 H. L. Cas. 79.

A petitioner for a divorce bill was excused for not having brought an action for damages against the adulterer, upon the statement of his witnesses that they did not find him until three years after the discovery of the adultery, and the petitioner was not able to pay the expenses of an action. *Martin's Divorce*, 1 H. L. Cas. 79.

Personal Service out of the Jurisdiction—Affidavit of Service.]—The respondent in a divorce bill being out of the jurisdiction and the petitioner in poor circumstances, the house dispensed with the attendance at the bar of a witness to prove personal service of the bill and the several orders of the house on the respondent; and ordered that an affidavit proving such personal service, and sworn under 18 & 19 Vict. c. 42, before the British minister or consul at the place where the respondent resided, should be deemed sufficient proof of such service. *Joynt's Divorce Bill*, 13 App. Cas. 741—H. L. (D.)

Bastardising Clause.]—A paragraph in a divorce bill contained allegations tending to bastardise a child to which the wife had given birth during the marriage. There was access at the natural period of the conception of the child:—Held, that such paragraph was inadmissible and must be struck out of the bill. *Hewat's Divorce Bill*, 12 App. Cas. 312—H. L. (D.)

Service of Notice of Second Reading—Substituted Service.]—In proceedings upon a divorce bill application was made in May, 1886, to dispense with personal service on the respondent on the ground that his address was unknown to the petitioner, that a solicitor who had previously acted for the respondent had admitted that he knew of his address but had refused to divulge it, and that the respondent had been last heard of in February, 1886, being then at Montreal, in Canada:—Held, that the application was premature, and must be refused. *Gifford's Divorce Bill*, 12 App. Cas. 361—H. L. (D.)

Where on a bill for divorce it appeared that the respondent's address was concealed, and the house ordered substituted service, service was ordered to be made on the respondent's solicitor, on the respondent's parent, and also on the person with whom the respondent appeared to be residing. *A.'s Divorce Bill*, 12 App. Cas. 364—H. L. (D.)

Adultery—Impotence—Provision for Wife.]—Where, on a bill of divorce by the husband on the ground of the wife's adultery, the adultery was proved, but it appeared that the husband had not fulfilled his duty by providing a home for the wife when she was separated from him by order of his medical attendant, the house in passing the bill directed that a clause should be added making provision for the wife. *A.'s Divorce Bill*, 12 App. Cas. 364—H. L. (D.)

Allowance to Wife.]—Where upon a bill for divorce by the husband it appears that the wife has no means to defend herself, the house will order the husband to pay her a small sum in order that she may make her defence. *A.'s Divorce Bill*, 12 App. Cas. 364—H. L. (D.)

Ireland—Wife's Bill—Adultery coupled with Cruelty.]—The same evidence which since the Divorce Act, 1857, enables the divorce court to pronounce a decree for dissolution of marriage will be considered by the house of lords sufficient ground for passing a divorce bill relating to Ireland, where that act does not apply. *Westropp's Divorce Bill*, 11 App. Cas. 294—H. L. (D.)

—— **Cruelty.**]—Acts which would if done in England be held by the high court of justice to constitute legal cruelty will also be held to constitute legal cruelty in divorce bills. *Gifford's Divorce Bill*, 12 App. Cas. 361—H. L. (D.)

Petition in Formâ Pauperis.]—Practice on petitions for divorce in formâ pauperis. *Chippendall's Divorce Bill*, 1 H. L. Cas. 497, n.

y. Costs.

i. *Jurisdiction to Award.*

See Divorce Rules, 1865, rr. 151—158, 177—179, 199, 201.

Not Prayed for.]—The court may order the costs of the proceedings in a suit for dissolution of marriage to be paid by the co-respondent, although the petitioner may not have prayed for them in his petition. *Finlay* v. *Finlay and Rudall*, 30 L. J., Mat. 104.

Absolute Authority.]—The court which hears the suit has absolute authority over costs, and no appeal as to costs only lies. *Glennie* v. *Glennie and Bowles*, 3 Sw. & Tr. 109; 7 L. T. 696.

Suit for Nullity.]—The father of a de facto husband, sued for a decree of nullity by reason of undue publication of banns. The de facto wife defended the suit, the issue in which was tried by a jury, who found a verdict against her, and the court made a decree of nullity. On motion to condemn the husband in the wife's costs, the court held that s. 51 of the Divorce Act gave it power so to do, if the circumstances of the case warranted it; but that, as the wife, by not going into the witness-box, had shown that she had no reasonable ground of defence to lay before the jury, her costs were not made necessary by the conduct of her husband; and rejected the motion. *Wells* v. *Cottam and Wells*, 3 Sw. & Tr. 593; 34 L. J., Mat. 12; 10 Jur. (N.S.) 1208; 13 W. R. 279.

No Power after Decree Absolute.]—After a decree has been made absolute in a suit for dissolution of marriage the court cannot condemn a party in the costs of the proceedings. *Wait* v. *Wait and Flower*, 40 L. J., Mat. 30; L. R. 2 P. 228; 24 L. T. 846; 19 W. R. 760.

Verdict against Wife—Divorce Rules, 1865, r. 159.]—When on the hearing or trial of a cause the decision of the judge ordinary, or the verdict of the jury, is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the judge ordinary, at the time of such hearing or trial.

This rule is not imperative, but the court may dispense with it, and entertain an application for the wife's costs, subsequently to the hearing of a meritorious case. *Conradi* v. *Conradi and Flashman*, 35 L. J., Mat. 49; L. R. 1 P. 163; 14 L. T. 170; 14 W. R. 589.

ii. *Wife's Petition.*

See Divorce Rules, rr. 158, 159, 199—201.

Possession of Separate Property.]—The law presumes that by the contract of marriage all the property passes to the husband. The wife is in consequence a privileged suitor in the court with regard to costs; but where she has separate

property she is liable, as any other unsuccessful suitor, to be condemned in costs. *Milne* v. *Milne and Fowler*, 40 L. J., Mat. 13 : L. R. 2 P. 202 ; 23 L. T. 877 ; 19 W. R. 423. And see *Miller* v. *Miller*, L. R. 2 P. 13, and *Morris* v. *Freeman*, 3 P. D. 65.

Wife out of Jurisdiction—Security.]—Semble, the court will order a wife (petitioner), who is out of the jurisdiction and has separate property, to give security for costs. *M.* f. c. *De B.* v. *De B.*, 44 L. J., Mat. 41 ; 33 L. T. 263.

A wife who is unsuccessful in a suit by her for a judicial separation is not entitled to her costs of the hearing, although security for such costs has been given, if she is possessed of sufficient property to defray her own costs. *Heal* v. *Heal*, 36 L. J., Mat. 62 ; L. R. 1 P. 300.

Insufficient Allowance.]—When the sum allowed in the registry for a wife's costs of trial is inadequate for the purpose, the proper course is to apply on summons to the judge ordinary at chambers, that the registrar be directed to make a further estimate, and not to move the court for the allotment of a specific sum. *Madan* v. *Madan and De Thoren*, 18 L. T. 337 ; 16 W. R. 712. And see *Hurley* v. *Hurley*, 61 L. J., P. 14 ; [1891] P. 367 ; 65 L. T. 353.

Non-Payment by Husband.]—If a wife is unable to go to trial in consequence of the non-payment of her costs by the husband, she should either apply at chambers to have the case stand over, or appear in court on the day of hearing and state her inability to proceed. *Curtis* v. *Curtis*, 38 L. J., Mat. 9 ; 19 L. T. 610.

Where a wife's costs for the hearing had not been paid into court, owing to her own delay in filing a bill for taxation, the court refused to postpone the trial, or to make any special order to secure her costs after the verdict had gone against her. *Bridgman* v. *Bridgman and Puckrin*, 20 L. T. 87.

De die in diem.]—In a suit for dissolution of marriage, the wife is entitled to her costs de die in diem. *Weber* v. *Weber*, 1 Sw. & Tr. 219 ; 28 L. J., Mat. 11 ; 6 W. R. 867. S. P., *Holt* v. *Holt*, 28 L. J., Mat. 12.

Though a wife may, during the progress of a suit for dissolution of marriage, obtain an order for taxation of her costs de die in diem against her husband, and also that security be given by the husband for the costs of the hearing, if no such order is made before the hearing, and she is unsuccessful in the suit, the husband has not to pay her costs. *Keats* v. *Keats and Montezuma*, 1 Sw. &. Tr. 324 ; 28 L. J., Mat. 57 ; 5 Jur. (N.S.) 176 ; 7 W. R. 377.

The committee of a lunatic having instituted a suit for judicial separation by the direction of the court of chancery on the ground of the adultery of his wife, she applied that her costs de die in diem might be taxed, and also that the petitioner might deposit in the registry or give security for the costs of the hearing. Both applications were refused, on the ground that the wife had by the order of the court of chancery an ample allowance out of the estate of the lunatic. *Woodgate* v. *Taylor*, 30 L. J., Mat. 197, n.

Limit—Amount Paid into Registry.]—Where a husband's petition is dismissed, and the wife's costs of the hearing exceed the sum secured or paid into the registry to meet them, the husband is liable to pay the balance. Application for the balance should be made on summons, and not on motion. *Cooke* v. *Cooke and Allen*, 3 Sw. & Tr. 603 ; 34 L. J., Mat. 15.

A wife who has obtained a decree nisi is entitled to an order for the payment of her surplus costs of the hearing, beyond the amount deposited in the registry, although a motion for a new trial and a bill of exceptions are pending. *Chetwynd* v. *Chetwynd*, 4 Sw. & Tr. 108 ; 34 L. J., Mat. 65 ; 13 W. R. 528.

Where in a suit for dissolution of marriage, on the ground of the wife's adultery, the adultery is proved, but the petition is dismissed on account of the husband's marital misconduct, the wife is entitled to all her costs, though they may exceed the sum paid into the registry, and the co-respondent will not be condemned in costs. *Starkey* v. *Starkey and Irwin*, 30 L. J., Mat. 118. S. P., *Goode* v. *Goode*, 30 L. J., Mat. 105 ; 7 Jur. (N.S.) 317.

In a divorce suit, the costs of the wife payable by the husband are not limited to the amount paid into court or secured by the husband for that purpose. *Robertson* v. *Robertson and Fawgrossa*, 51 L. J., P. 5 ; 6 P. D. 119 ; 45 L. T. 237 ; 29 W. R. 880—C. A.

In a divorce suit the usual order had been obtained for securing the wife's costs of the hearing, and there had been no appeal from that order, and no further costs were asked for at the hearing. Subsequently the case of *Robertson* v. *Robertson* (supra) was decided in the court of appeal, and the divorce court was thereupon asked to order payment of the wife's full costs. Application refused. *Smith* v. *Smith, Major and Child*, 51 L. J., P. 31 ; 7 P. D. 84 ; 46 L. T. 696 ; 30 W. R. 688.

—— **Registrar's Report—Comparison of Respective Incomes of Husband and Wife—Discretion.**]—Where an order has been made for the payment to the wife of alimony pendente lite :—Held, under such circumstances, that in making an order under Rule 158 of the Rules in Divorce and Matrimonial Causes, which requires the husband in a divorce suit to put the wife in funds to meet costs, the registrar or judge does not act upon a wrong principle in taking into consideration a comparison of the respective incomes of the husband and wife. *Allen* v. *Allen and Bell* 63 L. J., P. 78 ; [1894] P. 134 ; 6 R. 585 ; 70 L. T. 326 ; 42 W. R. 230—C. A.

Liability of Husband—Extent of.]—In the ecclesiastical court the proctor of a wife defending a suit for divorce was always entitled to receive from her husband the reasonable costs of conducting her defence. *Wells* v. *Wells*, 1 Sw. & T. 308 : 27 L. J., Mat. 95.

A wife is entitled to pledge her husband's credit for the reasonable costs incurred by her in instituting and prosecuting divorce proceedings against him. *Ottaway* v. *Hamilton*, 47 L. J., C. P. 424. Affirmed, 47 L. J., C. P. 725 ; 3 C. P. D. 393 ; 38 L. T. 925 ; 26 W. R. 783—C.A.

The costs of a solicitor employed by a married woman to institute proceedings on her behalf against her husband, to obtain a judicial separation, can only be recovered against the husband when the necessity for such proceedings has been made out in point of fact. *Taylor* v. *Hailstone*, 52 L. J., Q. B. 101 ; 47 L. T. 440.

The mere fact that the solicitor had reasonable grounds for believing, upon information obtained,

that proceedings ought to be taken is not sufficient to render the husband liable for costs incurred in obtaining such information, unless it appears to the court that there was any necessity for such proceedings. *Ib.*

The costs of preparing a case for the opinion of counsel, and of negotiations entered into with a view to an arrangement for a separation before the institution of proceedings, are not recoverable against the husband if the court should be of opinion that there was no necessity for instituting these proceedings. *Ib.*

A suit for a decree of nullity promoted by the wife on the ground of impotency was dismissed. Subsequently she filed a petition for dissolution of marriage on the ground of adultery, coupled with cruelty and desertion, and obtained a decree nisi. The court held, that the respondent ought not to be condemned in the costs of both suits; and in allowing the petitioner the full costs of the suit in which she was successful, ordered that the respondent should have credit for the sum paid by him on account of her costs in the suit for nullity. *Ditchfield* v. *Ditchfield*, 38 L. J., Mat. 51; L. R. 1 P. 729; 20 L. T. 1015.

Laches of Solicitor.]—Where the wife had, prior to the hearing, obtained an order under r. 126 for a reference to the taxing-master to fix a sum to be lodged in court, or secured by the husband, to cover her costs of the trial; but her solicitor took no steps to have the order carried out, and proceeded to trial without any sum being lodged or secured:—Held, that if the wife failed to establish her case, she was not entitled to costs against her husband. *Carnegie* v. *Carnegie*, 15 L. R., Ir. 513.

At the hearing of a suit for divorce preferred by the wife, the charges of cruelty were withdrawn, and those of adultery were not proved, and the petition was accordingly dismissed. No order had been made upon the husband to secure any sum for his wife's costs. The court refused to order the respondent to pay the costs of the petitioner. *Thompson* v. *Thompson*, 57 L. T. 374. *And see*, as to the duty of a respondent wife's solicitor, *Walker* v. *Walker and Lawson*, col. 967, and *Townson* v. *Townson*, 78 L. T. 54.

Security for Costs—Disobedience to Order to Pay Money into Court.]—In a suit by a wife for judicial separation on the ground of her husband's alleged cruelty an order was made, previously to the hearing, directing the respondent to "lodge in court the sum of 40*l.* estimated by one of the registrars as sufficient to cover the costs and expenses of the petitioner of and incidental to the hearing of the cause, or give a bond, under the hand and seal of the said respondent, and of two sufficient sureties, in the penal sum of 80*l.*, conditioned for the payment of such expenses of the said petitioner as shall be certified to be due and payable by the said respondent, not exceeding the said sum of 40*l.*, with forty-eight hours' notice of such sureties to the solicitor of the petitioner." The respondent having failed to pay the money into court or give the required security, the petitioner moved for an attachment against him for disobeying the order:—Held, that the failure to comply with the order was not a default in payment of money within s. 4 of the Debtors Act, 1869, and therefore that an attachment could be issued. *Bates* v. *Bates*, 58 L. J., P. 85; 14 P. D. 17; 60 L. T. 125; 37 W. R. 230—C. A. *See* Divorce Rules, 1875, rr. 199—201.

—— **Attachment for Non-payment—Undischarged Bankrupt.**]—The respondent—the husband—in a suit for divorce was an undischarged bankrupt, but was shown to be in receipt of a weekly salary of 30*l.*, which was not under the control of the trustee in bankruptcy. An order had been made by the court, and duly served on him, to pay into court or give security for the sum of 40*l.*, to cover the wife's costs of the hearing of her petition; but although nearly two years had elapsed from the date of such order, he had failed to comply with it:—Held, that the fact that the respondent had been adjudged bankrupt did not preclude the court from issuing an attachment, and the court made an order accordingly. *Shine* v. *Shine*, [1893] P. 289; 69 L. T. 500. And see *Clarke* v. *Clarke*, and cols. 963, 976.

—— **Debtors' Act—Attachment.**]—The provisions of the Debtors Act, 1869, do not apply to a case where a party has been ordered to find security for costs, and disobedience of the order is a contempt of court to be enforced by attachment. *Lynch* v. *Lynch*, 54 L. J., P. 93; 10 P. D. 183; 34 W. R. 47.

—— **Writ of Elegit—Motion to Set Aside.**]—The husband, respondent, obtained a mandamus to his wife to deliver up certain deeds; he failed to comply with an order as to his wife's costs and she issued a writ of elegit; the court though the wife had not complied with the mandamus, refused to set aside the writ but put the wife upon terms as to the receipts arising from the property. *Kippax* v. *Kippax*, 67 L. T. 382.

—— **Intervention of Queen's Proctor.**]—It is not the practice of the court to order a husband to give security for his wife's costs incidental to an intervention of the queen's proctor. *Butler* v. *Butler*, 59 L. J., P. 30; 15 P. D. 32; 62 L. T. 477. See *S. C.* in C. A., col. 965.

Injunction to restrain Parting with Property—Reconciliation—Continuing Injunction.]—A judicial separation having been pronounced at the suit of the wife, an interim injunction was obtained against the husband restraining him from dealing with certain property belonging to him. Subsequently a reconciliation took place. The wife's solicitor applied to have the injunction continued until a receiver of the property should be appointed or until the balance of his costs was paid; the court refused to continue the injunction or to appoint a receiver. *Hawes* v. *Hawes*, 57 L. T. 374.

Charging Order—Solicitor—Permanent Maintenance.]—A sum secured to the wife on a dissolution of marriage under s. 32 of the Divorce Act, 1857, is not alimony, and is property in respect of which the court has jurisdiction to grant the wife's solicitor a charging order for costs under s. 28 of the Solicitor's Act, 1860; but the court will not grant such an order unless the solicitor make out a primâ facie case of inability to obtain payment in any other way. *Harrison* v. *Harrison*, 58 L. J., P. 28; 13 P. D. 180; 60 L. T. 39; 36 W. R. 748—C. A. *See* col. 964.

Appeal to House of Lords.]—Except in a very exceptional case, a wife is not entitled to payment from her husband of her costs of an appeal to the house of lords in which she is the appel-

lant, in cases where the judgments of the courts below have found her guilty of a matrimonial offence, and have declared her to have ceased being the wife of the respondent. *Begg* v. *Begg*, 15 App. Cas. 170—H. L. (Sc.)

When Decree in Favour of Wife.]—When a wife proceeds for a judicial separation and it is granted, she is entitled to her costs as a matter of right. In the absence of any order of the court to the contrary, costs follow the decree of separation as a matter of course. *Peacock* v. *Peacock*, 27 L. J., Mat. 71.

Where the court decrees a dissolution of marriage at the suit of a wife, costs follow the decree as a matter of course, if the court, in pronouncing its decree, gives no direction as to costs. *Dixon* v. *Dixon*, 28 L. J., Mat. 96.

Where dissolution of marriage, on the ground of the wife's adultery, is decreed, if no order to the contrary is made, the husband pays the wife's costs. *Ling* v. *Ling and Croker*, 1 Sw. & Tr. 180; 27 L. J., Mat. 58.

A wife, in whose favour a decree for a dissolution of marriage is made, is entitled to costs against her husband, where no order has been made. *Kaye* v. *Kaye*, 4 Sw. & Tr. 239; 27 L. J., P. 54.

—— **Suing in Formâ Pauperis.**]—A wife suing in formâ pauperis for a dissolution of marriage, if she obtains a decree, is entitled to costs. *Afford* v. *Afford*, 2 Sw. & Tr. 387; 30 L. J., Mat. 174; 5 L. T. 138.

On Failure of Wife's Suit.]—Where the registrar has directed a sum of money to be paid into court to meet the expenses of the wife's petition at the hearing, and her suit fails, the husband will not be liable to a greater amount than the sum so paid in, though her costs, as ascertained on taxation, exceed that sum. *Sopwith* v. *Sopwith*, 2 Sw. & Tr. 105; 29 L. J., Mat. 132; 6 Jur. (N.S.) 404; 2 L. T. 472; 8 W. R. 552.

The practice of the court is that a wife, if she fails, will not be entitled to taxed costs beyond the sum of money paid into court by the husband at the order of the registrar. *Glennie* v. *Glennie and Bowles*, 3 Sw. & Tr. 109; 7 L. T. 696.

The court rejected a motion for an order on a husband to pay the balance of the wife's taxed costs above such sum of money paid into court, and condemned her solicitor in the costs of the motion. *Ib.*

Where, upon the trial of a case, the decision of the court is against the wife, the costs of the wife, incidental to the trial, are not allowed against the husband, unless ordered. *Todd* v. *Todd*, 12 Jur. (N.S.) 237; 13 L. T. 759; 14 W. R. 350.

The court has power to disallow the wife's costs of the hearing of a suit in which she has been unsuccessful, although security for such costs has been deposited in the registry by the husband, but it will only exercise that power in cases where the wife's attorney has been guilty of some misconduct, or has instituted the suit knowing that it was without reasonable ground. *Flower* v. *Flower*, 42 L. J., Mat. 45; L. R. 3 P. 132; 29 L. T. 253; 21 W. R. 776. *And see* Divorce Rules, 1865, r. 159, and *Conradi* v. *Conradi and Flashman*, col. 954.

—— **Adultery Proved against Husband.**]—When on a husband's petition for a dissolution of marriage on the ground of the wife's adultery, she proved that he also had been guilty of adultery, the court granted an order for her full costs; but allowed the petition to remain on the file for a month, in order to enable the petitioner, if he thought fit, to move in the meantime for a new trial. *Bridges* v. *Bridges and Barnett*, 16 L. T. 34.

Cases where Allowed and Disallowed.]—A wife having obtained a decree nisi, confessed adultery on the intervention of the queen's proctor. The decree was thereupon reversed, and the petition dismissed:—Held, notwithstanding, that the petitioner was entitled to all costs for which she had obtained orders, either for payment or taxation, prior to the time that her adultery was proved. *Whitmore* v. *Whitmore*, 35 L. J., Mat. 52; L. R. 1 P. 96; 14 L. T. 171; 14 W. R. 352.

An order for taxation of the wife's costs pending suit does not necessarily imply also payment.

But an order for taxation of her costs on the decree nisi is for the purpose of payment when the amount is ascertained. *Ib.*

In a suit in which material circumstances were proved on the part of the wife, respondent, although the verdict established her adultery, the court, after the lapse of three months from the date of the decree nisi, and notwithstanding r. 159, allowed her costs to be taxed against the husband. *Somerville* v. *Somerville and Webb*, 36 L. J., Mat. 87; 16 L. T. 466.

"Usual Order"—Petition Dismissed—Separate Property.]—The court will not refuse the "usual order" for a wife's costs, unless her solicitor has been guilty of improper conduct in the institution or prosecution of the suit. Thus, where a wife petitioned for a judicial separation upon the ground of cruelty, and the court, in dismissing her petition, expressed a very strong opinion that the charges she had made against her husband were trumpery, and where it was shown that she had separate estate producing an annual income of 29*l.* (the husband's income being 135*l.*) and was supporting her two young children without any assistance from her husband, the court declined to condemn her in the costs of the suit, and being of opinion that no suggestion of improper conduct in bringing the case before the court could be made against her solicitor, the court, upon the wife's application, made the "usual order" for her costs. *Aires* v. *Aires*, 65 L. T. 859.

—— **Suit for Judicial Separation—Wife's Costs refused.**] — In a suit by a wife for judicial separation on the ground of cruelty, where no summons for recovery of documents had been applied for by the wife's solicitor, it transpired, and was conclusively proved at the hearing, that numbers of affectionate letters had passed between the parties during a period of more than a year after the husband had gone to China to resume his official duties, and, after the acts specified in the petition as cruelty and deposed to by the petitioner, were alleged to have been committed. At the close of the petitioner's case the petition was dismissed, and the court refused to make the "usual order" for the wife's costs. *Hough* v. *Hough*, 71 L. T. 703.

Unnecessary Charges of Cruelty—Rule 159.]—A wife's petition for divorce alleged acts of adultery, the proof of which was that the respondent was alleged to have communicated a

venereal disease to the petitioner; this was also alleged as an act of cruelty. The petition also contained a charge of cruelty of a general character, but of which the court thought that the petitioner's solicitors had the clearest evidence of condonation when they commenced proceedings. The jury found all the issues in favour of the respondent. A comparatively small sum had been secured to the petitioner for her costs by the respondent. After verdict the petitioner applied for an order to be allowed her full costs of suit:—Held, that the petitioner was entitled to her full costs of the main charge, as the court, after consideration, was unable to say that the solicitors had acted improperly in taking proceedings, but that she was not entitled to the costs of the charges of cruelty which had been condoned. *Ash* v. *Ash*, 62 L. J., P. 97; [1893] P. 222; 1 R. 524; 68 L. T. 500.

Solicitor of Wife — Husband's Bond to — Enforcing Bond.]—In a petition by the wife for judicial separation, her solicitor has no greater right than his client to recover costs from the opposite party. Where, therefore, a petition by the wife for judicial separation had been dismissed with costs:—Held, that the solicitor of the petitioner could not enforce against the respondent the bond executed by the respondent, under rule 158 of the divorce court rules, as security for the petitioner's costs of the trial. *Russell* v. *Russell*, 61 L. J., P. 45; [1892] P. 152; 66 L. T. 436—C. A.

Discretion of Court as to Costs — Appeal.] —Under s. 51 of the Divorce Act, 1857, the costs of any suit or proceeding under the act are in the discretion of the court. Where, therefore, the court has, in the exercise of its discretion, refused an application under rule 199 of the divorce court rules to allow the bond given by the husband to the wife's solicitor under rule 158 to be enforced, the court of appeal is precluded by s. 49 of the Judicature Act, 1873, and s. 20 of the Appellate Jurisdiction Act, 1876, from reviewing such decision. *Ib.*

Attachment Refused.] — The court refused to grant an attachment against a husband for non-payment of costs incurred on behalf of the wife, in a suit instituted by her for judicial separation, on the ground of his alleged cruelty, when it appeared that the husband had been compelled to separate from her several months before the institution of the suit in consequence of her drunkenness and violence, and had not the means of complying with the order for payment. *Holland* v. *Holland*, 4 Sw. & Tr. 78; 34 L. J., Mat. 65; 11 L. T. 750; 13 W. R. 505.

Intervention of Queen's Proctor.] — The intervention of the queen's proctor after a wife has obtained a decree nisi does not affect her right to the costs of the suit. *Gladstone* v. *Gladstone*, 44 L. J., Mat. 46; L. R. 3 P. 260; 32 L. T. 404.

No next Friend.] — A married woman, pending a petition by her in the divorce court for a declaration of nullity of marriage, filed a bill and obtained an injunction against her husband, but did not sue by a next friend. The petition in the divorce court having been dismissed:—Held, upon a motion by the husband to dissolve the injunction, that no order to pay the costs of the motion could be made against the wife or her solicitor. *Sealey* v. *Gaston*, 13 W. R. 577.

Adultery Proved — Appeal.] — A husband and wife who were married before 1882, presented cross petitions for dissolution of marriage, the wife's petition being presented before that of her husband. They were both found guilty of adultery, and the husband was also found guilty of cruelty of an aggravated character. The judge refused to decree dissolution of marriage, but granted the wife a decree for judicial separation, and gave her her costs. The husband having appealed, the court of appeal discharged the order for judicial separation:—Held, that the wife was entitled, notwithstanding her adultery, to her costs both in the court below and on the appeal. Semble, if the wife had been herself the appellant, and had been unsuccessful, she would not have had her costs of the appeal. *Otway* v. *Otway*, 57 L. J., P. 81; 13 P. D. 141; 59 L. T. 153—C. A.

Sum Allowed to be Paid out of Corpus of Settled Property—Variation of Settlement.]— A wife had obtained a dissolution of marriage on the ground of her husband's adultery and cruelty. Subsequently she petitioned for a variation of settlements. At the time of the hearing of such petition she was indebted to her solicitors in the sum of 49*l.* 16*s.* 9*d.*, balance of account for costs of the suit and of the petition for variation of settlements. The court being satisfied that there was no prospect of recovering the costs from the husband, allowed such sum of 49*l.* 16*s.* 9*d.* to be paid out of the corpus of the settled property, although there were living issue of the marriage. *Hipwell* v. *Hipwell*, 61 L. J., P. 84; [1892] P. 147; 67 L. T. 396.

Wife bringing Countercharges.]—Where a wife's answer contains charges against the husband which at the time appear to have been made without any foundation, the whole of her costs will not be allowed to be taxed as against her husband. *Clark* v. *Clark, Perrin and Cumins*, 4 Sw. & Tr. 111; 34 L. J., Mat. 71; 12 L. T. 148; 13 W. R. 549.

In a suit for dissolution of marriage on the ground of a wife's adultery, the respondent and co-respondent denied the charge, and the respondent further charged the petitioner with adultery. At the hearing this latter charge was substantially the joint defence of the respondent and co-respondent. A jury found that the respondent and co-respondent had not been guilty of adultery, and also that the petitioner had not been guilty of adultery:—Held, that the respondent was entitled to the whole of her costs incurred in supporting the first issue, although they should exceed the sum deposited in the registry, but that, as to the second issue, she was entitled only to a moiety of the costs incurred. *Burroughs* v. *Burroughs*, 31 L. J., Mat. 124.

In a suit by a husband for dissolution of marriage by reason of the wife's adultery, she recriminated adultery, which she charged as having taken place with A. and B. At the trial no evidence was offered in support of the charge with B. The court ordered that the costs incurred by the petitioner in respect of the charge of adultery with B. should be deducted from the sum paid into court to meet the wife's costs of trial.

Morgan v. *Morgan and Porter*, 38 L. J., Mat. 41; 20 L. T. 588.

A wife's costs of counter-charges of adultery against her husband were disallowed, although they had been paid into court, the evidence by which those counter-charges were supported being false, and there being no reasonable ground for making them. *Wilson* v. *Wilson*, 41 L. J., Mat. 74; L. R. 2 P. 435; 27 L. T. 351; 20 W. R. 891.

A husband having filed a petition for dissolution on the ground of adultery, the wife brought counter-charges against the husband, and though not successful in the suit she succeeded in establishing these counter-charges:—Held, that she was entitled to her costs. *Caldecott* v. *Caldecott and Cartwright*, 29 L. T. 699; 22 W. R. 239.

—— **Attachment.**]—Where a husband petitioned for a dissolution of his marriage on the ground of his wife's adultery, and the wife, in her answer, made counter-charges against him, the court refused to issue an attachment against such husband for non-compliance with an order to secure his wife's costs, he having filed an affidavit alleging want of means. *Bates* v. *Bates* (14 P. D. 17) distinguished. Semble, the proper course under such circumstances would be for the wife to move to dismiss the petition. *Clarke* v. *Clarke*, 60 L. J., P. 97; [1891] P. 278. *See* col. 957.

Decision Postponed till after Taxation.]—In future if in a divorce suit in which a wife is found guilty the court is asked to order payment of her full costs, the court will postpone its decision until after her bill of costs has been taxed. The case of *Robertson* v. *Robertson*, col. 956, referred to. *Ib.*

Application to Dismiss Petition.]—Where a wife has petitioned against the husband and the proceedings are ended, before hearing, by her return to cohabitation, the petition will be dismissed, on the husband's application, only on payment of taxed costs. *Cooper* v. *Cooper*, 3 Sw. & Tr. 392; 33 L. J., Mat. 71; 10 L. T. 275.

A suit having been instituted on the part of a wife for a dissolution of her marriage, in which the husband had appeared and answered, an application was made on his behalf that the petition should be dismissed on an affidavit of the wife that the suit had been improperly instituted, and that she had returned to cohabitation, The court ordered such application to stand over until the wife's attorney had had an opportunity to tax his costs and enforce them against the husband. *Dixon* v. *Dixon*, 40 L. J., Mat. 38; L. R. 2 P. 253; 25 L. T. 135; 19 W. R. 787.

Taxation of—General Principles.]—The general principles of taxing costs against a husband in matrimonial suits are the same as in other causes. The rule of the ecclesiastical courts not to allow more than two counsel on taxation, is not applicable where the evidence is oral in open court. *Suggate* v. *Suggate*, 1 Sw. & Tr. 497; 1 L. T. 306; 8 W. R. 178.

Where a London attorney conducts the suit, no expenses of a local attorney will be allowed against the husband. *Ib.*

Case requiring to be well Proved.]—In a suit for dissolution the respondent's counsel withdrew their opposition after a few witnesses had been called. The registrar disallowed the costs of several witnesses who were in attendance, but not called, and also disallowed maintenance-money for the witness on whom the proof of the wife's case chiefly depended. The court confirmed the registrar's report on the latter point, but on the ground that the case was one which, from the circumstances, required to be well proved, allowed the expenses of the witnesses who were not called. *Finney* v. *Finney*, 21 L. T. 597.

Lien of Solicitor.]—Before trial of the issue in a cause a sum of money was paid into the registry by the husband to meet his wife's costs. Subsequently the marriage was dissolved, and the co-respondent was condemned in all the costs of the proceedings, but the husband was unable to recover them:—Held, that the wife's proctor had a lien upon the money so paid into the registry; and the amount of his taxed costs was ordered to be paid out to him. *Evans* v. *Evans and Robinson*, 1 Sw. & Tr. 328; 28 L. J., Mat. 136; 5 Jur. (N.S.) 606; 7 W. R. 181.

An attorney retained by a married woman in a matrimonial suit has a lien for costs incurred on her account, including costs disallowed on taxation as between her and her husband, but allowed as between attorney and client, upon all moneys received by him on her account in the course of the suit. This lien extends to alimony in the hands of the attorney. *Bremner* v. *Bremner and Brett*, 36 L. J., Mat. 11; L. R. 1 P. 954; 15 L. T. 297; 15 W. R. 75. And see *Harrison* v. *Harrison*, col. 958, and *Hall* v. *Hall* (No. 2), col. 966, and *Russell* v. *Russell*, col. 961.

Intervention by Queen's Proctor—Payment out before Decree Absolute.]—In cross-petitions by the husband and wife for dissolution of the marriage, a decree nisi was pronounced on the wife's petition, and the husband was condemned in costs. Subsequently the queen's proctor intervened, and charged the wife with adultery, collusion, and suppression of material facts. The husband, in compliance with an order of the registrar, had paid money into court to meet the wife's costs in both suits:—Held, that the wife was not entitled to have the money in court paid out until the decree nisi had been made absolute. *Butler* v. *Butler*, 58 L. J., P. 71; 14 P. D. 160; 38 W. R. 272.

Payment out pending Appeal.]—In cross-suits for dissolution on a first trial, a jury having found all the issues in favour of the wife, the court pronounced a decree nisi in her favour; subsequently the queen's proctor intervened, and on a second trial a jury found that she had been guilty of collusion and suppression of material facts, but were unable to agree as to whether she had been guilty of adultery or not, and the court thereupon rescinded the decree nisi; the wife appealed against such rescission of the decree:—Held, that an application for payment out to the wife's solicitors of a sum of 90*l.* which had been paid into the registry to secure the estimated costs of the wife up to the trial of the cross-petitions, must be refused, pending appeal, on the ground that the wife's solicitor had been present when a collusive agreement was signed by the husband and wife. *Butler* v. *Butler*, 59 L. J., P. 11.

A wife having obtained a decree nisi in a peti-

tion for divorce, the queen's proctor intervened, and she was proved to have obtained the decree by collusion, to which her solicitors were parties. The petition was accordingly dismissed. The husband in the course of the proceedings had paid into the registry two sums of money to cover the wife's costs of the two proceedings:—Held, that under the circumstances the wife was not entitled to an order that such moneys should be paid out to her or her solicitors. *Butler* v. *Butler*, 59 L. J., P. 30; 15 P. D. 32; 62 L. T. 477. See *S. C.*, in C. A., infra, *next case.*

Appeal as to Costs.] — Although in proceedings for divorce a wife as a general rule is allowed her costs, the allowance of such costs is under the Divorce Act, 1857, s. 51, in the discretion of the court, and there is no appeal from the refusal of the court to order the wife's costs to be paid. The costs occasioned to a wife by the intervention of the queen's proctor, are also within the discretion of the court, and if the judge in his discretion disallows them, an appeal from an order refusing them will not lie. *Butler* v. *Butler*, 62 L. T. 477; 15 P. D. 126—C. A. And see *Russell* v. *Russell*, col. 961.

—— **Decree rescinded — Money paid into Court ordered to be paid out to Queen's Proctor.**]—At the trial of two cross-petitions for dissolution by the husband and wife, the wife, by arrangement between the parties, obtained a decree nisi, and the husband was condemned in costs. The queen's proctor intervened, charging both parties with collusion, and the wife with adultery. At the trial of these issues the jury found that the parties had been guilty of collusion, but disagreed as to the adultery, and the decree nisi was rescinded. The husband had paid into court sums amounting to 140*l.* to meet the wife's costs. The court had refused—and the court of appeal had confirmed this decision—to allow any part of the sum to be paid out to the wife or her solicitors. The court now, on application by the queen's proctor, ordered the whole sum of 140*l.* to be paid out to him in part payment of his costs for procuring the reversal of the decree nisi. *Butler* v. *Butler*, 59 L. J., P. 86; 15 P. D. 161; 63 L. T. 260.

Security for—Co-respondent's Application for.] —The court, being satisfied that the petitioner had, as a fact, assets in this country upon which, if defeated in his suit, execution for any costs ordered to be paid by him could be levied, refused the application of one of the co-respondents that the petitioner be ordered to give security for his costs. *Redfern* v. *Redfern*, 63 L. T. 780.

iii. *Husband's Petition.*

Wife's Costs.]—The rule is that, whether the wife is successful or not, the husband is bound to furnish her with the means of carrying on the litigation, and the practice is for the registrar to estimate a reasonable amount for her costs, which sum is either paid in or security is given for it. *Hurley* v. *Hurley* (No. 1), 61 L. J., P. 14; [1891] P. 367; 65 L. T. 353.

Abortive Trial—Full Costs allowed to Wife.] —At the trial of a petition by a husband for divorce the jury disagreed, and were discharged without giving a verdict. The court, upon the application of the wife, made an order that her costs of the hearing should be taxed and paid in full, and refused to limit such costs to the amount deposited in court. *Ib.*

Money in Court — Set-off — Solicitor's Lien.]—A husband having obtained a decree nisi against his wife, the wife moved for a new trial, and her motion was dismissed with costs. The husband claimed to apply a sum which he paid into court to provide for the costs of the wife's defence to the action, and which still remained in court, in payment of his costs on the motion for the new trial:—Held, that the court ought not to deprive the wife's solicitor of his costs out of the fund provided for that purpose, in the absence of misconduct on his part, and the application was refused. *Hall* v. *Hall*, 60 L. J., P. 73; [1891] P. 302; 65 L. T. 206—C. A.

Order against Guilty Wife.] — On a husband's petition a decree was pronounced on account of the wife's adultery with costs against the co-respondent. It was proved that the wife was possessed of separate property, and an order was made against the wife for the costs of the suit. *Millward* v. *Millward*, 57 L. T. 569; 51 J. P. 616.

The court has absolute discretion to make such order as to costs as to it may seem just, and will not inquire whether at the time the wife committed the wrongful act, she had or had not any separate estate, but will only consider what is just at the time when it has to arrive at a decision; if the court finds that at that time there is property of the guilty wife upon which an order for costs, if made, can operate, the guilty wife, like any other unsuccessful litigant, will be condemned in costs. *Hyde* v. *Hyde*, 59 L. T. 523.

—— **Notice of Application.**] — Where on a husband's petition for divorce, application was made to condemn the wife, who had not appeared to defend the suit, in costs, the court declined to entertain the application until she had received notice of it. *Field* v. *Field*, 13 P. D. 23; 58 L. T. 90; 36 W. R. 720; 52 J. P. 56.

Husband's getting Leave to Sue in formâ pauperis—Wife's Costs.]—Upon a husband's petition for divorce, the solicitor for the wife incurred costs which were taxed, and ordered to be paid; but after the pleadings were closed, and before the cause was set down, the petitioner, without paying them, applied for and obtained leave to proceed in formâ pauperis. The wife's solicitor thereupon took out a summons before the judge in chambers, calling upon the petitioner to show cause why further proceedings should not be stayed by reason of the petitioner not having complied with the order dated February 8, 1897, for payment of 20*l.* 11*s.* 6*d.* for the respondent's taxed costs. The registrar who taxed the bill had refused to order a stay of proceedings in the event of the amount not being paid by the petitioner. The judge ordered proceedings to be stayed until payment of the wife's taxed costs. *Joseph* v. *Joseph and Burnhill*, 76 L. T. 236. *And see* where queen's proctor intervenes, *White* v. *White*, [1898] P. 124.

Duty of Wife's Solicitor.] — In a suit by

a husband for divorce on the ground of his wife's adultery, the wife in her answer denied the adultery, and made counter-charges that the petitioner had been guilty of great unkindness towards her, and had kept her without food, and had deserted her; and further, that he had committed adultery with a woman unknown. Particulars of this last plea were asked for and given. The petitioner, in his reply, denied the counter-charges. At the hearing, the wife did not go into the witness-box, and the court found for the petitioner upon all the issues and pronounced a decree nisi. Upon application by counsel for the respondent that she should be allowed the usual order for her costs, the learned judge expressed the opinion that, as the case was undefended, no such costs ought to be allowed without an explanation from the solicitor as to how he came to put an answer upon the record, and to contest the case at all. Counsel for the respondent thereupon called the country solicitor who had acted as solicitor for the respondent, and he stated, in effect, that the respondent brought him the petition and citation with which she had been served, and asked him to act for her; that she instructed him that the charge made against her in the petition was untrue, but that she had been requested to leave the house where she had been staying. The solicitor saw the respondent's sister, in reference to the counter-charges of unkindness and desertion, and both she and the respondent asserted that no misconduct had taken place prior to the alleged desertion. He did not make inquiries of the people at the house where the respondent had resided apart from her husband, as he gathered that the latter had received his information from those people, and that as they were hostile to the respondent, and one or more of them would probably be called at the hearing in support of the petitioner's case, anything that they might be able to say in regard to the respondent had better be left to be dealt with in cross-examination. The solicitor further stated that this was the first divorce case in which he had been retained, and that he had acted throughout with bona fides:—Held, that to warrant a petitioner (husband) in opposing, and the court in refusing, the usual order for a wife's costs, it is not necessary to show "misconduct" on the part of the wife's solicitor. Held, further, that a solicitor acting for the wife in a matrimonial case is not entitled to rely upon his client's instructions, but, in order to entitle him to look to the husband for payment of the wife's costs, he must fairly investigate for himself the various points put forward by the wife as a defence, and must satisfy himself in regard to their reasonableness. Held, that the usual order for wife's costs be refused, and that the amount in court be paid out to the petitioner. *Walker* v. *Walker and Lawson*, 76 L. T. 234. *And see* col. 957.

Husband Dead—Order against Executors.]—Where a husband, respondent in divorce proceedings, died on the eve of the trial, an order for the wife's costs, limited to the amount lodged in court, was afterwards made against the husband's executors, to whom leave was given to attend the taxation. *Cunningham* v. *Cunningham*, 77 L. T. 405.

iv. *Of Co-Respondent.*

See Divorce Rules, 1875, rr. 199—201.

Dismissal of Petition.]—In a suit by a husband for dissolution of marriage, the co-respondent appeared, but filed no answer. Upon a motion by the petitioner for the dismissal of the petition, as against the co-respondent, on the ground that there was no evidence against him:—Held, that the application could only be granted upon payment of the co-respondent's costs. *Smith* v. *Smith and Millet*, 34 L. J., Mat. 11.

Where the jury was discharged without giving a verdict, and the petitioner did not proceed to a second trial, but allowed his petition to be dismissed, the court, under the peculiar circumstances of the case, declined to order him to pay the co-respondent's costs. *Bancroft* v. *Bancroft and Rumney*, 34 L. J., Mat. 144.

In a suit by a husband for dissolution, the jury was discharged without giving a verdict; the petitioner did not go to a second trial, and the petition was dismissed. There was no evidence connecting the co-respondent with the respondent, except that of two witnesses, who swore to acts of adultery, but whose evidence did not satisfy the jury that adultery had been committed. The court condemned the petitioner in the co-respondent's costs. *Whitmore* v. *Whitmore and Brettell*; 35 L. J., Mat. 32; L. R. 1 P. 25.

Verdict — Second Trial.] — On the trial of the issues in a husband's suit for dissolution of marriage, no witnesses were called by the respondent or the co-respondent; and the jury being unable to agree, was discharged without giving a verdict. When the issues came on for trial a second time, witnesses were called by the co-respondent, and the jury found a verdict of not guilty. The court refused to condemn the petitioner in the co-respondent's costs of the first trial. *Wight* v. *Wight and Field*, 36 L. J., Mat. 129; L. R. 1 P. 368; 16 L. T. 300.

The insertion in a petition of a claim for damages does not deprive the court of the power to make such order as to costs as may seem just, given by 20 & 21 Vict. c. 85, s. 51. *West* v. *West and Parker*, 40 L. J., Mat. 11; L. R. 2 P. 196; 23 L. T. 786; 49 W. R. 392.

On a trial of an issue of adultery the alleged adulterer was called as a witness, and simply denied the charge without entering into any details or offering any explanation of his conduct. The jury was unable to agree upon their verdict, and the issue was tried a second time. On the second trial the alleged adulterer was again examined, and, besides denying the adultery, entered into full details and explained his conduct. The jury found that he was not guilty of the charge. The court refused to condemn the husband in his costs, on the ground that by his suspicious conduct and by his reticence on the first trial he had contributed to put the husband to the expense of a second trial. *Ib.*

Guilty of Imprudent Conduct.] — When the co-respondent has acted with imprudence with a person whom he knew to be a married woman, the court will leave him to pay his own costs. *Carstairs* v. *Carstairs and Dickenson*, 3 Sw. & Tr. 538.

The jury found that the respondent had been guilty of adultery, but that there was not sufficient evidence against the co-respondent. The

co-respondent's conduct having been such as to lead to a reasonable suspicion in the mind of the petitioner that he had been guilty of adultery, the court refused to allow him his costs. *Robinson* v. *Robinson and Gamble*, 32 L. J., Mat. 210.

When an improper intimacy had been carried on between a co-respondent and the respondent, the co-respondent was ordered to pay his own costs, although there was no evidence of adultery, and the petition was dismissed. *Winscom* v. *Winscom and Plowden*, 3 Sw. & Tr. 380; 33 L. J., Mat. 45; 10 Jur. (N.S.) 321; 10 L. T. 100; 12 W. R. 535.

Proof of Charges against Respondent.]—A husband petitioned for a dissolution of his marriage on the ground of the adultery of his wife with the co-respondent, which on the hearing was proved; but, in addition, the co-respondent also proved that the petitioner had himself been guilty of incestuous adultery; the petition was dismissed:—Held, that although the co-respondent was liable for the costs of proving the wife's adultery, he was entitled to be paid the costs of the issue against the husband on which he had succeeded. *Conradi* v. *Conradi and Flashman*, 35 L. J., Mat. 49; L. R. 1 P. 63; 14 L. T. 170; 14 W. R. 589.

Connivance by Petitioner.]—In a suit for dissolution of marriage, tried before the judge ordinary and a common jury, the latter found that the respondent and co-respondent had committed adultery together, that the petitioner had condoned such adultery, and, further, that the petitioner had connived at his wife's adultery with another person, and they assessed the damages at one farthing. The court dismissed the petition, and ordered the petitioner to pay the costs of the respondent and of the co-respondent. *Adams* v. *Adams and Colter*, 36 L. J., Mat. 62; L. R. 1 P. 333; 16 L. T. 69.

Decree Nisi reversed on Queen's Proctor Intervening.]—It was proved that after marriage the husband had led a profligate life:—Held, decree to be reversed, including that part of it which condemned the co-respondent in costs. *Ravenscroft* v. *Ravenscroft*, 41 L. J., Mat. 28; L. R. 2 P. 376; 26 L. T. 265; 20 W. R. 448. And see *Hechler* v. *Hechler*, col. 895.

Taxation after Ten Years] — A decree nisi was pronounced in a suit for dissolution with costs against the co-respondent, in July, 1886, but the costs were not taxed till February, 1897. The divorce court rules are silent as to the course to be adopted in such a case. By Ord. XLII. of the rules of the supreme court, r. 23 (which is not applicable to a divorce proceeding), if no step has been taken to enforce a judgment for six years leave must be obtained from the court or a judge to do so. In the present case the petitioner applied to the court (following the practice under Ord. XLII., r. 23) for an order for the co-respondent to pay the taxed costs and for leave to issue execution. The court granted the application, intimating that the proper course had been taken, but, under the special circumstances of the case, ordered that execution should not be levied for three months. *Goodwin* v. *Goodwin and Arnold*, 66 L. J., P. 107; [1897] P. 87; 45 W. R. 656.

Queen's Proctor — Unsuccessful Intervention.] — The court refused to condemn a co-respondent, who had not been dismissed from the suit, in the costs of an unsuccessful intervention by the queen's proctor under 23 & 24 Vict. c. 144, s. 7. *Blackhall* v. *Blackhall*, 57 L. J., P. 60; 13 P. D. 94; 59 L. T. 151; 36 W. R. 926.

Security for Costs.]—In a petition for dissolution of marriage, the husband, who was an uncertificated bankrupt, claimed damages. Upon application by the co-respondent:—Held, that unless the claim for damages was withdrawn the petitioner must give security for the costs of the action. *Smith* v. *Smith and Palk*, 7 P. D. 227; 47 L. T. 355; 31 W. R. 124.

v. *Against Co-Respondent.*

When Allowed.]—The court may order the costs of the proceedings to be paid by a co-respondent where the adultery is established, although the petitioner may not have prayed for such costs. *Finlay* v. *Finlay and Rudall*, 30 L. J., Mat. 104. S. P., *Goldsmith* v. *Goldsmith, Dalrymple and Woolay*, 31 L. J., Mat. 163.

Wife's costs may be taxed by petitioning husband against co-respondent, though they could not against husband, as where wife's solicitors ought to have known her guilty. *Townson* v. *Townson*, 78 L. T. 54.

A co-respondent having put in no answer is not entitled to be heard on the question of costs. *Tourle* v. *Tourle*, 1 Sw. & Tr. 176.

—— **Adultery of Petitioner after Decree Nisi.**]—No ground for reversing a decree condemning the co-respondent in costs. *Hulse* v. *Hulse and Tavernor*, 41 L. J., Mat. 19; L. R. 2 P. 357; 25 L. T. 764; 20 W. R. 447.

—— **Knowledge that Respondent was Married.**]—The court will not condemn a co-respondent in costs where it is not proved that at the time his connection with the wife commenced he knew she was a married woman. *Priske* v. *Priske and Golby*, 29 L. J., Mat. 195. And see *Teagle* v. *Teagle and Nottingham*, 1 Sw. & Tr. 188; 27 L. J., P. 55; 6 W. R. 736. *Ling* v. *Ling*, 1 Sw. & Tr. 187; 27 L. J., P. 58; 6 W. R. 736. *Boddington* v. *Boddington*, 27 L. J., P. 53.

But costs were given against the co-respondent, who knew that the respondent was a married woman, though the husband's conduct towards his wife was remiss. *Badcock* v. *Badcock*, 1 Sw. & Tr. 188; 6 W. R. 737.

A co-respondent appeared and denied the charge of adultery, and alleged condonation and adultery on the part of the petitioner. There was evidence that the respondent and co-respondent had on several occasions cohabited, and that she became pregnant in consequence; but there was no evidence that the co-respondent had been aware that she was married. The evidence in support of the co-respondent's plea of condonation and the counter-charge of adultery was very insufficient. The court granted a decree nisi, refusing to condemn the co-respondent in the costs of the issue of his adultery with the co-respondent, but condemned him in the costs of the issues raised by his other pleas. *Howe* v. *Howe*, 15 W. R. 498.

At the time when the co-respondent first became improperly intimate with the respondent he was not aware that she was a married woman. Within about a month after the first act of adultery he had reason to believe that she was a married woman. He still continued the adulterous intercourse:—Held, that costs could not

be ordered against the co-respondent. *Newby* v. *Newby*, 77 L. T. 142.

When a petitioner had lived separately from the respondent for several years in consequence of her intemperance, and during the separation and prior to the adultery proved she had been leading an abandoned life, the court, notwithstanding that the co-respondent must have known that the respondent, when he committed the adultery, was a married woman, refused to condemn him in costs. *Nelson* v. *Nelson and Howson*, L. R. 1 P. 510.

The exercise of the discretion as to costs vested in the court depends upon the opinion of the court as to the conduct of all the parties in each case; and even if it is proved that the co-respondent knew the respondent to be a married woman when the adultery was committed, it does not necessarily follow that he will be condemned in the whole of the costs. *Codrington* v. *Codrington and Anderson*, 4 Sw. & Tr. 63; 34 L. J., Mat. 60; 11 Jur. (N.S.) 286; 13 W. R. 527.

When a respondent in her answer charged the petitioner with wilful neglect and misconduct, and that charge was negatived by the verdict of the jury, and a decree was granted on the ground of her adultery with the co-respondent and with another person who was not a party to the suit, the court, being of opinion that the conduct of the petitioner had been such as to invite reasonable challenge, refused to condemn the co-respondent in the whole of the costs of the suit, and condemned him in those costs only which had been incurred in proving the respondent's adultery with him. *Ib.*

Where a wife, who had been a prostitute before marriage, left her husband in Australia without his consent and against his wishes, and on arriving in England commenced an adulterous intercourse with the co-respondent, with whom she had had an immoral intimacy previous to her marriage: and the co-respondent did not know that the respondent was a married woman until a week after their second intimacy had commenced, but after he was made aware of her marriage continued to cohabit with her, his alleged reason for doing so being that she received no support from her husband, and unless he (the co-respondent) had supported her, she would have been driven back to a life of prostitution:—The court, under the circumstances, refused to condemn the co-respondent in costs, although the petitioner had done his best to prevent his wife from coming home from Australia, and was not in a position to make her an allowance whilst living apart from him. *Learmouth* v. *Learmouth*, 59 L. J., P. 14; 62 L. T. 608.

Misconduct on Part of Husband.]—Where a wife's conduct has been profligate, and that to the husband's knowledge, before the adultery committed with the co-respondent, the latter will not be liable to costs. *Boyd* v. *Boyd and Collins*, 1 Sw. & Tr. 562; 29 L. J., P. 79; 6 Jur. (N.S.) 56; 1 L. T. 243; 8 W. R. 160.

Where the adultery of the wife is proved, but the petition is dismissed on account of the husband's marital misconduct, the co-respondent will not be condemned in costs, nor will he be allowed his costs. *Seddon* v. *Seddon*, 2 Sw. & Tr. 640; 31 L. J., Mat. 101; 7 L. T. 253.

Where damages were claimed from a co-respondent, and it appeared that the respondent was leading an abandoned life when the co-respondent made her acquaintance, and there was evidence raising a strong suspicion that the petitioner must have been aware of that fact:—Held, that the co-respondent ought not to be condemned in costs, on the ground that the claim for damages was under the circumstances improper. *Manton* v. *Manton and Stevens*, 4 Sw. & Tr. 159; 34 L. J., Mat. 121; 11 Jur. (N.S.) 863.

A co-respondent found to have been guilty of adultery is not, as a matter of course, relieved from payment of the costs of that issue, merely by reason of the husband having been guilty of such adultery as to induce the court to dismiss the petition. *Bremner* v. *Bremner and Brett*, 3 Sw. & Tr. 378; 33 L. J., Mat. 202; 10 L. T. 99; 12 W. R. 444.

Co-respondent liable for Costs of Apportionment of Damages paid into Court.]—Where a co-respondent has been condemned in the costs of a suit for dissolution, he is liable for the costs of and incident to proceedings before the registrar for the apportionment and settlement of such damages. *Irwin* v. *Irwin*, 59 L. J., P. 53; 62 L. T. 612.

Petition Dismissed—Co-Respondent Guilty.]—If a petition against a wife is dismissed on any grounds, she will be entitled to her full costs; and even although the adultery with the co-respondent is proved, he, the co-respondent, will not be liable to costs under these circumstances. *Goode* v. *Goode and Hanson*, 30 L. J., Mat. 105; 7 Jur. (N.S.) 317. S. P., *Starkey* v. *Starkey*, 30 L. J. Mat. 118.

No Appearance on part of Wife—Verdict against Co-Respondent—Wife held not guilty of Adultery charged.]—In a suit for dissolution of marriage instituted by a husband on the ground of his wife's adultery with the co-respondent, the respondent did not appear, and the jury found a verdict against the co-respondent with 50*l.* damages; the issue of the wife's adultery being for the court, the court found that she had not committed adultery, the connection having been against her will, and dismissed the petition, but gave judgment against the co-respondent for the damages and costs. *Long* v. *Long*, 60 L. J., P. 27; 15 P. D. 218.

Petitioner and Co-Respondent charged with Collusion—Queen's Proctor.]—Where a decree of dissolution of marriage had been pronounced on a husband's petition, and the queen's proctor afterwards intervened and charged both the petitioner and co-respondent with collusion and conspiracy, the court, having found all the issues in favour of the queen's proctor, condemned the co-respondent in the costs of the queen's proctor's intervention, although the co-respondent did not appear upon such intervention. *Blackhall* v. *Blackhall* (13 P. D. 94) distinguished. *Taplin* v. *Taplin*, 60 L. J., P. 88; [1891] P. 283; 64 L. T. 870.

Order for Payment—"Final Judgment"—Decree for Dissolution of Marriage.]—After a decree for a dissolution of marriage an order made by the court upon the co-respondent to pay the petitioner's costs is not a "final judgment" within sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883; a bankruptcy notice cannot therefore be issued against the co-respondent in respect of such an order. *Dale, Ex parte*,

Binstead, In re, 62 L. J., Q. B. 207; [1893] 1 Q. B. 199; 4 R. 146; 68 L. T. 31; 41 W. R. 452; 9 Morrell, 319—C. A.

Death of Co-Respondent before Payment—Petitioner appointed Receiver.]—In a petition by a husband for divorce, a decree absolute had been pronounced and the co-respondent condemned in the costs of the petition. An arrangement was subsequently made by which the co-respondent undertook to pay the amount of the costs by instalments; but he died intestate before the whole of such instalments had been paid. Immediately after his death an order was made restraining his widow from dealing with his estate. The court, under Ord. XVII., r. 4, and Ord. XLII., r. 28, appointed the petitioner receiver of the co-respondent's estate, but directed that the order should not be drawn up for a week, in order that the widow of the co-respondent might decide whether she would take out administration and give security for the debt. *Waddell* v. *Waddell*, 61 L. J., P. 110; [1892] P. 226; 67 L. T. 389.

What Costs.]—On a petition for dissolution of marriage the court, if the adultery is proved, has power to order all the costs of the proceedings to be paid by the co-respondent, although the court does not decree dissolution of the marriage. *Forster* v. *Forster and Berridge, In re*, 3 Sw. & Tr. 144; 10 Jur. (N.S.) 254.

The question of costs is in the discretion of the court in the circumstances of each case; and where the petitioner obtained a verdict, establishing—first, the adultery of the respondent and co-respondent; secondly, the adultery of the respondent with a person other than the co-respondent; and, thirdly, the petitioner's innocence of the charge brought against him by the respondent—the judge, in the circumstances of the case, refused to condemn the co-respondent in costs other than those occasioned by the issue of adultery raised by his answer, and found against him. *Codrington* v. *Codrington and Anderson*, 4 Sw. & Tr. 63; 34 L. J. Mat. 60; 11 Jur. (N.S.) 286; 13 W. R. 527.

Intervention of Queen's Proctor.]—As a general rule, when a dissolution of marriage is decreed on the ground of a wife's adultery, the co-respondent will be condemned in all the costs, as well those of the respondent as those of the petitioner. *Evans* v. *Evans and Robinson*, 1 Sw. & Tr. 328; 28 L. J., Mat. 136; 5 Jur. (N.S.) 606; 7 W. R. 181.

At the hearing the adultery of the respondent with the co-respondent was proved, but as the adultery of the petitioner was also proved, the petition was dismissed, and an order made condemning the co-respondent in the costs incurred by the petitioner in proving his adultery with the respondent:—Held, that this order comprised all the expenses incidental to the filing and prosecution of the petition so far as they related to the adultery of the co-respondent. *Baker* v. *Baker*, 36 L. J., Mat. 119; and see *Hechler* v. *Hechler*, 58 L. J., P. 27.

—— **Of First Trial.**]—A jury being unable to agree, was discharged without giving a verdict, and a decree was pronounced, condemning the co-respondent in costs, but the court refused to include in these costs the costs of the first trial. *Wood* v. *Wood and Stanger*, 37 L. J., Mat. 25; L. R. 1 P. 467.

—— **Of Application to Deal with Settlements.**]—A co-respondent is liable to costs of a successful application to deal with property under settlement, but if part of such an application fails, and the costs of that part can be separated from the other costs, they ought not to be thrown on the co-respondent. *Stone* v. *Stone and Brownrigg*, 10 L. T. 140.

When a co-respondent is condemned in costs, he is liable for the costs of the petitioner and respondent incurred in obtaining an alteration of a marriage settlement. *Gill* v. *Gill and Hogg*, 10 L. T. 137. And other references, cols. 107, 265.

vi. *Of Queen's Proctor and other Interveners.*

Entitled to, on proving Collusion.]—The right of the queen's proctor to costs, under 23 & 24 Vict. c. 144, s. 7, is confined to cases of collusion. *Lautour* v. *Queen's Proctor*, 10 H. L. Cas. 685; 33 L. J., Mat. 89; 10 Jur. (N.S.) 325; 10 L. T. 611; 12 W. R. 611.

Though the queen's proctor may fail to establish a charge of collusion, the court will not order the costs to be paid by the crown if the petitioner's conduct has been such as to justify the intervention. *Jessop* v. *Jessop*, 2 Sw. & Tr. 301; 30 L. J., Mat. 193; 7 Jur. (N.S.) 609.

The queen's proctor intervened in a suit for dissolution of marriage and pleaded, charging the petitioner with adultery and collusion. The petitioner traversed both charges, but before the issues were tried moved the court to dismiss the petition. The queen's proctor not consenting, the court rejected the motion on the ground that the queen's proctor would be entitled to his costs if he established collusion. *Joyce* v. *Joyce*, 33 L. J., Mat. 200.

Where the queen's proctor intervened and charged collusion, that material facts had not been brought before the court, and that the petitioner had been guilty of adultery, and at the hearing established the first two charges and abandoned the last, the court refused to condemn the petitioner in costs, on the ground that he had been put to great expense in preparing to defend the charge of adultery. *Barnes* v. *Barnes, and Grimwade*, 37 L. J., Mat. 4; L. R. 1 P. 505; 17 L. T. 286; 16 W. R. 281.

Pauper Petitioner.]—Costs will be given the queen's proctor against an unsuccessful pauper petitioner. *White* v. *White*, [1898] 1 P. 124.

Unsuccessful Intervention.]—On motion to make decree nisi absolute, the queen's proctor intervened, but the court made the decree absolute, and made no order as to the queen's proctor's costs. *Cox* v. *Cox*, 2 Sw. & Tr. 306; 30 L. J., Mat. 255; 4 L. T. 450; 9 W. R. 924.

The court has no power to condemn the queen's proctor in the costs of an unsuccessful intervention under 23 & 24 Vict. c. 114, s. 7. *Wilson* v. *Wilson*, L. R. 1 P. 180; 14 L. T. 674; 15 W. R. 22. S. P., *Rogers* v. *Rogers*, 31 L. J., P. 101; *Gray* v. *Gray*, 2 Sw. & Tr. 554; 31 L. J., P. 83; 6 L. T. 336; 10 W. R. 863.

Not Appearing in his Official Capacity.]—When the queen's proctor does not intervene in his official capacity, but appears as one of the public, the court has no authority to award to him his costs. *Bowen* v. *Bowen and Evans*, 3 Sw. & Tr. 530; 33 L. J., Mat. 129; 13 W. R. 109.

How provided for when Suit Abandoned.]—When a decree nisi is pronounced, and upon the intervention of the queen's proctor, the decree absolute is abandoned, and also the suit, and there is no answer by the petitioner to the queen's proctor's plea, or payment of the costs of the suit, the court will order it to be placed in the reserved list until payment of the queen's proctor's costs. *Collins* v. *Collins and Smith*, 44 L. T. 31. *And see* col. 892.

Of other Interveners.]—After a decree nisi for a dissolution of marriage, affidavits were filed by a private individual, setting out facts to induce the court not to make the decree absolute. At the last moment the intervener withdrew his opposition, and the decree was made absolute:—Held, that the court has no power to condemn an intervener in the costs of his intervention. *Vivian* v. *Vivian and Waterford (Marquis)*, 39 L. J., Mat. 54; L. R. 2 P. 100; 23 L. T. 267; 18 W. R. 936.

As to Payment out of Wife's Costs Pending Intervention.]—*See* col. 965.

vii. *Other Matters relating thereto.*

Of Motions.]—The costs of a party's appearance on a motion will not be allowed if such appearance is unnecessary, although he may have received notice to appear from the opposite side. *Frebout* v. *Frebout and Penny*, 30 L. J., Mat. 214.

When two separate motions were made on the same day for an attachment against a husband, the one for non-payment of costs, and the other for non-payment of alimony, the court in granting an attachment, allowed the costs of only one motion. *Watts* v. *Watts*, 4 Sw. & Tr. 274: 31 L. J., Mat. 29.

When an order for particulars of charges of adultery is obtained upon motion in court instead of by summons in chambers, the extra costs thus occasioned will not be allowed. *Higgs* v. *Higgs and Hopkins*, 32 L. J., P. 64; 11 W. R. 154.

Review of Taxation.]—The proper mode of reviewing a taxation of costs is by moving for a rule to show cause why the taxation should not be reviewed, and not by act on petition. *Dickens* v. *Dickens*, 28 L. J., Mat. 94.

The court will not interfere with the discretion of the registrar in respect of particular items allowed or disallowed on taxation, unless it can be shown that the taxation proceeded on an erroneous principle. *Cooke* v. *Cooke*, 3 Sw. & Tr. 374; 33 L. J., Mat. 79; 10 L. T. 141.

Remedy for Costs.]—The provisions, relating to costs, maintained in the Matrimonial Causes Acts, 1857 and 1858, and the Rules of Court, 1866, made under those acts, provide a remedy for the recovery of costs concurrently with, and not in substitution for, the provisions of the common law. *Ottaway* v. *Hamilton*, 47 L. J., C. P. 725; 3 C. P. D. 393; 38 L. T. 925; 26 W. R. 783—C. A.

Enforcing Payment—Death of Petitioner.]—After a decree absolute had been made for a dissolution of his marriage with his wife, together with an order for costs against the co-respondent, but before such costs had been taxed, the husband died:—Held, that his representative was entitled, under 33 & 34 Vict. c. 28, s. 19, to enforce such order for costs against the co-respondent. *Hawks* v. *Hawks* or *Hawkes* v. *Hawkes and Fenwick*, 45 L. J., P. 41; 1 P. D. 137; 34 L. T. 659; 24 W. R. 489.

By Attachment.]—An omission to indorse on a writ of attachment for non-payment of costs the amount of the costs, is a mere irregularity, which will be waived by delay in applying to the court to set aside the writ. *Pearson* v. *Pearson*, 2 Sw. & Tr. 546; 31 L. J., Mat. 102; 8 Jur. (N.S.) 158; 5 L. T. 772; 10 W. R. 410.

The court will not grant an attachment for non-payment of costs unless the original order for payment has been served upon the party liable by showing the same to him. *Davies* v. *Davies and Dalby*, 3 Sw. & Tr. 437; 31 L. J., Mat. 104; 6 L. T. 163; 10 W. R. 447. S. P., *Parr* v. *Parr and White*, 32 L. J., Mat. 90; 11 W. R. 550.

Where an original order has been filed in the registry, the court, upon an affidavit of facts, will direct it to be delivered out for the purpose of service. *Ib.*

The court granted an attachment for non-payment of costs, after substituted service of the order for payment. *Miller* v. *Miller and Hicks*, 31 L. J., Mat. 165.

An attachment will not be granted for non-payment of costs pursuant to an order, unless a copy of the order is annexed to the affidavit of service. *Busby* v. *Busby*, 2 S. & T. 383; 30 L. J., Mat. 172; 5 L. T. 137.

After a decree for dissolution of marriage with costs against the co-respondent, and an order for the payment of such costs, an attachment was issued against the co-respondent for non-payment. The person who had been cited and served with the process and notices as the co-respondent throughout the suit, moved to set aside the attachment on the ground that his surname was misspelt, and one of his christian names omitted in the citation, and process, and notices:—Held, that the co-respondent having taken no step to set the mistake right in the course of the suit, could not at the last moment take advantage of it to invalidate the proceedings, and that the order for an attachment must stand. *Churchill* v. *Churchill and Abbott*, 37 L. J., Mat. 41; L. R. 1 P. 485; 17 L. T. 619.

—— **Cross-examination as to Means.**]— In a husband's suit for divorce, where the wife in her answer also prayed for a dissolution of the marriage, the husband had been ordered to deposit in the registry, or to give security for, 80*l.*, to cover the wife's costs of the hearing. On his neglecting to comply with the order, the court declined to issue a writ of attachment against him, but ordered him to attend to be cross-examined as to his means. *Sullivan* v. *Sullivan, Lehay, Madden and Slaney*, 33 L. T. 706.

—— **Party already in Custody.**]—Where a party is in custody under an attachment for non-payment of costs, and it is desired to charge a second attachment, the court, in accordance with the practice of the court of chancery, will, upon motion, direct a writ of habeas to issue to the person having custody of the party; and, on the appearance of such party, he will be charged with the second attachment. *Dickens* v. *Dickens*, 2 Sw. & Tr. 521; 31 L. J., Mat. 59; 6 L. T. 659; 10 W. R. 810.

—— **Enforcing Decree against Married Women.**]—Where the court had condemned defendants in costs and had made an order upon them for the payment, it refused to direct an attachment to issue against them for non-compliance with that order, on their stating that they were married women and had no separate property. *Harris* v. *Bradbury*, 2 Sw. & Tr. 459; 31 L. J., Mat. 86; 6 L. T. 163; 10 W. R. 447.

By Ca. Sa.]—The court has no power to direct a ca. sa. to issue for costs, a ca. sa. not being a process used in the court of chancery. *Hearne* v. *Hearne*, 29 L. J., Mat. 158, n.

By Sequestration.]—A sequestration having been issued against the estate of M., who was a plaintiff in an action in which he had recovered 65*l.* 5*s.* and costs, the court ordered the solicitor for the defendant in that action to pay that sum into the registry, not to be paid out until further order; the solicitor to have notice of any application respecting it, so that he might enforce his lien for any extra costs to which he might be entitled, and to be indemnified against costs which he might incur in enforcing his lien beyond the amount of the fund. *Munt* v. *Munt*, 2 Sw. & Tr. 661; 31 L. J., Mat. 134; 7 L. T. 438.

By other Means.]—Where a party to a suit had failed to obey an order for the payment of costs, the court will not upon his application give judgment until the costs are paid, or a valid reason for their non-payment given. *Chichester* v. *Mure*, 32 L. J., Mat. 120; 11 W. R. 686.

In taxing costs incurred by a wife in a proceeding against her husband, the registrar will satisfy himself whether the attorney for the wife had or had not reasonable grounds for bringing the several matters pleaded before the court. If he had, he will be allowed all proper costs of proving such matters, even although the decision of the court on some of them may be against the wife. *Allen* v. *Allen and D'Arcy*, 2 Sw. & Tr. 107; 30 L. J., Mat. 9; 7 Jur. (N.S.) 103; 3 L. T. 480; 9 W. R. 389.

The principle of taxation of costs in matrimonial suits is as between party and party, but not as between party and party in the common law courts. The costs of issues found against the wife will not be allowed her unless they have been vexatiously and improperly put upon the record. *Ib.*

The number of witnesses whose expenses are to be allowed, is a question for the discretion of the registrar, who should allow the expenses of such as there was reasonable ground for calling or subpœnaing. *Ib.*

The reasonable expenses of journeys and inquiries taken and instituted for the purpose of procuring information should also be allowed. *Ib.*

For further Time to Answer.]—Costs of an application for further time to answer on behalf of a wife will, as a general rule, not be taxed against the husband. Nor costs of a motion for the husband to attend and be examined on the wife's petition for alimony, and his answer on oath thereto, where the result of his examination is to establish the truth of his answer on oath. *Harding* v. *Harding and Lance*, 2 Sw. & Tr. 549; 31 L. J., Mat. 76; 6 L. T. 692; 10 W. R. 811.

Special Jury.]—Semble, that when, upon the application of a wife, a cause is tried by a special jury, the court may, in its discretion, refuse to allow the wife the costs of the special jury. *Scott* v. *Scott*, 32 L. J., Mat. 40.

For further Particulars.]—Costs of an unsuccessful opposition by a wife to a motion for further particulars of the charges in her petition for dissolution of marriage against her husband will not be allowed her. *Hepworth* v. *Hepworth*, 30 L. J., Mat. 253.

Previous to Commencement of Suit—Professional Attendances.]—An order having been made, during the progress of a suit for judicial separation by a wife, that her costs should be taxed, as against the husband, the registrar disallowed, first, all charges incurred previously to the commencement of the suit; and secondly, charges for attendances by the solicitor on her father, alleged to have been necessary in consequence of her illness:—Held, that this taxation was right, inasmuch as by the practice of the ecclesiastical courts charges incurred before the commencement of the proceedings and attendances of a proctor, unless on his client personally, were never allowed as between party and party. *Dickens* v. *Dickens*, 2 Sw. & Tr. 103; 28 L. J., Mat. 94.

Counsel's Fees.]—Term refresher fees will be allowed. *Stoate* v. *Stoate*, 30 L. J., Mat. 214.

The fee of counsel for advising on the sufficiency of an answer, which is special, and not a mere traverse of the allegations in a wife's petition, will be allowed. *Hepworth* v. *Hepworth*, 30 L. J., Mat. 253.

When an application is made in court which might have been made in chambers, the applicant, if successful, is only entitled to such costs as would have been incurred in chambers. *Higgs* v. *Higgs and Hopkins*, 32 L. J., Mat. 64; 11 W. R. 154.

Husband not Appearing.]—In a suit for dissolution of marriage, the husband, having no defence, did not enter an appearance, and a decree nisi was made against him. The court gave him permission to attend before the registrar on the taxation of his wife's costs. *Letts* v. *Letts*, L. R. 2 P. 16.

Poverty of Husband.]—The court will make an order for the taxation and payment of a wife's costs against the husband, notwithstanding his apparent inability to pay them. *Ward* v. *Ward*, 1 Sw. & Tr. 484; 29 L. J., Mat. 17.

The inability of a husband to deposit in the registry, or give security for a sum of money to defray the wife's costs of the hearing pursuant to order, is no ground for refusing an attachment against him for non-compliance with the order. *Hepworth* v. *Hepworth*, 2 Sw. & Tr. 414; 31 L. J., Mat. 18; 5 L. T. 365; 10 W. R. 195.

Subsequent Bankruptcy of Husband.]—Where an order was made that the suit be stayed until the wife's costs were paid, the court held that the subsequent bankruptcy of the petitioner did not cancel or vacate it, and refused to allow the petition to be heard until the respondent was put in a position to defend herself. *Morris* v. *Morris and Morris*, 15 L. T. 545.

To Wife's Proctor.] — The court made an order for payment of a wife's costs to her proctor, in a suit for judicial separation. *Thomas* v. *Thomas*, 2 Sw. & Tr. 64; 2 L. T. 390; 8 W. R. 476.

A demand for payment of costs having been personally made on the respondent by a person on behalf of the petitioner's proctor, a receipt for the costs, signed by the proctor, being at the same time shewn to the respondent, is sufficient to found an order for an attachment. *Ib.*

Staying Proceedings for Non-Payment.]—A wife having obtained an order upon her husband to pay to her or her attorney a certain amount of taxed costs, endeavoured to enforce such order by a fi. fa., but failed in recovering them. The court ordered the proceedings in the divorce suit to be stayed until the taxed costs had been paid by the husband, but would not extend the order to the expenses incurred in the suing out and execution of the fi. fa. *Keane* v. *Keane*, 42 L. J., Mat. 12; L. R. 3 P. 52; 27 L. T. 768; 21 W. R. 248.

When the husband is petitioner, and does not comply with an order to give security, the court will stay the suit. *Hepworth* v. *Hepworth*, supra.

Where a husband had paid a sum into the registry to meet the wife's costs of the hearing of the petition, and had died shortly before the time appointed for the hearing, the court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors, and the payment to them of such taxed costs out of the fund in the registry, with leave to the solicitors of the husband's executor to attend the taxation. *Hall* v. *Hall*, 3 Sw. & Tr. 390.

A wife having established a good defence in law to her husband's petition, will be entitled to have her costs taxed against him, though she may have omitted to take the precaution of having a sum of money paid into court, or security given to meet her costs of the hearing. *Ellyatt* v. *Ellyatt, Taylor and Halse*, 3 Sw. & Tr. 504; 33 L. J., Mat. 137; 10 Jur. (N.S.) 1035; 11 L. T. 44.

Money paid into court by a husband petitioning for a dissolution of marriage to meet his wife's costs of the hearing, is primarily liable to the payment of those costs when taxed, although the co-respondent may have been condemned in all the costs, including those of the wife. And the husband may be unable to obtain them from him. *Evans* v. *Evans and Robinson*, 1 Sw. & Tr. 328; 28 L. J., Mat. 136; 5 Jur. (N.S.) 606; 7 W. R. 181.

In a suit by a wife for judicial separation, an application was made for an order for the payment by the respondent of the petitioner's taxed costs, incurred previously to the hearing, to her attorney. Affidavits were filed showing that the petitioner had been living in open adultery for several years before the petition was filed, and up to the date of the petition. The court, having reason to believe that the suit was not instituted bonâ fide, but for the purpose of obtaining costs from the husband, refused to make the usual order for the payment of costs to the petitioner's attorney, but directed that they should be paid into the registry to abide the event of the hearing. *Rogers* v. *Rogers*, 4 Sw. & Tr. 82; 34 L. J., Mat. 87; 12 L. T. 236; 13 W. R. 546.

Where there were cross-suits and the marriage was dissolved on the ground of the wife's adultery, the court held that the husband was not liable for the costs of the wife in her suit, inasmuch as she had not taken the ordinary steps to get them taxed previously to the final determination that she had been guilty of adultery. *Rolt* v. *Rolt*, 3 Sw. & Tr. 604; 34 L. J., Mat. 51.

The decree pronouncing her guilty of adultery should be pleaded to entitle the court to take notice of it. *Ib.*

In a suit by a husband for dissolution of marriage, a jury found that the wife had committed adultery. On a new trial, granted on the ground of surprise, the wife succeeded. The court being of opinion that the case was trumped up by the husband, condemned him in the wife's costs of both trials, and also in the costs of the rule for a new trial. *Nicholson* v. *Nicholson and Ratcliffe*, 33 L. J., Mat. 114.

In a suit by a wife for judicial separation on the ground of cruelty and incestuous adultery, the court being of opinion that there was no pretence for the charge, upon dismissing the petition refused to allow the wife her costs of the hearing, although security for them had been given. *Jones* v. *Jones*, 41 L. J., Mat. 21; L. R. 2 P. 333; 25 L. T. 856; 20 W. R. 303. Affirmed on appeal, 41 L. J., Mat. 53; 26 L. T. 106; 20 W. R. 449.

—— **Fresh Adultery.**] — Non-payment of the costs of a suit for dissolution of marriage, in which the husband, the petitioner, has failed, is not a ground for staying proceedings in a suit by him for dissolution on the ground of fresh adultery. *Yeatman* v. *Yeatman and Rummell*, 39 L. J., Mat. 37; 21 L. T. 647; 18 W. R. 232.

Where Part Allowed.]—In a suit for dissolution of marriage the wife, before the hearing, obtained the usual order for the taxation of the costs. The registrar made an appointment and found that her taxed costs, up to the date of the order, amounted to 9*l.* 11*s.* 6*d.*, and that 90*l.* would be a reasonable sum to be paid into the registry to cover her costs of the hearing, but he declined to make his report to that effect, as the petitioner's solicitor was not present, and he made a second appointment. In the interim the cause was heard, and the wife failed in the suit:—Held, that she was not entitled to the costs incurred before the date of the order, nor to the costs of the hearing. *Gough* v. *Gough and Baynton*, 33 L. J., Mat. 136.

At the hearing of a wife's petition for a dissolution of marriage, it was proved that the husband had committed adultery, that such adultery had been condoned, but that the right of the wife to complain was revived by subsequent cruelty. After the verdict was given, the wife elected to take a decree for judicial separation only, which was made, with costs generally against the husband. The wife was the only witness produced to prove the charge of cruelty. The court refused to order the registrar to review his taxation of costs, by disallowing all the charges therein as to the proof of adultery, but ordered that any costs consequent upon the wife's evidence, which would not have been admitted if she had prayed in the first instance for a judicial separation, should be struck out. *Dent* v. *Dent*, 35 L. J., Mat. 61; L. R. 1 P. 125; 14 L. T. 137; 14 W. R. 544.

Suit for Nullity.]—The wife's costs of the hearing of a suit of nullity, instituted by her on the ground of the husband's impotence, were ordered to be paid by the husband to the extent of the sum for which he had deposited security

in the registry, although the petition was dismissed. *Tavenor*, f. c. *Ditchfield* v. *Ditchfield*, 35 L. J., P. 51; L. R. 1 P. 127; 12 Jur. (N.S.) 344; 14 L. T. 227.

—— **Instituted by Father.**]—In a suit of nullity of marriage, instituted by the father against the husband and wife, the wife is not entitled to have her costs de die in diem taxed against the petitioner. *Wells* v. *Wells and Cottam*, f. c. *Wells*, 3 Sw. & Tr. 364; 33 L. J., Mat. 72; 10 Jur. (N.S.) 444; 10 L. T. 138; 12 W. R. 672.

Suit Instituted by Guardian.] — A guardian who institutes a suit on behalf of an infant husband for dissolution of marriage by reason of his wife's adultery will be ordered to pay into the registry, or give security for a sum to meet the wife's costs of the hearing. *Beavan* v. *Beavan*, 2 Sw. & Tr. 652; 31 L. J., Mat. 166; 8 Jur. (N.S.) 769; 7 L. T. 435.

"Costs of Suits."—On a compromise, "costs of suit" held not to include costs of execution of a separation deed part of the compromise. *Lancaster* v. *Lancaster*, col. 929.

III. SEPARATION DEEDS.

1. Validity of Stipulations Generally.

Agreement to Live Separately.]—An agreement by husband and wife to live separately is not contrary to public policy and may be specifically enforced whether executory or executed. *Wilson* v. *Wilson*, 1 H. L. Cas. 538; 12 Jur. 467. *But see* 5 H. L. Cas. 40; 23 L. J., Ch. 697. *Besant* v. *Wood*, 48 L. J., Ch. 497; 12 Ch. D. 605; 40 L. T. 445. *Hunt* v. *Hunt*, 31 L. J., Ch. 161; 8 Jur. (N.S.) 85; 5 L. T. 778; 10 W. R. 215.

The husband cannot set up adultery to avoid such agreement. *Scholey* v. *Goodman*, 8 Moore, 350; 1 Car. & P. 36.

An agreement between a husband and the father of his wife, on her behalf, executed also by the wife, that the husband and wife should live apart, and that the husband should execute, when required, a deed of separation, to contain all usual and proper clauses, and also to secure 40*l.* a year for the maintenance of his wife and child, decreed to be specifically performed. *Gibbs* v. *Harding*, 38 L. J., Ch. 604; L. R. 8 Eq. 490; 21 L. T. 322; 17 W. R. 1093.

By an indenture between husband and wife of the first and second parts, and a trustee for the wife, of the third, reciting that unhappy differences had arisen between the husband and wife, and that they had mutually agreed to live separate, and the husband covenanted to pay an annuity during so much of the wife's life as he should live, in full satisfaction of her support and maintenance, and of all alimony whatsoever, and that he would not, at any time thereafter, sue her for the restitution of conjugal rights; and the trustee covenanted that the wife should release her husband's real and personal estate from all claims for jointure, dower, or thirds, and that he would indemnify the husband from debts incurred by the wife after separation: —Held, that such indenture was valid, and that a plea by the husband, "that the wife had instituted a suit in the ecclesiastical court for restitution of conjugal rights, in which cause he had put in an allegation and certain exhibits, charging her with adultery, and that a decree of divorce à mensâ et thoro was thereupon pronounced by that court," was no answer to an action by the trustee for arrears of the annuity. *Jee* v. *Thurlow*, 4 D. & R. 11; 2 B. & C. 547; 2 L. J. (O.S.) K. B. 81; 26 R. R. 453.

—— **No Covenant not to Sue or to Condone—Judicial Separation.**]—In a suit by the husband for dissolution on the ground of his wife's adultery, the wife in her answer made a counter-charge of desertion, and prayed for a judicial separation. It appeared that the husband left his wife in November, 1884, and in January, 1887, a deed was executed by which the wife agreed to live apart from her husband, but there was no covenant not to sue and no agreement to condone past offences. The jury found all the issues in favour of the wife:—Held, that the deed was not a bar to the wife's remedy, and that she was entitled to a decree of judicial separation. *Moore* v. *Moore*, 56 L. J., P. 104; 12 P. D. 193; 57 L. T. 568; 36 W. R. 110; 51 J. P. 632.

Covenant in Case of Future Separation.]—A covenant by a husband, to pay to trustees a certain annual sum by way of separate maintenance for his wife in case of their future separation, with the consent of such trustees, or their executors, is valid. *Rodney (Lord)* v. *Chambers*, 2 East, 283.

A settlement containing a provision for future separation is only void so far as relates to that provision. *Merryweather* v. *Jones*, 4 Giff. 499; 10 Jur. (N.S.) 290; 10 L. T. 62; 12 W. R. 524.

By articles before marriage a husband covenanted to settle an annuity on the wife after marriage, to be paid in the event of his death, or any separation taking place:—Held, that such a covenant was contrary to public policy and morality, and could not be enforced by a court of equity. *Cocksedge* v. *Cocksedge*, 14 Sim. 244; 13 L. J., Ch. 384; 8 Jur. 659, 935. See *Vandergucht* v. *De Blaquiere*, 5 Mylne & C. 229.

By an ante-nuptial settlement, the father of the husband conveyed freehold hereditaments to the use of trustees, during the life of the wife, for her separate use, subject to a proviso, whereby it was declared that if a separation should take place by reason of any disagreement between the husband and wife, or otherwise, the rents should, from the time of such separation, during the joint lives of the husband and wife, be paid to the husband:—Held, that the proviso was in the nature of a condition, and not of a limitation; and that it was void, as being contrary to public policy. *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982; 22 L. J., Ch. 841; 17 Jur. 584; 1 W. R. 245.

Any agreement made, before or after marriage, which contemplates a voluntary separation of husband and wife, is void, as contrary to the policy of the law. *Anon.*, 3 Kay & J. 382.

By an ante-nuptial settlement, property of the husband was limited, during the joint lives of himself and the wife, "if she should so long continue to live with him, and should not live separate and apart from him through any fault of her own," in trust for the separate use of the wife, without power of anticipation; and after the decease of either, "or in the event of the wife living separate and apart from her husband through any such fault," for the survivor, or for the husband, as the case might be; and after the death of the survivor, "or in the event of the wife living separate and

apart from her husband through any such fault as aforesaid," for the children of the marriage :—Held, that the limitations over upon the separation of the wife and husband were void, as contrary to the policy of the law, for such a limitation in favour of the husband, if valid, would be a direct inducement to permit a state of separation, capriciously commenced by the wife, to continue. *Ib.*

A deed by which a husband makes a provision for his wife in case of a future separation is radically defective. *Procter* v. *Robinson*, 35 Beav. 329. *S. C.*, on appeal, 15 W. R. 138.

A proviso annexed to the grant of an annuity for its cesser on the annuitant, a married man, living apart from his wife, is void. *Nicholl* v. *Jones*, 36 L. J., Ch. 554.

A promise to pay money if the promisee will execute a deed of separation between himself and his wife, if not void for illegality of consideration. *Jones* v. *Waite*, 4 Man. & G. 1104 ; 5 Scott (N.R.) 951 ; 9 Cl. & F. 88 ; 6 Jur. 653.

No subsequent Separation.]—Where a deed was made between husband, wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation ; but, in fact, no separation then took place nor was intended to take place at that time :—Held, that the deed was void. *Hindley* v. *Westmeath* (*Marquis*), 6 B. & C. 200 ; 9 D. & R. 351 ; 5 L. J. (O.S.) K. B. 115 ; 30 R. R. 290.

By a deed, which recited that B. and his wife had agreed to live apart from each other during the remainder of their lives "upon the terms and conditions thereinafter contained," he covenanted with trustees to allow his wife to live separately, and settled a sum of money upon trust for his wife for her life, and for their children after her death, with a proviso that if he and his wife should afterwards agree by writing under their hands, attested by two witnesses, to cohabit together, the income of the trust fund should be paid to him during such cohabitation, and the trustees covenanted to indemnify him against his wife's acts and engagements. No separation took place between them :—Held, that the deed was a separation deed, and not a voluntary settlement, and that as no separation took place, it was wholly void. *Bindley* v. *Mulloney*, L. R. 7 Eq. 343 ; 20 L. T. 263 ; 17 W. R. 510.

Illegal and Legal Covenants can be Separated.]—A court of equity will enforce a legal and proper covenant in a separation deed although other covenants in the deed may be illegal. *Hamilton* v. *Hector*, L. R. 13 Eq. 511.

By a separation deed, made after the wife had instituted proceedings in the divorce court for divorce and the custody of her children, the husband covenanted to deliver up forthwith to his wife all her journals, diaries, and private correspondence and memoranda ; that the two elder children of the marriage should remain at such schools in England as the husband, or such schools elsewhere as he with the consent of the wife, should direct ; that he and his wife should each have access to them at all reasonable and convenient times, subject to the regulations of the schools ; and that their holidays should be passed by them at such places and in such manner as the trustees of the deed should direct ; and that the two younger children (who were respectively under the age of seven) should remain in the custody of the wife :—Held, that the husband was not entitled to make or retain copies of the journals, diaries, and memoranda covenanted to be delivered up. *Ib.*

Held, also, that having regard to the evidence with respect to the husband's misconduct, the covenants with respect to the holidays of the two elder children were reasonable and proper, and would be enforced by the court, even if the covenant as to the custody of the younger children was not legal, as to which, however, the court expressed no opinion. *Ib.*

Between Husband and Deceased Wife's Sister.]—By a deed purporting to be a deed of separation between a man and his deceased wife's sister, the man covenanted with the trustees to pay to the woman, during the joint lives of himself and her, an annuity of 40*l.* per annum, and the trustees covenanted with the man to indemnify him against all the future debts and liabilities of the woman. The deed also contained a proviso that if the parties should live together again, the deed should become void. The man became bankrupt :—Held, that, inasmuch as the man and woman could never legally be married, the deed was in effect a common annuity deed, and the trustees were entitled to prove for the value of it under the Bankruptcy Act, 1869, s. 31. *Naden, Ex parte, Wood, In re*, 43 L. J., Bk. 121 ; L. R. 9 Ch. 670 ; 30 L. T. 743 ; 22 W. R. 936.

Return to Cohabitation — Bankruptcy.]—A wife was entitled at the time of her marriage to a sum of money secured by the promissory note of her brother. A deed of separation between her and her husband was executed, in which her brother covenanted that he would hold the money upon trust for the wife and husband successively for life and then for the child of the marriage. The husband and wife, after separation, returned to cohabitation, and the husband became bankrupt :—Held, that as the deed contained provisions beyond the purview of a mere separation deed, it could be supported as a valid settlement, and that the brother, having by the deed made himself a trustee of the legal debt, it became subject to the wife's equity to a settlement. *Ruffles* v. *Alston*, 44 L. J., Ch. 308 ; L. R. 19 Eq. 539 ; 32 L. T. 236 ; 23 W. R. 465. *See* col. 1003.

Covenant not to Commence or Prosecute Proceedings—Prior Adultery of Wife—Subsequent Adultery by Husband.]—A separation deed contained a clause, "No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or which has arisen before the date of these presents." Prior to the execution of the deed it was known that the wife had committed adultery. Subsequently the husband committed adultery, and the wife filed her petition for a judicial separation :—Held, that the wife's prior adultery was a bar to the court granting her the relief prayed for, and that the husband was not precluded by the covenant from pleading it, as he he was not thereby "commencing or prosecuting" proceedings. *Rose* v. *Rose* (8 P. D. 98) considered. *Gooch* v. *Gooch*, 62 L. J., P. 73 ; [1893] P. 99 ; 1 R. 516 ; 68 L. T. 462 ; 41 W. R. 655.

Covenant Sufficient to support Deed.]—A covenant to indemnify a husband against his wife's debts is not the only consideration that will support articles of separation: a covenant to put an end to a suit against the husband in the ecclesiastical court, or to pay him an annuity, or to pay his existing debts, is sufficient. *Wilson* v. *Wilson*, 14 Sim. 405; 14 L. J., Ch. 204; 9 Jur. 148. Affirmed in the house of lords, 1 H. L. Cas. 538; 12 Jur. 467. Disapproved in, *S. C.*, 5 H. L. Cas. 40; 23 L. J., Ch. 697. *And see* cols. 987, 988.

Covenant not to Visit Wife.]—A separation deed in which the husband covenants with a surety that he will not visit the wife without the surety's consent, does not contemplate reconciliation and subsequent separation, so as to be void as being contrary to public policy. *Webster* v. *Webster*, 4 De G. M. & G. 437; 22 L. J., Ch. 837; 1 W. R. 509.

Husband to have Benefit of Wife's Establishment.]—A wife having instituted a suit against her husband for a divorce, an arrangement was come to, and the husband executed a deed, by which he assigned a house to trustees to permit the wife to enjoy it and accommodate herself and children; and an income of 4,000*l.* a year was also provided for her separate use, to keep up the establishment for herself and children, "upon such a scale and regulated in such a manner as she should think fit," and the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous to reside in the house, "and to conform to the spirit and intention of the deed, and to partake of the benefit of the establishment to be kept up therein by the wife, he should be at liberty so to do." The suit was discontinued, and the husband partook of the establishment:—Held, first, that the deed was not void on any ground of public policy; secondly, that being a family arrangement and a compromise of disputed rights, there was a sufficient consideration; thirdly, that it was not void for uncertainty; and, fourthly, that the court could enforce its due performance, both by the wife and the husband. *Jodrell* v. *Jodrell*, 9 Beav. 45; 15 L. J., Ch. 17.

Obtained by Misrepresentation or Undue Influence.]—By a deed of three parts between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separately, the husband covenanted to pay to the trustee an annuity for the separate maintenance of the wife. The trustee having sued the husband for arrears of the annuity, the latter pleaded that he was induced to make the deed by means of false and fraudulent misrepresentations made by the plaintiff to him, that is to say, by the plaintiff, before the making of the deed, falsely and fraudulently representing to him that the wife was a virtuous woman, whereas in truth she was not a virtuous person, and that the plaintiff had carnally known her, and subsequently to the intermarriage of her and the defendant, and before the making of the deed, which last-mentioned facts the plaintiff concealed from the defendant, and induced him to make the deed in order that the plaintiff might continue an adulterous intercourse with the wife. At the trial, the plea was found, and the verdict thereon entered for the defendant:—Held, on motion to enter judgment for the plaintiff non obstante veredicto, that although the plea did not show that the representations set out were necessarily fraudulent, it not being alleged that the plaintiff knew them to be false, or that he knew that the wife was the defendant's wife at the time he had intercourse with her, yet it might be sustained as a general plea of fraud, which, after verdict, was a good answer to the action. *Evans* v. *Edmonds*, 13 C. B. 777; 1 C. L. R. 653; 22 L. J., C. P. 211; 17 Jur. 883; 1 W. R. 412.

Held, also, that it was not necessary to allege that the wife, as cestui que trust, was a party to the fraud upon the defendant, as a court of law can only look to the legal rights of the parties to the deed. *Ib.*

To an action by a trustee, on a deed of separation between husband and wife for non-payment by the husband of the wife's annuity, it is no defence on equitable grounds, that the husband and wife were induced to live apart by the undue influence, persuasion, and threats of the trustee, who unlawfully harboured the wife: and that, at the time the deed of separation was executed, the wife was pregnant, of which fact she and the trustee kept the husband in ignorance, and thereby induced him to execute the deed; and that he has always been willing to receive back and cohabit with his wife. *Kendall* v. *Webster*, 1 H. & C. 440; 31 L. J., Ex. 492.

Release of Reversionary Life Interest—Annuity—Death of Husband—Election—Confirmation.]—A woman, married in 1873, covenanted in a separation deed that she would on the death of her husband release a reversionary life interest expectant upon the death of her husband, to which she was entitled under her marriage settlement, and the husband provided for the payment to his wife of an annuity, some instalments of which she received during his life. On the death of the husband:—Held, that the wife was not bound by the covenant, and that consequently, notwithstanding the receipt of the annuity, she had never been in a position to make an election. *Harle* v. *Jarman*, 64 L. J., Ch. 779; [1895] 2 Ch. 419; 13 R. 610; 73 L. T. 20; 43 W. R. 618.

2. Prospective Separation.

Agreement for, Void.]—Any agreement made before or after marriage, which contemplates a voluntary separation of husband and wife, is void, as contrary to the policy of the law. *Anon.*, 3 Kay & J. 382; *Westmeath* v. *Salisbury*, 5 Bli. (N.S.) 339; *Westmeath* v. *Westmeath*, 1 Dow, (N.S.) 519, and *Brindley* v. *Mulloney*, L. R. 7 Eq. 343; 20 L. T. 263; 17 W. R. 510; *Cocksedge* v. *Cocksedge*, 5 Hare, 397, 432 n.; *Green* v. *Green*, 5 Hare, 400 n.; *Vandergucht* v. *De Blaquiere*, 5 Myl. & C. 229; 3 Jur. 1116; *Smith* v. *Smith*, 18 Jur. 1021.

A deed providing for prospective separation is invalid, and a separation deed being put an end to by a reconciliation, a clause to revive the provision for the wife is invalid, but a provision for her separate use, notwithstanding future reconciliations or separations, is good. *Byrne* v. *Carew* (*Lord*), 13 Ir. Eq. R. 1.

Condition or Limitation.]—By an ante-nuptial settlement, the father of the husband conveyed freehold hereditaments to the use of trustees, during the life of the wife, in trust for her sepa-

rate use subject to a proviso, whereby it was declared that if a separation should take place by reason of any disagreement between the husband and wife, or otherwise, the rents and profits should from the time of such separation, during the joint lives of the husband and wife, be paid to the husband:—Held, that the proviso was in the nature of a condition, and not of a limitation; and that it was void as being contrary to public policy. *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982; 22 L. J., Ch. 841; 17 Jur. 584; 1 W. R. 245.

—— **Extent of Invalidity.**]—A settlement containing a provision for future separation is only void so far as relates to that provision. *Merryweather* v. *Jones*, 4 Giff. 499; 10 Jur. (N.S.) 290; 10 L. T. 62; 12 W. R. 524. And see 4 Giff. 509.

A deed by which a husband makes a provision for his wife in case of a future separation is radically defective. *Proctor* v. *Robinson*, 35 Beav. 329; 15 W. R. 138.

Proviso for Cesser of Annuity on Separation.]—A proviso annexed to the grant of an annuity for its cesser on the annuitant, a married man, living apart from his wife, is void. *Nicholl* v. *Jones*, 36 L. J., Ch. 554.

Apportionment of Annuity of Separation.]—By deed executed before marriage, it was agreed that if any separation should take place by the desire or at the instance of the wife, then the husband should receive the moiety of an annuity, which the wife was possessed of, and she should receive the other moiety, without the control of her husband, but if such separation should take place at the instance or by the means of the husband, then the wife shall receive the whole annuity. This is such an agreement as equity will support, and if the separation appears to be caused by the means of the husband, the wife shall have the whole annuity during such separation. *Hoare* v. *Hoare*, 2 Ridgw. P. C. 268.

3. Consideration, General Legality.

Compromise of Indictment for Assault.]—Specific performance of agreement for separation of husband and wife, decreed, though agreement provided for compromises of indictment for assault. *Elworthy* v. *Bird*, 2 Sim. & S. 372; 3 L. J. (O.S.) Ch. 190. See *Westmeath (Earl)* v. *Westmeath (Countess)*, Jac. 126.

An agreement by a husband in consideration of his wife waiving the further prosecution of an indictment against him for an assault, to allow her an annuity by way of separate maintenance, is an illegal consideration though entered into with the sanction of the court in which the indictment was tried. *Garth* v. *Earnshaw*, 3 Y. & Coll. 584.

Discontinuance of Nullity Suit.]—Articles of separation decreed to be specifically performed. A covenant to indemnify the husband against his wife's debts is not the only consideration that will support such articles. A covenant to put an end to a suit against the husband in the ecclesiastical court, or to pay him an annuity, is sufficient. *Wilson* v. *Wilson*, 14 Sim. 405; 14 L. J., Ch. 204; 9 Jur. 148. Affirmed 1 H. L. Cas. 538; 12 Jur. 467.

An agreement to put an end to a suit for nullity of marriage on the ground of impotency is not contrary to public policy. *Ib.*

Support and Education of Children.]—Semble, though a deed of separation contains no more than a covenant on the part of the wife's trustees that the wife shall provide support for and educate the children of the marriage, and that she shall not sue the husband for alimony or otherwise, still it is a deed for valuable consideration, and not voluntary. *Nixon* v. *Hamilton*, 2 Dr. & Wal. 364; Ir. Eq. R. 56.

Execution by Husband—Payment by Third Party.]—The execution of a deed of separation (already agreed upon and drawn up) by the husband is a legal consideration for an agreement by a third person to pay a sum of money to the husband towards the discharge of certain debts and expenses for which the husband was solely liable. *Jones* v. *Waite*, 9 Cl. & F. 101. Affirming 8 L. J., Ex. 305; 1 Bing. (N.C.) 655; 1 Scott, 730; 4 L. J., C. P. 184.

4. Covenant of Indemnity.

Covenant to Indemnify by Trustees, a consideration—Not necessary to Validity.]—On a deed of separation the trustees indemnifying the husband against the wife's future debts is a valuable consideration, and takes the conveyance out of the statute. *Stephens* v. *Olive*, 2 Bro. C. C. 90. And see *Worrall* v. *Jacobs*, 3 Mer. 256.

A deed of separation between husband and wife, containing no covenant on the part of a trustee to indemnify the husband, or other valuable consideration, is not on that account void. *Frampton* v. *Frampton*, 4 Beav. 287; 5 Jur. 980. And see *Haworth* v. *Bostock*, 4 Y. & C. 1; and *Westmeath* v. *Westmeath*, Jac. 126.

Deed good against Husband, though not against Creditors.]—In a deed of separation purporting to be made on account of unhappy differences of temper, the husband covenanted with trustees of the wife to pay an annuity to her, but there was no covenant of indemnity to him against the wife's debts:—Held, nevertheless, that the covenant, though not good as against the creditors of the husband, was good against his estate. *Clough* v. *Lambert*, 10 Sim. 174; 3 Jur. 672.

Conditional Covenant to Indemnify.]—By articles of separation the husband covenanted with his wife's trustee to secure to her an annuity of 1,000*l.* on or before a certain day, and the trustee covenanted with the husband that on the annuity being secured he would enter into a covenant to indemnify the husband against the wife's debts:—Held, that the latter covenant, though conditional, was sufficient to support the articles. *Wellesley* v. *Wellesley*, 10 Sim. 256. *And see* 4 Myl. & C. 561: 9 L. J. (N.S.) Ch. 21; 4 Jur. 2.

Covenant by Third Person.]—Covenant by a third person to indemnify the husband against wife's debts, a good consideration. *Compton* v. *Collison*, 2 Bro. C. C. 377.

Covenant by Wife restrained from anticipation no consideration.]—A husband, upon a treaty for separation from his wife, agreed with a trustee to pay his wife an annuity for her

separate use, and also, during their separation, to permit their daughter, an infant, but now of age, to reside with, and be under the control of, and educated and supported by, her mother; in consideration whereof the wife (who was entitled under her marriage settlement to property, settled to her separate use without power of anticipation) agreed with the trustee to indemnify her husband in respect of any debt on her own account or on account of their daughter. The trustee declining to enforce payment of arrears of the annuity, or to act any longer as trustee:—Held, first, that this was a voluntary agreement on the part of the husband, no consideration moving from the trustee by way of indemnity or otherwise, and the wife having no power to contract so as to bind property as to which, though settled to her separate use, she was restrained from anticipation. *Walrond* v. *Walrond*, 1 Johns. 18; 28 L. J., Ch. 97; 4 Jur. (N.S.) 1099; 7 W. R. 33.

Abdication of Parental Duty by Husband.]—Besides the stipulation relative to the daughter being contrary to the policy of the law, semble, no action on the agreement would lie: and the circumstance of the daughter's having since attained her majority would not affect the question. *Ib.*

Jurisdiction of Court of Equity.]—The spiritual court has exclusive cognisance of the rights and duties arising from the state of marriage: a court of equity, therefore, has no jurisdiction upon a contract for separation between husband and wife simply; much less where it will affect a purchaser or creditor; but the jurisdiction holds in special cases, as where a third party covenants to indemnify the husband against the wife's debts, or a fortune accrues to the wife after separation, or the property is the subject of a trust. *Legard* v. *Johnson*, 3 Ves. 352.

Husband an Alien.]—The plaintiff married the defendant, an alien, and afterwards, by a deed of separation not acknowledged, conveyed real and personal estate to a trustee to pay an annuity to the defendant. The trustee covenanted to pay the annuity, and the plaintiff to indemnify the trustee. An action being brought against the trustee by the defendant, the plaintiff filed a bill for an injunction, and to set aside the deed, under which she insisted the defendant, as an alien, could take nothing, and that the marriage was not legal according to the law of Guernsey, where it was celebrated; that she had executed the deed supposing the defendant to have legal rights over her property, and that the deed was not acknowledged. The court refused to continue the injunction to the hearing on any of the grounds except the last. *Dumoncel* v. *Dumoncel*, 13 Ir. Eq. R. 92.

Semble, the plaintiff having denied the marriage, and covenanted to indemnify the trustee, could not rely on the deed not being properly acknowledged. *Ib.*

Deed Voluntary.]—A separation deed containing a covenant by the trustees that the husband should be at liberty to reimburse himself, with respect to his wife's debts, out of the annuity thereby made payable to her, but no other covenant on their part, is a voluntary instrument, *Cowx* v. *Foster*, 1 John. & H. 30; 29 L. J., Ch. 886; 6 Jur. (N.S.) 1051; 2 L. T. 797.

5. COVENANT NOT TO SUE FOR RESTITUTION OR MOLEST.

Molestation — Proceedings for Divorce in Foreign Country.]—A covenant in a separation deed between husband and wife not to molest is not broken unless there is both an annoyance and an intention to annoy. Where therefore a husband covenants in a separation deed not to molest his wife, the fact that he subsequently goes to a foreign country for the purpose of instituting, and does there institute, proceedings for divorce does not of itself amount to molestation in the absence of an intention to annoy the wife. *Hunt* v. *Hunt*, 67 L. J., Q. B. 18; [1897] 2 Q. B. 547; 77 L. T. 421—C. A.

Breach—No Trustee—Wife Covenanting not to Molest, Annoy or Interfere—Absence of dum casta clause—Adultery of Wife no Answer to Action.]—The intervention of a trustee is unnecessary to enable a married woman to sue her husband under a separation deed entered into between her and her husband. In the absence of express provision, adultery of the wife is no answer to an action by her for breach of covenant in a separation deed, even if there be a covenant not to molest, annoy or interfere. *Sweet* v. *Sweet*, 64 L. J., Q. B. 108; [1895] 1 Q. B. 12; 15 R. 146; 71 L. T. 672; 43 W. R. 303; 59 J. P. 373.

Restitution Suit—Injunction.]—A husband having in a deed of separation covenanted with trustees on behalf of his wife, that he would not endeavour to compel her to cohabit or live with him by any legal proceedings, afterwards commenced a suit against her in the divorce court for restitution of conjugal rights:—Held, that the trustees of the deed and the wife were entitled to an injunction to restrain him from proceeding with the suit. *Hunt* v. *Hunt*, 31 L. J., Ch. 161; 8 Jur. (N.S.) 85; 5 L. T. 778; 10 W. R. 215. Quære *Spering* v. *Spering*, 3 Sw. & Tr. 211; 32 L. J., Mat. 116; 9 L. T. 24; 11 W. R. 810.

The policy of the law and the jurisdiction of courts of equity in reference to deeds of separation, considered. *Ib.*

Covenant Specifically Enforceable.]—A covenant entered into by a husband in a separation deed not to molest his wife, may, where the consideration for the deed is sufficient, be specifically enforced by a decree of the court of chancery. A covenant by a husband, in a separation deed, not to sue his wife for the restitution of conjugal rights, is a covenant which is not, in itself, illegal; but is one which, if he enters into an agreement to insert it in a separation deed, the court will compel him to insert accordingly. *Ib.* And see *Sanders* v. *Rodway*, 16 Beav. 207; 16 Jur. 1005; *Moore* v. *Moore*, 56 L. J., P. 104; 12 P. D. 193; 57 L. T. 568; 36 W. R. 110; 51 J. P. 632; and *Besant* v. *Wood*, 48 L. J., Ch. 497; 12 Ch. D. 605; 40 L. T. 445; post, col. 1014.

A deed of separation between husband and wife contained a covenant by the trustees of the wife, that she should not molest or disturb her husband; a suit in the divorce court, for a judicial separation, is no breach of the covenant. *Thomas* v. *Everard*, 6 H. & N. 448; 30 L. J., Ex. 214.

By a deed a husband covenanted with the trustee of the deed to make an allowance to his wife, and the trustee covenanted, on behalf of the wife, neither to sue for restitution of con-

jugal rights or alimony, nor to molest, trouble, or disturb the husband. Shortly after the execution of the deed, the wife, who had duly received her allowance, commenced proceedings in the divorce court for a judicial separation, and for alimony. Thereupon the husband filed a bill in equity against his wife, praying that she might be restrained from continuing the proceedings, and from doing any act to molest, trouble or disturb him:—Held, that he was entitled to a perpetual injunction to the extent (only) of restraining the proceedings in the divorce court. *Flower* v. *Flower*, 25 L. T. 902; 20 W. R. 231.

—— **Suit for Dissolution—Evidence.**]—Husband and wife executed a deed which provided that "in case either party shall hereafter commence or prosecute any proceeding against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either in relation to any such offence or misconduct, shall be pleaded nor alleged by either party, or be admissible in evidence." The wife was subsequently guilty of adultery with a co-respondent, and the husband instituted a suit for dissolution of marriage by reason of such adultery:—Held, that evidence of familiarities between the wife and co-respondent prior to the separation was admissible within the terms of the deed. *Harris* v. *Harris and Woodden*, 41 L. J., Mat. 61; 27 L. T. 428; 21 W. R. 80.

Independent Covenants — Molestation, what is.]—Covenants in a separation deed, by which respectively the husband has covenanted to pay an annuity to a trustee for the wife, and the trustee has covenanted that the wife shall not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent, and, therefore, a breach of the covenant that a wife shall not molest the husband is not an answer to an action for the annuity. Neither adultery alone by the wife, nor adultery by her followed by the birth of an illegitimate child, is a breach of a covenant in a separation deed against molestation by the wife. But, semble, adultery by the wife followed by the birth of an illegitimate child whom she puts forward as the child of her husband, especially if this is done with intent to claim a title or property to which the legitimate offspring of her husband would be entitled, is evidence of a breach of a covenant against molestation by her. By Brett, M.R., in order to constitute a breach of the covenant in a separation deed against molestation by a wife, some act must be done by her, or by her authority, with intent to annoy her husband, and which is in fact an annoyance to him, or at least some act must be done by her or by her authority with a knowledge that it must of itself without more annoy her husband, or annoy a husband with reasonable and proper feeling. *Fearon* v. *Aylesford (Earl)*, 54 L. J., Q. B. 33; 14 Q. B. D. 792; 52 L. T. 954; 33 W. R. 331; 49 J. P. 596—C. A. And see *Crouch* v. *Waller*, 4 De G. & J. 302.

Alimony.]—In a separation deed the husband covenanted with the trustee to allow to his wife 50*l.* a year for her support, he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf that she would not in any way endeavour to compel the husband again to live with her, or to allow her "any further or greater or other support, maintenance or alimony" than the annuity of 50*l.*:—Held, that in the absence of any act showing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, a court of equity would not, upon an interlocutory motion, restrain her from proceeding in the divorce court to obtain an allowance for alimony, as incident to her petition for a judicial separation on the ground of cruelty, but the court put her under an undertaking to deal with the alimony as the court should direct. *Williams* v. *Baily*, L. R. 2 Eq. 731.

When made in ignorance of Facts.]—Upon motion by a wife for an injunction to restrain her husband from proceeding in the divorce court to obtain a dissolution of marriage, on the ground of a contract by the husband to condone all former causes of complaint, and not to take legal proceedings in respect thereof:—Held, that as the contract might be set up by way of defence in the divorce court, and as it was executed by the husband in ignorance of the fact that his wife had committed adultery, and on her positive assertion of innocence, a court of equity would not interfere to stay proceedings in the divorce court. *Brown* v. *Brown*, 38 L. J., Ch. 153; L. R. 7 Eq. 185; 19 L. T. 594; 17 W. R. 98.

When not Acted on—Desertion.]—A deed of separation never acted upon does not deprive a husband's subsequent separation from his wife against her will of the character of desertion. *Cock* v. *Cock*, 3 Sw. & Tr. 514; 33 L. J., Mat. 157; 10 Jur. (N.S.) 806; 10 L. T. 726; 13 W. R. 189.

Action against Husband for Board and Lodging of Wife.]—Where an action is brought against a husband for board and lodging of his wife who is living apart from him without her fault and without means of maintenance, it is no defence to such action that a deed of separation had been entered into by which the husband had covenanted to pay her an annual sum, and that the deed had become void by reason of the wife's breach of covenant not to molest her husband. *Tucker* v. *Tarrant*, 35 L. T. 6.

Suit for Judicial Separation.]—A suit for judicial separation is not a breach of a covenant not to molest. *Thomas* v. *Everard*, 6 H. & N. 448; 30 L. J., Ex. 214.

6. Effect of, on Property.

Separated Wife Accepting Bill.]—Married woman separated from her husband, and having a separate maintenance, renders the same liable by accepting bill of exchange. *Stuart* v. *Kirkwall*, 3 Madd. 387.

Legacy—Payment to Separated Wife.]—A husband and wife in America, by a deed of separation agreed to live apart, and that the wife should be at liberty to carry on business, etc., and to retain for her own use all her present and future property, in any way acquired. Subsequently a legacy, having accrued in right of the wife, was carried to the account of the husband and wife. Nothing having been heard of the husband for fourteen years, on a petition presented by the wife, asking the transfer to her of the stock, the court directed the stock to be sold, and the proceeds paid to her on her sole

receipt. *Whitworth* v. *Dilworth*, 2 Sm. & G. 35; 18 Jur. 445; 2 W. R. 150.

Raising Jointure notwithstanding Separation.]—By articles of separation, dated in June, 1834, the defendant agreed that he would, on or before the 1st of February, 1835, by a charge on freehold estates, or by investment of an adequate sum of money, or by the best means which might then be in his power, effectually secure to the plaintiff, his wife, an annuity of 1,000*l*. In December, 1834, a deed of arrangement was executed between the defendant and his son, by which certain family estates were conveyed to trustees to raise money for the payment of various incumbrances, afterwards to such uses as the defendant and his son should appoint, and in default of appointment to the defendant for life, and then to his son absolutely, with a power for the defendant to jointure his then present or any future wife to the extent of 1,000*l*. per annum:—Held, that the plaintiff was entitled to have her jointure raised out of the estates, as against the defendant and his son. *Mornington* (*Countess*) v. *Mornington* (*Earl*), 18 L. J., Ch. 442.

Equity to a Settlement.]—A married woman who had left her husband, and was living separate from him, but not in a state of adultery, held to be entitled to a settlement out of a sum of stock to which her husband had become entitled in her right. *Eedes* v. *Eedes*, 11 Sim. 569; 10 L. J., Ch. 199.

—— **Return to Cohabitation.**]—A wife was entitled at the time of her marriage to a sum of money secured by the promissory note of her brother. A deed of separation between her and her husband was executed, in which her brother covenanted that he would hold the money upon trust for the wife and husband successively for life and then for the child of the marriage. The husband and wife, after separation, returned to cohabitation, and the husband became bankrupt:—Held, that as the deed contained provisions beyond the purview of a mere separation deed, it could be supported as a valid settlement, and that the brother, having by the deed made himself a trustee of the legal debt, it became subject to the wife's equity to a settlement. *Ruffles* v. *Alston*, 44 L. J., Ch. 308; L. R. 19 Eq. 539; 32 L. T. 236; 23 W. R. 465.

Indemnity against Thirds at Common Law—Share under Statute of Distributions.]—Husband and wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, and, by a separation deed, containing the usual provisions, the husband agreed to pay to his wife, for her maintenance, an annuity of 180*l*. a year, and it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts and contracts of his wife, and all dower and thirds at common law or by custom, which she, at any time thereafter might claim, challenge, or demand from, out of, or against her husband, or his present or future estate, real or personal, and an agreement that the wife should make and execute all such acts, deeds, and matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of her husband. The husband afterwards dying intestate:—Held, that the deed did not deprive the wife of her share of her husband's personal estate, under the statute of distributions. *Slatter* v. *Slatter*, 1 Y. & Coll. 28.

Dividend of Stock for Maintenance of Wife—Grant of Annuity.]—Trust in a deed of separation, to permit A. to receive the dividend of stock for the maintenance and support of the wife, with a covenant of indemnity to her husband; a grant by her of an annuity out of the dividends was held void. *Hyde* v. *Price* 3 Ves. 437.

Delivery Up of Separated Wife's Journals—Husband no Right to Copies.]—By a separation deed, made after the wife had instituted proceedings in the divorce court for divorce and the custody of her children, the husband covenanted to deliver up forthwith to his wife all her journals, diaries, and private correspondence and memoranda: that the two elder children of the marriage should remain at such schools in England as the husband, or such schools elsewhere as he with the consent of the wife, should direct; that he and his wife should each have access to them at all reasonable and convenient times, subject to the regulations of the schools; and that their holidays should be passed by them at such places and in such manner as the trustees of the deed should direct; and that the two younger children (who were respectively under the age of seven) should remain in the custody of the wife:—Held, that the husband was not entitled to make or retain copies of the journals, diaries, and memoranda covenanted to be delivered up. *Hamilton* v. *Hector*, L. R. 13 Eq. 511. Affirmed, 40 L. J., Ch. 692; L. R. 6 Ch. 701; 19 W R. 990.

Marriage Settlement and Covenant in Separation Deed.]—By a marriage settlement personal property was settled (as to the wife's property) to her for life to her separate use, with remainder to the children of the marriage. By a deed of separation the husband covenanted "that all such estates, real and personal, which might at the date of the marriage settlement, or which during the joint lives of husband and wife should descend, or come to, or devolve upon, or be given, or devised or bequeathed, or conveyed to or in trust for him, should be holden, enjoyed, sold, given away, devised, bequeathed, and disposed of by the wife, her heirs, executors, administrators and assigns." Two children of the marriage attained twenty-one, and died intestate, leaving the husband their sole next of kin:—Held, that the beneficial interests which the children had acquired under the settlement, and which devolved upon the husband as next of kin, were not bound or affected by the husband's covenant in the separation deed. *Hudson* v. *King*, 6 L. T. 856.

Held, also, that such beneficial interests formed part of the husband's personal estate. *Ib.*

Admission of Will.]—Admission of will by feme covert, heiress-at-law, living separate from her husband, sufficient to establish it. *Codrington* v. *Shelburne* (*Earl*), Dick. 475.

Powers of Registrar—Agreement to Separate—Marriage Contract under French Law—Deed drawn by Registrar—Variation of Conditions of Contract.]—In a suit by the wife for dissolution of marriage, the parties at the hearing agreed on certain terms of separation which were made an order of court, and it was referred to the registrar to draft a deed of separation embodying these terms with the usual clauses, and with full power to determine all questions as to the form of the deed, and all questions arising out of the terms of the settlement. The parties, being English subjects, had been married in Paris, and the marriage contract declared that they adopted the French law as ruling the civil conditions of their marriage. The contract stipulated that the parents of the petitioner as her dowry should pay various sums to the husband, the wife, and the children, under certain circumstances; and also contained various conditions as to the investment and devolution of property acquired by the wife at and after her marriage, the power of disposing of property, movable and immovable, by the husband and wife, mutually in each other's favour, the mutual liability for debts contracted by either:—Held, that, under the terms of the agreement, the registrar had power to determine the questions arising under the French law as to whether a separation of bodies effected a separation of goods, or whether a separation of goods was brought about by the agreement, even though a contrary effect might be inferred from its terms; and, also, whether an intention that separation of goods should not take place could be gathered from the agreement. But, held, further, that the parties, on signing the agreement, could only be taken to have intended that the deed should embody and carry out the modifications of the marriage contract relating to the respective proportions of the income to be paid to the husband and wife, and to the giving up by the husband of all articles belonging to the wife—and that the registrar had exceeded his powers in dealing with the pecuniary relations of the parties under the other terms of the marriage contract. *De Ricci* v. *De Ricci*, 61 L. J., P. 17; [1891] P. 378.

7. Wife's Annuity Clause.

Absolute Covenant to pay Annuity—Adultery by Wife.]—In a separation deed a covenant, by which the husband undertakes to pay his wife an annuity without restricting his liability to such time as she shall be chaste, is good, and is not against public policy, and the covenant remains in force and the annuity continues payable, although the wife afterwards commits adultery. But, semble, per Cotton, L.J., on the authority of *Evans* v. *Carrington* (2 De G. F. & J. 481), that if the covenant had been inserted in the separation deed, with the intent that the wife might be at liberty to commit adultery, the deed would have been void. *Fearon* v. *Aylesford (Earl)*, 54 L. J., Q. B. 33; 14 Q. B. D. 792; 52 L. T. 954; 33 W. R. 331; 49 J. P. 596—C. A.

Enforcing.]—Covenant in deed of separation to pay trustee of wife an annuity, enforced though there was none to indemnify husband. *Ros* v. *Willoughby*, 10 Price, 2.

Bill against husband and a creditor upon the wife's annuity, to have articles of separation performed; decreed fully as against the husband, and that he should exonerate the annuity from the charge upon it. *Fitzer* v. *Fitzer*, 2 Atk. 511.

Though a man is bound to maintain his wife and children, yet his funds are liable to creditors. *Ib.*

Injunction to stay proceedings at law for recovering an annuity secured to the wife by a deed of separation not containing any covenant to indemnify the husband from debts, refused. *Westmeath (Earl)* v. *Westmeath (Countess)*, Jac. 126.

Decree for arrears and growing payments upon bond for annuity upon separation of husband and wife, the trustee refusing to enforce the bond without indemnity. An appropriation to answer the growing payments was refused. *Cooke* v. *Wiggins*, 10 Ves. 191. And see *Walrond* v. *Walrond*, 1 Johns. 18; 28 L. J., Ch. 97; 4 Jur. (N.S.) 1099; 7 W. R. 33.

Contingent Charge.]—A., on a separation from his wife, covenants to pay her an annuity of 200*l.* during her life, and assigns a pension for his own life and that of J. R., to trustees, as an auxiliary fund in case of failure of payment by him; and covenants that in case of his and J. R.'s death in the lifetime of the wife, all his real and personal estate shall be charged with the annuity. A. dies, leaving real estate which descended on the heir-at-law, and personal to the amount of 16,000*l.* J. R. is surviving. The wife has no right to an allocation of the real and personal estate to secure her annuity. *Lynar* v. *Mills*, 2 Sch. & Lef. 338.

Whether such a bill would be entertained if it were alleged and appeared that the executors had wasted the assets, quære. *Ib.*

Annuity to Husband — Release of Marital Right — Consideration.]—In a deed executed upon a separation between husband and wife, by them and the trustees of their marriage settlement, the wife charged her separate property comprised in the settlement with the payment of an annuity to the husband, and the husband released his marital rights in respect of all future property acquired by the wife. The release by the husband is a good consideration for the grant of the annuity by the wife, and the court will enforce the payment of the annuity. *Logan* v. *Birkett*, 1 Myl. & K. 220; 2 L. J. Ch. 52.

Consideration.]—After a separation between a husband and wife, an action was brought by the wife's mother against the husband for necessaries supplied to the wife and was settled by arbitration. Under the award two deeds were executed, by one of which a previous post-nuptial agreement and warrant of attorney were recited; and in pursuance of them an annuity was made payable to the wife for her separate use out of trust property to which the husband was beneficially entitled. By the other deed covenants were entered into by trustees on behalf of the wife that she would not molest the husband, and for indemnifying him against her debts, and that out of the annuity granted by the other deed the wife would support the children whom the husband covenanted to leave under her charge; and there was a proviso in the latter deed making it void on the husband and the wife cohabiting. The wife's conduct rendered her unfit to have the

care of the children:—Held, first, that the annuity deed was not merely voluntary or incomplete, but created an effectual trust not affected by the wife's conduct. *Crouch* v. *Waller*, 4 De G. & J. 302.

Held, secondly, that after subsequent cohabitation the children had no title to maintenance out of the annuity. *Ib.*

Parole Agreement — Part Performance — Statute of Frauds.]—In a deed of separation, a husband covenanted with a trustee to pay to his wife an annuity for her life. Subsequently, when oppressed with illness, he solicited his wife to return and live with him; but this she declined to do, unless he would agree to continue the payment of the annuity; and thereupon, in accordance with a stipulation proposed by the wife's trustee, he verbally agreed to secure the annuity upon his real estate. Upon the faith of this parol contract, the wife returned to and cohabited with her husband, and continued so to do up to the time of his death, which happened within a fortnight afterwards. On a bill filed by the widow, claiming to be a creditor against her husband's real estate in respect of the annuity, the devisee objected that the parol agreement was, under the statute of frauds, void; but the court held, that there had been a sufficient part performance of the agreement to entitle the wife to a decree to charge the real estate with the annuity. *Webster* v. *Webster*, 27 L. J., Ch. 115; 3 Jur. (N.S.) 655; 5 W. R. 725. And see *S. C.*, 4 De G. M. & G. 437; 1 Sm. & G. 489; 22 L. J., Ch. 837; 1 W. R. 509.

Marriage with Deceased Wife's Sister.]—By a deed purporting to be a deed of separation between a man and his deceased wife's sister, the man covenanted with the trustees to pay to the woman, during the joint lives of himself and her, an annuity of 40*l.* per annum, and the trustees covenanted with the man to indemnify him against all the future debts and liabilities of the woman. The deed also contained a proviso that if the parties should live together again the deed should become void. The man became bankrupt:—Held, that, inasmuch as the man and woman could never legally be married, the deed was in effect a common annuity deed, and the trustees were entitled to prove for the value of it under the Bankruptcy Act 1869, s. 31. *Nuden, Ex parte, Wood, In re*, 43 L. J., Bk. 121; L. R. 9 Ch. 670; 30 L. T. 743, 575; 22 W. R. 768.

Satisfaction of Annuity by Legacy.]—A., by deed of separation, covenanted with the trustee of the deed to pay him an annual sum of 52*l.* during the life of A.'s wife, to be paid to her on four special quarterly days for her separate use, without power of anticipation. A., by will, subsequently gave certain specific property to trustees, to pay out of the rents an annuity of 52*l.* to his wife generally, on the same special quarterly days:—Held, that there being no direction in the will to pay debts and legacies, and no expression of a contrary intention, the general rule must prevail, that the annuity given by the will was in satisfaction of the annuity covenanted to be paid by the deed of separation; and that the widow was put to her election. *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595; 31 L. T. 225.

Personal Covenant.]—A., by articles of separation between himself and his wife, covenanted that he would, on or before a specified day, either by a charge on freehold estates in England or Wales, or by an investment of money, secure the payment of an annuity to a trustee for his wife:—Held, that this was only a personal covenant, and created no actual charge, but only bound the covenantor to create a charge upon his lands on or before a certain day. *Mornington* v. *Keane*, 2 De G. & J. 292; 27 L. J., Ch. 791; 4 Jur. (N.S.) 981; 6 W. R. 434.

Covenant to make Provision for Children.]—In a separation deed the husband covenanted to pay an annuity during his life to the wife for the support of her herself and her infant child, C. J., and that he would by deed or will secure for her after his decease an annuity of 30*l.* He further covenanted that he would support all the children, that was to say (naming four other children), except C. J., "and should and would, by his last will or otherwise, make a proper and sufficient provision for all the said children after his decease." The husband died without having made any provision for C. J.; and by his will, after bequeathing two annuities, gave all the residue of his property to trustees, for his other children equally:—Held, that C. J. was entitled to the benefit of the covenant. *Swift* v. *Grazebrook*, 12 Jur. 87.

Provable in Husband's Bankruptcy.—An annuity determinable on unchastity is provable in the husband's bankruptcy. *Neal, Ex parte, Batey, In re*, 14 Ch. D. 579; 43 L. T. 264; 28 W. R. 875.

8. Arrangements as to Children.

See 36 & 37 Vict. c. 12, s. 2.

Delivery of, to Father, notwithstanding Provision in Separation Agreement.]—Children ordered to be delivered up by their mother to their father on habeas corpus, notwithstanding provisions contained in deeds of separation for their residing with the mother. *Westmeath's (Lord) Children, In re*, Jac. 267, n.

Abdication of Duty by Father—Policy of Law.]—The rule of law, that a covenant by a father to abstain from seeing or exercising any control over his children is void, is grounded upon this, that such a covenant is opposed to the welfare of the child; but if the court finds that by reason of the conduct of the father his control is injurious to the child, such a covenant will be enforced. *Swift* v. *Swift*, 34 Beav. 266; 34 L. J., Ch. 209; 11 Jur. (N.S.) 148; 11 L. T. 697; 13 W. R. 378. Affirmed, 34 L. J., Ch. 394; 11 Jur. (N.S.) 458; 12 L. T. 435; 13 W. R. 731.

By a memorandum of agreement made between husband and his wife, who was suing him for a divorce, it was agreed that a deed of separation should be executed, containing, among other provisions therein mentioned, provisions that two of their children should be placed entirely in the custody of the wife; that none of the children should be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child; and that neither of the two eldest sons should be sent to any school without the written consent of both husband and wife, unless to certain specified places of education:—Held, that the provisions as to the children were contrary to public policy,

as interfering with the due discharge of the father's duties with respect to them, and that on this ground, apart from all other objections, a decree for the execution of the deed of separation could not be made, though, if it had been executed, the insertion of those provisions would not have made it wholly void. *Vansittart* v. *Vansittart*, 2 De G. & J. 249 ; 27 L. J., Ch. 289 ; 4 Jur. (N.S.) 519 ; 6 W. R. 386.

By a deed of separation a husband and wife agreed to live separately for the rest of their lives, and the husband covenanted to pay to the wife a sum of 15*s.* per week, and to permit her to have the custody of the children of the marriage, wholly freed from his authority, as if she were a feme sole. The marriage was afterwards dissolved on the ground of the wife's adultery :—Held, that the husband's agreement to permit his wife to have the custody of the children ought not to be enforced, and that the terms of the deed of separation ought to be varied by reducing the amount of the weekly payment to the wife from 15*s.* to 10*s.* *Jump* v. *Jump*, 52 L. J., P. 71 ; 8 P. D. 159 ; 31 W. R. 956.

Matrimonial Domicil in France—Agreement Contrary to Policy of English Law.]—A native of England married in England a woman a native of France and went to reside with her in France, where their children were born. Differences having arisen, the wife instituted a suit in England, where the husband was residing, for a divorce, on the ground of cruelty and adultery, to which the husband filed a responsive allegation, and caused a suit in chancery to be instituted to obtain possession of the two youngest children, who had remained in France with their mother. The Lord Chancellor made an order for delivery of the children to their father, and a court in France made an order for carrying it out. The wife appealed against both orders. An agreement was then signed by the wife in France, and by the husband in England, by which it was stipulated that the youngest child should be left with the mother, that the wife's appeals should be abandoned, and her suit for a divorce, and that she would facilitate the husband's proceedings for a divorce, and that the husband would pay her an annuity and allow her access to all her children. The wife abandoned her appeals and her suit for a divorce, and the husband's responsive allegation was also dismissed. The wife filed a bill to obtain access to her children, and to have the annuity paid her :—Held, that, assuming the agreement to be one which was to be judged of by French law, and that it was valid by French law, it would not be enforced here, inasmuch as the stipulations that the youngest child should, in contravention of the order of the Lord Chancellor, be delivered to his mother, and that the wife would facilitate the husband's proceedings for a divorce, were contrary to the laws and policy of England. *Hope* v. *Hope*, 8 De G. M. & G. 731 ; 26 L. J., Ch. 417 ; 3 Jur. (N.S.) 454 ; 5 W. R. 387.

Misconduct of Father towards Children.]—A husband who had indecently conducted himself towards an infant female child of the marriage, and separated from his wife in consequence, covenanted in the separation deed that the children of the marriage (who were infants) should at all times thereafter be under the sole care, management, and protection of the wife :—Held, that the covenant was not contrary to public policy, and was enforceable in equity at the suit of the wife ; and that an injunction consequently granted against the husband to restrain him from proceeding to obtain the infant children from the custody of the wife should not be a perpetual injunction, but one until further order only. *S. C.*, 1 De G. J. & S. 710.

Misconduct by Husband—Proper Covenants enforced.]—A court of equity will enforce a legal and proper covenant in a separation deed although other covenants in the deed may be illegal. *Hamilton* v. *Hector*, L. R. 13 Eq. 511. Affirmed, 40 L. J., Ch. 692 ; L. R., 6 Ch. 701 ; 19 W. R. 990.

By a separation deed, made after the wife had instituted proceedings in the Divorce Court for divorce and the custody of her children, the husband covenanted to deliver up forthwith to his wife all her journals, diaries, and private correspondence and memoranda : that the elder two children of the marriage should remain at such schools in England as the husband, or such schools elsewhere as he with the consent of the wife, should direct ; that he and his wife should each have access to them at all reasonable and convenient times, subject to the regulations of the schools ; and that their holidays should be passed by them at such places and in such manner as the trustees of the deed should direct ; and that the younger two children (who were respectively under the age of seven) should remain in the custody of the wife :—Held, that having regard to the evidence with respect to the husband's misconduct, the covenants with respect to the holidays of the elder two children, were reasonable and proper, and would be enforced by the court, even if the covenant as to the custody of the younger children was not legal, as to which, however, the court expressed no opinion. *Ib.*

Access by Wife—Husband taking Children to Egypt.]—By a deed of separation made in 1880 between H., a medical officer in the army, and his wife, provision was made as to the custody of their four children (of whom the eldest was eleven and the youngest three years of age) during the approaching absence of the husband in India, after which he was to resume the entire custody of them, but he covenanted that full and free liberty of access to them should be always accorded to the wife, to the extent at least of her having the opportunity of spending one day in every fortnight with them. In 1884 he was ordered to Egypt, and proposed to take the first and third of the children with him. Mrs. H. applied for an injunction to restrain him from doing so :—Held, that the covenant did not bind H. to keep the children in a place where Mrs. H. could conveniently have access to them, and did not preclude him from taking them with him to any place where he might be ordered in the course of his duties, and that the injunction must be dissolved, there being no case made that he was removing them for the purpose of preventing Mrs. H. from having access to them. *Hunt* v. *Hunt*, 28 Ch. D. 606 ; 52 L. T. 302 ; 33 W. R. 157 —C. A.

"Usual Terms as to Access"—Custody.]—Cross petitions for divorce by husband and wife were withdrawn at the hearing, upon terms which included the execution of a separation deed to be settled by a counsel agreed upon in case of differ-

ence, and to contain "all usual terms as to access to children, &c." The parties could not agree, and the counsel settled a deed, providing that the wife should have the sole custody of the children, two boys of thirteen and fourteen, for half their vacations:—Held, in an action by the wife for specific performance of the agreement, that these provisions related to custody and not access, and it was beyond the powers of the counsel to insert them. That the court had power to settle the proper form of deed instead of referring it back. *Eversheď* v. *Eversheď*, 46 L. T. 690; 30 W. R. 732.

Semble, in an action for specific performance of an agreement to execute a separation deed, the court will not go into evidence whether the provisions agreed upon are for the benefit of the children. *Ib.*

Custody given to Wife—Specific Performance.]—The court will not refuse specific performance of an agreement for a separation deed—in compromise of a divorce suit—on the ground that it provides for the wife having the custody of the children. *Hart* v. *Hart*, 50 L. J., Ch. 697; 18 Ch. D. 670; 45 L. T. 13; 30 W. R. 8.

Child Born after Agreement—Participation in Fund.]—Upon a separation between A. and B. (husband and wife), a deed was executed, making a provision for the wife, and all and every the children of A., by B., who should attain twenty-one. A reconciliation took place, and another child was born:—Held, upon the construction of the deed, that such last-mentioned child did not participate in the provision. *Hulme* v. *Chitty*, 9 Beav. 437; 10 Jur. 323.

Unfitness of Wife—Atheistical Opinions—Removal of Children.]—By a covenant in a separation deed executed after the passing of the Infants' Custody Act, 1873, a father agreed that his infant daughter should remain in her mother's custody during eleven months in each year. The mother held and promulgated atheistical opinions, and refused to allow the child to receive any religious instruction. She also published and circulated an obscene book. The child was made a ward of court, being then about eight years old:—Held, that to bring up the child in the religion of her father was a duty which the court owed to its ward, and was unaffected by the covenant in the separation deed; and also that the refusal of religious instruction to the child and the publication of the obscene book were in themselves sufficient grounds for removing her from the custody of the mother. *Besant, In re*, 48 L. J., Ch. 497; 11 Ch. D. 508; 40 L. T. 469; 27 W. R. 741—C. A.

Deed not a delegation by Husband of Parental Rights.]—Such a deed does not place the wife with respect to the child in the same position as the father would have been in if he had not executed it. It does not amount to a delegation by the husband to the wife of his rights and powers in respect of the child, such substitution or delegation not being permitted by our law. *Ib.*

Covenant with Trustees to Maintain Children—Right of Child to sue—Cestui que Trust—Stranger suing on Covenant.]—To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of cestui qui trust under the contract. By a deed of separation between husband and wife, the husband covenanted with the trustees to pay to them an annuity for the use of the wife and two eldest daughters, and also to pay to the trustees all the expenses of the maintenance and education of the two youngest daughters, provided that the trustees permitted them to go to such school as the husband should direct, and provided also that the covenants by the trustees were duly observed and performed: provided also that the two youngest daughters should live at such place (being reasonable and proper for the purpose) as the husband should direct, and should be maintained and educated at his expense, the husband and wife to have all reasonable access to them. And the trustees covenanted with the husband that they would, during the continuance of the separation, keep him indemnified against all liability for the maintenance of the wife and two eldest daughters, and against all molestation by them, and that the wife would not take any proceedings against the husband for alimony, except as aforesaid; and that they, the trustees, would, on the husband defraying all the expenses connected therewith, carry out his desires as to the school at which the two youngest daughters should be educated, and the place at which they should live, and would permit them, if they so desired, and without any interference on the part of the wife, to accept any invitation of the husband to reside with him. On one of the two youngest daughters subsequently attaining sixteen, the husband refused any longer to maintain her, whereupon she brought an action, by her next friend, against the husband and the trustees of the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as plaintiffs:—Held, that upon the construction of the deed, the plaintiff was not in the position of cestui que trust under the covenant so as to entitle her to maintain the action, but liberty was given to her under the Rules of the Supreme Court, 1883, Ord. XVI. r. 2, to amend the writ, by adding the trustees, the wife, and the other daughters, or any of them, as plaintiffs. *Touche* v. *Metropolitan Railway Warehousing Co.* (L. R. 6 Ch. 671) considered. *Gandy* v. *Gandy*, 54 L. J., Ch. 1154; 30 Ch. D. 57; 53 L. T. 306; 33 W. R. 803—C. A.

The trustees refusing to be joined as co-plaintiffs, the statement of claim was amended by making the wife a co-plaintiff:—Held, that she had such an interest as entitled her to sue, the deed being an arrangement between the husband and wife, and the trustees being introduced on her behalf in order to get over the difficulty that the husband and wife could not at law sue each other, so that the trustees were to be considered trustees for the wife, and if they refused to sue, she could sue in equity. *Ib.* And see *De Crespigny* v. *De Crespigny*, col. 1016.

Party Taking Advantage of and Repudiating Deed.]—After the separation deed the husband committed adultery, and a decree was made for judicial separation, giving the custody of the two youngest daughters to the wife. After this the wife applied for increased alimony, which was granted by the president, but his decision was reversed on appeal (7 P. D. 168), both the argu-

ments and the judgment of the court of appeal proceeding on the footing (though the court did not expressly decide the point) that the husband remained liable under the deed to pay for the maintenance and education of the two youngest daughters. He now contended that his covenant was put an end to by the custody of the youngest daughters being given to his wife:—Held, that he was not at liberty to retain the benefit of a decision given on the footing that his liability under the covenant continued, and at the same time to insist that his liability under it had determined, and the appeal was ordered to stand over, with liberty to the wife to apply to the divorce court for increased alimony, if she should be so advised. *Ib.*

9. Resumption of Cohabitation.

Effect of.]—A deed of separation is avoided by the parties living together again. *Scholey* v. *Goodman*, 8 Moore, 350; 1 Car. & P. 36. *Angier* v. *Angier*, Gilb. 142.

A husband and wife when before the divorce court made an agreement in writing that if judicial separation was decreed, the wife should be permitted to enjoy during her life certain furniture; but that if she annoyed her husband her enjoyment of it should cease. Judicial separation was decreed, and the wife took possession of the furniture. The husband and wife afterwards resumed cohabitation:—Held, in an action by the wife to recover the furniture, that the agreement came to an end when cohabitation was resumed; and that, as the wife was entitled to the furniture during separation only, she took nothing under 20 & 21 Vict. c. 85, s. 25, which relates to property acquired by wife during separation. Dictum in *Randle* v. *Gould* (8 El. & Bl. 457) questioned. *Nicol* v *Nicol*, 55 L. J., Ch. 437; 31 Ch. D, 524; 54 L. T. 470; 34 W. R. 283; 50 J. P. 468—C. A.

—— **Judicial Separation—Alimony.**]—By a deed of separation in 1862, a husband and wife covenanted that the wife should not be compelled to cohabit with the husband, that she might dispose of her own property, that she might live where she pleased, and that the husband should pay to her 100*l.* a year while she should live chastely. From 1862 until 1872 the husband and wife lived apart; but in 1872 they resumed cohabitation. In 1879 they again separated, and in 1881 the wife obtained a decree of judicial separation with alimony at the rate of 180*l.* per annum. In an action by a lodging-house keeper against the husband for food and lodging supplied to the wife between July and October, 1880, the husband pleaded the deed of 1862, and that the 100*l.* a year therein covenanted to be paid by him to his wife had been so paid:—Held, that the deed was not rescinded by cohabitation having been resumed in 1872, that the decree for alimony did not affect the deed, and that the payment by the husband of the agreed sum was an answer to the action. *Negus* v. *Forster*, 46 L. T. 675; 30 W. R. 671.—C. A.

—— **On Action on Bond.**]—A defendant gave a bond to A. and B., conditioned for the payment of an annuity to his wife, unless she should at any time molest him on account of her debts, while living apart from her. By an indenture of the same date between the parties and the wife, reciting that the defendant and his wife had agreed to live separate during their lives, and that, for the wife's maintenance the defendant had agreed to assign certain premises to A. and B., and had given them an annuity bond; it was witnessed that the defendant assigned the premises to them in trust for the wife, and he covenanted to A. and B. to live separate from her, and not molest her or interfere with her property; and power was given to her to dispose of it by will, and to sell the assigned premises, and buy estates or annuities with the proceeds. The wife covenanted with the defendant to maintain herself during her life out of the property, unless she and the defendant should afterwards agree to live together again; and that he should be indemnified from her debts. The indenture (except as to the assignment), and also the bond, were to become void if the wife should sue the defendant for alimony, or to enforce cohabitation. And it was provided, "that if the defendant and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture." There was no express covenant on the part of the trustees. The defendant and his wife separated, and afterwards lived together again for a time, and this fact was pleaded to an action by the trustees upon the annuity bond, as avoiding the security:—Held, that the reconciliation was no bar to an action on this bond, since it did not appear that the bond and the indenture of even date with it, were not really executed with a view of immediate separation; and although there might be parts of the indenture which a court of equity would not enforce under the circumstances, yet there was nothing, on a view of the whole instrument, to prevent the court from giving effect to the clause which provided for a continuance of the trusts, notwithstanding a reconciliation. *Wilson* v. *Mushett*, 3 B. & Ad. 740; 1 L. J., K. B. 250.

Agreement as to—Subsequent to Deed.]—So, where a husband in a separation deed covenanted with a surety (who covenanted to indemnify the husband against the wife's debts) to pay the wife an annuity for life:—Held, that a subsequent agreement between the husband and surety that if the wife returned to live with the husband the annuity should continue was valid and enforceable in equity. *Webster* v. *Webster*, 4 De G. M. & G. 437; 1 Sim. & G. 489; 22 L. J., Ch. 837; 1 W. R. 509.

Although generally the provisions of a separation deed are annulled by reconciliation and re-cohabitation, yet a husband may so conduct himself subsequently as to create new obligations on the footing of the old obligations contained in the deed of separation. *Ib.*

Covenant providing for.]—Action upon a deed of separation, by which a husband covenanted with a trustee for the wife, "that, as and by way of a provision for the wife, he and his executors would pay to the trustee or to the wife, or one of them, during her life, 10*s.* weekly"; provided, "that in case the husband and wife should at any time thereafter voluntarily and mutually consent and agree, by any writing under both their hands, subscribed and attested by and in the presence of two or more credible witnesses, to live and cohabit, and should accordingly live and cohabit, together as man and wife for one calendar month next thereafter, the deed should

thenceforth be void." Equitable plea, that, before the arrears of the weekly allowance accrued, the husband and wife, without any writing under their hands, cohabited together for six months :—Held, that the deed was not impliedly avoided by such cohabitation. *Randle* v. *Gould*, 8 El. & Bl. 457 ; 27 L. J., Q. B. 57 ; 4 Jur. (N.S.) 304 ; 6 W. R. 108.

Construction—Parties not Husband and Wife—Annuity during Life—Resumption of Cohabitation.]—The rule applicable to a separation deed between husband and wife, that a provision made for the wife is primâ facie to be taken to be during separation only, will not be extended to a separation deed in similar form made between persons who have lived together without being husband and wife. In such a case, on that ground and on the construction of the deed, which granted to the woman an annuity "during her life" :—Held, that the annuity did not cease on the resumption of cohabitation. *Abdy, In re, Rabbeth* v. *Donaldson*, 64 L. J., Ch. 465 ; [1895] 1 Ch. 455 ; 12 R. 163 ; 72 L. T. 178 ; 43 W. R. 323—C. A.

Transfer of Shares—Re-transfer.]—On the marriage between the plaintiff and the defendant the whole of the plaintiff's property, except thirty-five shares in the Crystal Palace Company, was settled. The shares were taken possession of by the husband in his marital right, and were transferred into his name. A separation afterwards took place, and by the separation deed, which contained a covenant by the trustee under it to indemnify the husband against the wife's debts, the husband agreed to transfer the shares to a trustee for the separate use of the wife, and this was done. A re-cohabitation afterwards took place :—Held, that the agreement by the husband to transfer the shares was an integral part of the separation deed, and that as the latter had been rendered void by the re-cohabitation, the husband was entitled to a re-transfer of the shares. *O'Malley* v. *Blease*, 20 L. T. 899 ; 17 W. R. 952.

Maintenance of Children.]—As to the rights of children to maintenance out of annuity granted to wife under a separation deed where cohabitation has been resumed. See *Crouch* v. *Waller*, 4 De G. & J. 302.

10. Subsequent Adultery.

Effect of.]—Adultery of the wife after separation is no plea to a covenant to pay a trustee a separate maintenance for the wife. *Baynon* v. *Batley*, 8 Bing. 256 ; 1 M. & Scott, 339 ; 1 L. J., C. P. 75.

A deed of separation, if valid when executed, is not invalidated by subsequent adultery. *Evans* v. *Carrington*, 2 De G., F. & J. 481 ; 30 L. J., Ch. 364 ; 7 Jur. (N.S.) 197 ; 4 L. T. 65.

But the circumstance of a wife having induced her husband to execute a deed of separation, in contemplation of a renewal of the illicit intercourse, is sufficient to invalidate the deed. *Ib.*

A decree of dissolution of marriage, on the ground of adultery, is no answer to an action by the wife's trustee upon a covenant by the husband to pay her an annuity, contained in a deed of separation which recites the wife's acknowledgment of the adultery, which was afterwards made the foundation of the suit in the divorce court. *Gos'in* v. *Clark*, 12 C. B. (N.S.) 681 ; 31 L. J., C. P. 330 ; 9 Jur. (N.S.) 520 ; 6 L. T. 824.

Husband and wife were living apart under a deed of separation, when the husband presented a petition for a divorce, on the ground of his wife's adultery. The wife made a counter-charge of cruelty, and prayed for a judicial separation. At the hearing the jury found all the issues in favour of the wife :—Held, that the institution of the suit remitted the wife to the position which she held before the deed of separation, and, that, being the successful party, she was entitled to the full remedy allowed by the law, viz. a judicial separation. *Brown* v. *Brown and Shelton*, 43 L. J., Mat. 47 ; L. R. 3 P. 202 ; 31 L. T. 272.

—— **Marriage Settlement.**]—A bill by a husband against a divorced wife, the trustees of her marriage settlement, and of a deed of separation, alleged that the wife had been guilty of incontinence, before her marriage, with a person with whom she afterwards committed adultery ; and after her marriage she withdrew herself from her husband, and refused to cohabit with him, whereupon a deed of separation was executed by him, his wife, and a trustee : that the wife left the husband, and refused to cohabit with him, in collusion with her paramour, in order that she might more readily have adulterous intercourse with the paramour, and that she fraudulently procured the husband to execute the separation deed for the purpose of more securely carrying on her adulterous intercourse with the paramour ; that proceedings at law for crim. con., and in the divorce court for a dissolution of marriage, had been successfully prosecuted ; that a large sum was due to him for costs in such proceedings from the paramour ; that since the divorce he had made no payment under the separation deed ; and that an action by the trustee had been commenced against him. The bill prayed that the marriage settlement and the deed of separation might be set aside and declared void as against the husband :—Held (affirming 1 John. & H. 598 ; 29 L. J., Ch. 330 ; 6 Jur. (N.S.) 268), that the marriage settlement could not be set aside, either on the ground of the incontinence before marriage or of the subsequent adultery of the wife. *Evans* v. *Carrington*, 2 De G. F. & J. 481 ; 30 L. J., Ch. 364 ; 7 Jur. (N.S.) 197 ; 4 L. T. 65.

Held, also (reversing the vice-chancellor) that the deed of separation was fraudulent and void, there being evidence that the wife had had illicit intercourse before her marriage, and that she had induced the plaintiff to execute the deed in order more easily to renew and facilitate the criminal intercourse with her paramour. *Ib.*

Non-disclosure of ante-nuptial incontinence on the part of a wife :—Held, not to be such a fraud upon the husband as to entitle him to set aside settlement made upon the marriage. *Ib.*

But, semble, that adultery committed before separation will invalidate a separation deed. *Ib.*

The court of chancery has no jurisdiction to deprive an adulteress, whose marriage has been dissolved, of any benefit under a settlement made under the marriage. *Ib.*

The circumstance of a wife having induced her husband to execute a deed of separation, in contemplation of a renewal of the illicit inter-

course :—Held, sufficient to invalidate the deed. *Ib.*

Under a covenant of indemnity in such a deed, the husband has no claim in respect of costs incurred in the proceedings for a divorce. *Ib.*

Subsequent Divorce.]—By a deed of three parts, between husband, wife, and trustees, reciting that differences existed, and that the husband and wife had agreed to live separately, the husband covenanted to pay an annuity to the wife during their joint lives and so long as they should live separately and apart ; also, in case of survivorship, to pay a sum of money to the trustees for her funeral expenses ; the trustees also covenanted to protect the husband against molestation by the wife, and to indemnify against her debts :—Held, that a plea alleging her subsequent adultery, and a decree by the divorce court of dissolution of marriage, was no answer to an action by the trustees for arrears of the annuity, the covenant for payment of annuity being absolute so long as they should live separately and apart. *Charlesworth* v. *Holt*, 43 L. J., Ex. 25 ; L. R. 9 Ex. 38 ; 29 L. T. 647 ; 22 W. R. 94.

Permanent Maintenance notwithstanding Deed of Separation.]—A wife, by a deed of separation, agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance. Subsequently, having discovered that he had been guilty of incestuous adultery, she obtained a decree for dissolution of the marriage :—Held, that, notwithstanding the deed, she was entitled to the usual order for permanent maintenance. *Morrall* v. *Morrall*, 50 L. J., P. 62 ; 6 P. D. 98 ; 29 W. R. 897.

A husband's adultery with one K. was condoned by his wife, but, differences between them having subsequently arisen, the parties separated, each party by the separation deed covenanting not to take proceedings to compel living together, and the husband covenanting to pay for the wife's benefit an annuity of 252*l.* The husband afterwards renewed his adulterous connection with K., and on the ground of the last adultery the wife obtained a decree for judicial separation. At the time of the proceedings the husband's means had greatly increased, and the wife applied for an inquiry as to his means, with a view to obtaining the allowance of a larger sum by way of permanent alimony :—Held, that the husband and wife were bound by the separation deed, and that the wife was not entitled to permanent alimony. *Gandy* v. *Gandy*, 51 L. J., P. 41 ; 7 P. D. 168 ; 46 L. T. 607 ; 30 W. R. 673—C. A.

No Revival by subsequent Adultery.]—Where a wife had entered into a voluntary deed of separation, in which it had been covenanted on her behalf that she should not in any future proceedings against her husband plead any offence or misconduct which had then been committed by him, and she had subsequently filed a petition for dissolution of her marriage by reason of his adultery and cruelty, but had failed to establish the cruelty alleged by her to have been committed subsequently to the date of the execution of the deed of separation :—Held, that his previous cruelty had not been revived by his subsequent adultery, and that the petitioner was only entitled to a decree of judicial separation. *Rose* v. *Rose*, 52 L. J., P. 25 ; 8 P. D. 98 ; 48 L. T. 378 ; 31 W. R. 573—C. A.

Judicial Separation, notwithstanding Deed.]—Husband and wife agreed to separate, and a deed was executed under which an allowance was secured to the wife. Subsequently the husband filed a petition for dissolution of marriage on the ground of her adultery, which was alleged to have taken place after their separation. The wife denied the alleged adultery, charged the husband with cruelty and prayed for a decree of judicial separation. At the trial the jury found in favour of the wife :—Held, that the wife was remitted to her original position by the institution of the suit by the husband, and being the successful party in the suit, that she was entitled to the fullest redress which the law allowed, namely, a decree of judicial separation. *Brown* v. *Brown and Shelton*, 43 L. J., Mat. 47 ; L. R. 3 P. 202 ; 31 L. T. 272.

11. Suing on Deeds.

Not Executed by Trustee.]—By a deed of separation, A. and B. were named trustees for the wife. B. never executed the deed, but promised to do so, and, on two occasions, instructed an attorney to enforce the deed against the husband. B., who survived A., having died, the wife brought an action upon the deed in the name of the executors of B. against her husband, the proceedings in which action were stayed by a judge's order. The court, on the application of the wife, set aside the order, upon payment of the costs of the application, and giving security to the executors against the costs of the action to the satisfaction of the master. *Archard* v. *Coulsting*, 6 Man. & G. 75.

In Trustee's Name, but without his Authority.]—By a deed of separation a husband agreed to pay an annuity to a trustee for the use of the wife. The annuity being in arrear, and the trustee refusing upon indemnity to sue the husband, an action was commenced in the trustee's name, but without his authority, for the recovery thereof. Under the circumstances, the court refused to stay the proceedings at the instance of the defendant. *Auster* or *Auster* v. *Holland*, 1 B. C. Rep. 104 ; 15 L. J., Q. B. 229 ; 10 Jur. 786.

For Payment of Allowances.]—By a deed of separation, dated the 22nd April, 1797, a husband covenanted with F. to pay, during the life of the wife, into her proper hands, for her separate use, or to such persons as she should by any note in writing, signed with her proper hand, appoint, notwithstanding coverture, a yearly sum of 163*l.* 16*s.*, by weekly payments of 3*l.* 3*s.* The deed contained a proviso for redemption of the annuity, on payment by the husband to the wife, to and for her separate use, of 1,000*l.* and all arrears of the annuity. In November, 1797, the husband gave to S. a bond and a warrant of attorney for securing the principal sum of 1,400*l.*, and 5*l.* per cent. interest in July, 1799 ; and in answer to a bill filed by the husband in 1800, to restrain proceedings at law upon these securities, the covenantee, F., admitted that, as to 1,000*l.*, the consideration was the sum agreed to be paid by the husband for the redemption of the annuity ; and, upon the death of the husband, the bond and warrant of attorney were found

amongst his papers. In an action by the executor of F. upon the deed, to recover thirty-nine years' arrears of annuity, the defendant pleaded that he had, under the proviso therein, paid to the wife, to and for her separate use, 1,000*l.* and all arrears due at the time. At the trial, the judge told the jury that the absence of any payment of, or claim to, the annuity for thirty-nine years, though not conclusive, was evidence for them to consider whether or not the annuity had been extinguished by payment of the 1,000*l.* and arrears under the proviso; and that, if the bond and warrant of attorney were given to S. by the authority of the wife, and for her use, for the 1,000*l.*, and the money thereby secured was actually paid to the obligee, or to his personal representative, then such payment to the wife was within the meaning of the issue:—Held, that the direction was correct. *Bostock* v. *Hume*, 8 Scott (N.R.) 590; 7 Man. & G. 893.

Plea of Dissolution of Marriage.]—A covenant in a deed, whereby a husband covenanted with trustees that he would, during the joint lives of himself and his wife, and during so long as they should live separate and apart, pay unto the trustees for the separate use of his wife an annuity, is an absolute covenant for payment of the annuity during the joint lives of the husband and wife, and during so long time as they lived separately, and not merely while the marriage tie subsisted; therefore, a plea of dissolution of the marriage is no answer to an action on the covenant for arrears of the annuity. *Charlesworth* v. *Holt*, 43 L. J., Ex. 25; L. R. 9 Ex. 38; 29 L. T. 647; 22 W. R. 94. *Rowley* v. *Rowley*, 35 L. J., P. 110; L. R. 1 H. L. (Sc.) 63.

By a separation deed reciting that differences had arisen between a husband and wife, in consequence of which they had agreed to live apart, the defendant became a surety for the payment by the husband to the trustee for the wife, of a weekly sum during the joint lives of the husband and wife. In an action against the defendant, as surety, for arrears of the weekly sum:—Held, that a plea setting out the deed, and alleging that the defendant became a party to it to prevent any public exposure, that the wife had subsequently commenced a suit for a divorce, and that the marriage had been dissolved, was bad. *Grant* v. *Budd*, 30 L. T. 319; 22 W. R. 544.

Interference of Equity.]—The court of chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon. *Wilson* v. *Wilson*, 1 H. L. Cas. 538; 12 Jur. 467.

A husband entered into a covenant, in a deed of separation, that he would permit his wife to live separate from him, and would not molest her for so doing nor visit her without her consent:—Held, that a court of equity will restrain him from infringing such a covenant. *Sanders* v. *Rodway*, 16 Beav. 207; 16 Jur. 1005.

A husband, having in a deed of separation covenanted with trustees on behalf of his wife, that he would not endeavour to compel her to cohabit or live with him by any legal proceedings, afterwards commenced a suit against her in the divorce court for restitution of conjugal rights:—Held, that the trustees of the deed and the wife were entitled to an injunction to restrain him from proceeding with the suit. *Hunt* v. *Hunt*, 4 De G. F. & J. 221; 31 L. J., Ch. 161; 8 Jur. (N.S.) 85; 5 L. T. 778; 10 W. R. 215.

Power of Court, Variation of, after Dissolution of Marriage.]—In June, 1881, a deed of separation was executed by which the husband agreed to pay, for the benefit of the wife, 52*l.* a year. Shortly after the separation she committed adultery, and in November, 1882, a decree for dissolution of the marriage was made absolute. In April, 1883, the husband obtained leave to present a petition to vary the deed, on payment of all arrears up to that time. There were three children of the marriage, who were living with the husband. A petition having been presented, the matter was referred to the registrar, who reported that the wife had no means of support, and that the husband's income was about 270*l.* a year. Butt, J., treated the case as one of alimony depending mainly on the husband's means, and refused to vary the deed. But held, on appeal, that the case was not to be treated as one of alimony, but one in which the court had a discretion as to the amount of allowance which ought to be made to the wife under all the circumstances; and that, having regard to the circumstances, and the conduct of the wife in the suit, the husband ought to be allowed to retain one-half of the allowance provided by the deed. *Clifford* v. *Clifford*, 53 L. J., P. 68; 9 P. D. 76; 50 L. T. 650; 32 W. R. 747—C. A.

12. Specific Performance.

Jurisdiction.]—Courts of equity, recognising the validity of separation deeds, will enforce them. *Sanders* v. *Rodway*, 16 Beav. 207; 16 Jur. 1005.

A court of equity will recognise separation deeds, and enforce specific performance of covenants in them. *Hunt* v. *Hunt*, 31 L. J., Ch. 161; 8 Jur. (N.S.) 45; 5 L. T. 412; 10 W. R. 161.

The court of chancery has jurisdiction to enforce the specific performance of an agreement by which a person has bound himself to execute a deed, although such deed may be a deed of separation between himself and his wife. *Wilson* v. *Wilson*, 5 H. L. Cas. 40; 23 L. J., Ch. 697.

An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, will be decreed to be specifically performed. *Gibbs* v. *Harding*, 39 L. J., Ch. 374; L. R. 5 Ch. 336; 18 W. R. 361. Affirming, 21 L. T. 322.

—— **Discretion of Court.**]—There is no doubt of the general jurisdiction of a court of equity to decree the specific performance of articles between husband and wife for a separation and a separate maintenance. But the court exercises its discretion in this case very cautiously, and will not give its assistance until it has seen whether, from the circumstances of the case, there is or is not a probability of the parties being reconciled. A sentence in ecclesiastical court for the restitution of conjugal rights is a reason for this court refusing to give assistance:

in such a case, and, in general, if such an agreement is not fit to be enforced, the court will, on a cross bill, order it to be delivered up, though there may be cases in which no relief will be given to either party. *Fletcher* v. *Fletcher*, 2 Cox, 109.

—— **Revising Agreement.**]—Held, also, that the court was fully at liberty to examine the articles of agreement, and on finding in them a stipulation as to payment of debts inconsistent with the rest of the articles, and, insensible or absurd, to authorise the introduction into the deed of a covenant which would carry into effect the real intentions of the parties. *Wilson* v. *Wilson*, supra.

—— **Trifling Breaches by Person seeking to enforce.**]—A married woman can contract to live apart from her husband, and the husband is entitled to come to the court to enforce specific performance of such a contract. A husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part. Where, in a separation deed, the husband had covenanted to allow an infant child to reside with the wife, and had subsequently concurred as next friend of the infant in a petition under the Infants' Custody Act (36 Vict. c. 12) for the removal of the infant from the wife's custody, which had been ordered by the court:—Held, that this was not a breach of the husband's covenant. Injunction granted to restrain the wife from suing for restitution of conjugal rights. *Besant* v. *Wood*, 12 Ch. D. 605; 40 L. T. 445. And see *Jodrell* v. *Jodrell*, 9 Beav. 45; 15 L. J., Ch. 17; 9 Jur. 1022; and *Durand* v. *Durand*, 2 Cox, 207.

Legal and Illegal Covenants.] — A court of equity will enforce a legal and proper covenant in a separation deed, although other covenants in the deed may be illegal. *Hamilton* v. *Hector*, L. R. 13 Eq. 511. Affirmed, 40 L. J., Ch. 692; L. R. 6 Ch. 701; 19 W. R. 990.

Wife having Custody of Children.] — The court will not refuse specific performance of an agreement for a separation deed, because it provides for the wife having the custody of the children. *Hart* v. *Hart*, 50 L. J., Ch. 697; 18 Ch. D. 670; 45 L. T. 13; 30 W. R. 8.

Dum casta Clause.]—Secondly, that a dum casta clause did not come within the term "usual covenants," in a separation deed agreed to as part of the terms of compromise of a divorce suit. *Ib.* *And see* col. 857.

Usual Covenants.]—Thirdly, that the court would construe the term "usual covenants" in reference to surrounding circumstances, but the adultery of the wife not having been proved could not form an element for the consideration of the court. *Ib.*

Arbitration Clause.]—Fourthly, that the agreement on the face of it being complete, the arbitration clause could only come into force in case of difference between the parties, and did not oust the jurisdiction of the court to settle the deed itself. *Ib.*

Decree for specific performance; the deed of separation to be settled in chambers if the parties differed, and no dum casta clause to be inserted. *Ib.*

Mistake.]—It is no answer to a suit for specific performance for the defendant to say that though he understood what the words of the agreement were he was under a mistake as to their legal effect. *Ib.*

Offer by Husband to receive back Wife.]—Specific performance decreed of articles of separation at the suit of the wife (to allow her separate maintenance agreed upon), though the husband offered by his answer to receive her again. *Guth* v. *Guth*, 3 Bro. C. C. 614. But see *id.* n. See also *Seeling* v. *Crawley*, 2 Vern. 386.

Resumption of Cohabitation.]—If the parties choose to come together again, the articles are no longer binding. *Angier* v. *Angier*, Gilb. 142. *See* col. 1003.

Threats by Husband—Benefit to Wife.]—By post-nuptial settlement all the husband's property was vested in a trustee, in trust for his wife for life, for her separate use, but without power of anticipation, remainder to the husband absolutely; with a proviso, that if she should leave him on any account except by his permission, or by reason of his breach of the laws against her, she should forfeit all interest under the settlement. Differences having arisen, articles of arrangement were agreed upon, by which the parties were to live separate, and the wife was to have a fixed income, and a formal deed of separation was to be drawn up and executed. The husband threatened, unless this arrangement were carried out, to impeach the wife's interest under the settlement in various ways, and in particular it was clear that the whole of the premises were in his power, the settlement being voluntary, and that he might sell the whole to any purchaser for valuable consideration, and waste the proceeds:—Held, that the arrangement was beneficial to the lady, and ought to be carried out, the deed of separation to be settled, if necessary, by the judge. *Smith* v. *Smith*, 18 Jur. 1021.

13. Other Matters relating to.

Receiving Rents with Husband's Assent.]—Where a feme covert has for many years been separated from her husband, and during that time has received, for her separate use, the rents of her own property, which accrued to her by devise after the separation, she will be presumed to receive the rents and acknowledge the tenancy by her husband's authority. *Doe* d. *Leicester* v. *Biggs*, 1 Taunt. 367; 11 R. R. 533.

Surrender of Copyholds by Wife.]—Where a married woman lives apart from her husband under articles of separation, by which he covenants "that she shall enjoy to her own use all such estates, both real and personal, as shall come to her during the coverture, and that he will join in the necessary conveyances to limit them to such uses as she shall appoint"; and copyhold lands having afterwards descended to her, the husband again covenants in the same manner as before, and "that he will join in surrendering such estates to such uses as she shall appoint": the wife may surrender the copyhold lands without

the husband joining, and without a special custom for that purpose. *Compton* v. *Collinson*, 1 H. Bl. 334; 2 R. R. 786.

Pleading.]—In an action on a deed, reciting that differences had arisen between the plaintiff and his wife, and that it had been agreed to live apart, and that the plaintiff should be paid during the separation an annual sum of money out of the personal estate of his wife; and the defendant on behalf of the wife, with her privity, testified by her being a party, covenanted to pay the same out of the personal estate of the wife: —Held, that it was sufficiently shown by the declaration, although it contained no precise averment of the fact, that the wife had a personal estate, and the court refused to arrest the judgment. *Groome* v. *Debenham*, 6 M. & S. 345.

License to Wife to Live where She pleases.]—If a husband, by deed of separation executed by himself, but not executed by either of the trustees, gives his wife licence to live where she pleases, he is not justified in entering the house of a third person to reclaim his wife, as being improperly harboured there; and the husband, before doing so, should at least have given distinct notice to the third person that, as far as by law he could, he revoked the licence. *Lewis* v. *Ponsford*, 8 Car. & P. 687.

In an action of trespass, with a plea of justification, that the defendant entered the plaintiff's house to reclaim his wife, who was wrongfully harboured there, a deed of separation of the defendant and his wife is admissible, if executed by the defendant, although not executed by either of the trustees. *Ib.*

Expenses of Preparing and Executing.]—A husband who had separated himself from his wife agreed that a deed of separation should be prepared and executed:—Held, that he was not liable for the expenses of his wife's trustee in procuring a counterpart to be prepared and executed, in the absence of any promise to pay that expense. *Ladd* v. *Lynn*, 2 M. & W. 265; M. & H. 27; 6 L. J., Ex. 73; 1 Jur. 42.

Usual Covenants, what are.]—Held, that the court would construe the term "usual covenants" in reference to surrounding circumstances, but the adultery of the wife not having been proved it could not form an element for the consideration of the court. *Hart* v. *Hart*, 50 L. J., Ch. 697; 18 Ch. D. 670; 45 L. T. 13; 30 W. R. 8. And see *Fearon* v. *Aylesford*, 54 L. J., Q. B. 33; 14 Q. B. D. 792; 54 L. T. 954; 33 W. R. 331; 49 J. P. 596.

Dum casta Clause.]—A dum casta clause does not come within the term "usual covenants" in a separation deed agreed to as part of the terms of compromise of a divorce suit. *Hart* v. *Hart*, supra. *And see* col. 857.

Agreement apparently Complete—Arbitration Clause.] — The agreement on the face of it being complete, the arbitration clause could only come into force in case of difference between the parties, and did not oust the jurisdiction of the court to settle the deed itself. *Ib.*

Decree for specific performance; the deed of separation to be settled in chambers if the parties differed, and no dum casta clause to be inserted. *Ib.*

Mistake as to Meaning of Words.]—It is no answer to a suit for specific performance for the defendant to say that though he understood what the words of the agreement were he was under a mistake as to their legal effect. *Ib.*

Dum casta Clause — Cancellation.]—A wife having obtained a decree absolute for the dissolution of her marriage, a deed not containing a dum casta clause had subsequently, by order of the court, been executed by the respondent in the suit securing an annuity to the petitioner:—Held, that the court would have no power to set aside the deed by reason of any subsequent unchastity of the wife. *Bradley* v. *Bradley*, 51 L. J., P. 87; 7 P. D. 237; 47 L. T. 355; 31 W. R. 200.

Separated Wife not a Witness against Husband.]—After a deed of separation executed, the wife is not to all intents and purposes a feme sole, she cannot be a witness against her husband, or be guilty of the felony in his presence, nor can an action be maintained against her. *St. John* (*Lord*) v. *St. John* (*Lady*), 11 Ves. 530.

An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, will be decreed to be specifically performed. *Gibbs* v. *Harding*, 39 L. J., Ch. 374; L. R. 5 Ch. 336; 18 W. R. 361.

Satisfaction.]—A., by deed of separation, covenanted with the trustee of the deed to pay him an annual sum of 52*l.* during the life of A.'s wife, to be paid to her on four special quarterly days for her separate use without power of anticipation. A., by will, subsequently gave certain specific properties to trustees, to pay out of the rents an annuity of 52*l.* to his wife generally, on the same special quarterly days:—Held, that there being no direction in the will to pay debts and legacies, and no expression of a contrary intention, the general rule must prevail that the annuity given by the will was in satisfaction of the annuity covenanted to be paid by the deed of separation; and that the widow was put to her election. *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595; 31 L. T. 225.

Injunction to restrain Breach of.]—A married woman can contract to live apart from her husband, and the husband is entitled to come to the court to enforce specific performance of such a contract. A husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenant on his part. Where, in a separation deed, the husband had covenanted to allow an infant child to reside with the wife, and had subsequently concurred, as next friend of the infant, in a petition under the Infants Custody Act (36 Vict. c. 12) for the removal of the infant from the wife's custody, which had been ordered by the court:—Held, that this was not a breach of the husband's covenant. Injunction granted to restrain the wife from suing for restitution of conjugal rights. *Besant* v. *Wood*, 48 L. J., Ch. 497; 12 Ch. D. 605; 40 L. T. 445. *See* col. 990.

Wife's Conveyance—Specific Performance of.]—A married woman was entitled by an antenuptial settlement to a jointure rent-charge after her husband's death, secured upon his real estates in Ireland. The wife having left him, the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up and signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification that no further steps were to be taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise and was executed by the husband, but the wife refused to execute it, or to return to her husband, and the husband afterwards died:—Held, that the wife was not, when she signed the document, in all respects in the same position as a feme sole, and that even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4, c. 92, ss. 68, 71; and that specific performance of the agreement to release her jointure could not be decreed against her. *Hunt* v. *Hunt* (4 De G. F. & J. 221) and *Besant* v. *Wood* (12 Ch. D. 605) commented on by Selborne, L.C. *Cahill* v. *Cahill*, 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861—H. L. (Ir.)

—— **Apportionment of Maintenance.**] — A separate maintenance, payable quarterly, at the end of each quarter, is to be apportioned at the death of the wife. *Howell* v. *Hanforth*, 2 W. Bl. 1016.

Agreement to compromise Divorce—Access to Children.]—Cross petitions for divorce by husband and wife were withdrawn at the hearing, upon terms which included the execution of a separation deed to be settled by a counsel agreed upon in case of difference, and to contain "all usual terms as to access to children," &c. The parties could not agree and the counsel settled a deed, providing that the wife should have the sole custody of the children, two boys of thirteen and fourteen, for half their vacations:—Held, in an action by the wife for specific performance of the agreement, that these provisions related to custody and not access, and it was beyond the powers of the counsel to insert them. That the court had power to settle the proper form of deed instead of referring it back. *Eversheds* v. *Eversheds*, 46 L. T. 690; 30 W. R. 732. *See* col. 1001.

Semble, in an action for specific performance of an agreement to execute a separation deed, the court will not go into evidence whether the provisions agreed upon are for the benefit of the children. *Ib.*

Construction of Stipulations as to Debts contracted by Wife.]—Declaration on bond: plea, that it was conditioned for performance of covenants which were to indemnify the obligee from alimony and debts incurred by his wife after their separation, and that the defendant had performed the covenants; replication, that a judgment was recovered against the obligee by a creditor of his wife, and he paid debt and costs of which the defendant had notice. The defendant is liable for the costs as well as the debt paid by the plaintiff; for the covenant to indemnify is general, and it was not necessary for the plaintiff to give notice that an action was commenced; and if it had been necessary, the plaintiff must have recovered on these pleadings, for the defendant admitted notice. *Duffield* v. *Scott*, 3 Term Rep. 374.

A deed of separation between husband and wife contained a covenant by the wife and her trustee, that she, her executors or administrators, or the trustees, or some or one of them, should and would at all times save, defend and keep harmless and indemnified the husband from and against the debt or debts, sum or sums of money, which the wife had then, and at the time of the making of the deed, contracted, or which she should at any time thereafter contract:—Held, that this covenant included debts previously contracted by the wife for necessaries while living with the husband. *Summers* v. *Ball*, 8 M. & W. 596; 10 L. J., Ex. 368.

To an action on this covenant assigning a breach in not indemnifying against the debt of a wife, a plea that the debt was not contracted within the true intent and meaning of the covenant is bad, as being a traverse of matter of law. *Ib.*

Maintenance of Children.]—A deed of separation between husband and wife contained a covenant by him, that he would pay the whole expense of the education, maintenance and support, except as thereinafter mentioned, of their three children, all of whom it was agreed, should be and remain in the custody and under the complete control of the husband, provided, that the wife, or, if she should fail to do so, the trustees of the deed should pay the expense of the education, maintenance and support of such of the children as should be permitted by the husband to reside with her during the period of such residence:—Held, that, with the particular exception mentioned, this was a general covenant on the part of the husband to maintain the children at all times, and therefore he was responsible, notwithstanding they were of age and were not residing with his wife, nor were under his care, custody or control. *De Crespigny* v. *De Crespigny*, 2 C. L. R. 404; 9 Ex. 192; 23 L. J., Ex. 27; 2 W. R. 75. *And see* col. 998.

Not to Molest.]—A deed of separation between husband and wife contained a covenant by the husband that he would not molest or disturb his wife in her person or manner of living nor institute any suit to compel her to cohabit with him, and a covenant by E. that the wife should not at any time thereafter molest or disturb the husband, or require, by any means whatsoever, either by ecclesiastical censure or otherwise, or in any other manner endeavour to compel the husband to cohabit with her, or to enforce any restitution of conjugal rights:—Held, that a suit by the wife in the divorce court for a judicial separation was not any breach of the covenant not to molest or disturb the husband. *Thomas* v. *Everard*, 6 H. & N. 448; 30 L. J., Ex. 214.

Cost of preparing Deeds, as to.]—See *Lancaster* v. *Lancaster*, [1896] P. 118; 74 L. T. 64; 44 W. R. 440—C. A.

IV. WIFE'S PROPERTY.

1. GENERALLY.

a. Equitable Separate Property.

i. *Words Sufficient to Create.*

Intention.]—To prevent the marital right in property of a married woman, a clear inten-

tion that it shall be to her separate use must appear. *Lumb* v. *Milnes*, 5 Ves. 517. *Massey* v. *Parker*, 2 Myl. & K. 174; 4 L. J., Ch. 47. *Gilchrist* v. *Cator*, 1 De G. & Sm. 188; 11 Jur. 448. *Austin* v. *Austin*, 46 L. J., Ch. 92; 4 Ch. D. 233; 36 L. T. 96; 25 W. R. 346.

—— **Clause against Anticipation.**]—The intention to create a separate use for the benefit of a married woman will not be inferred from the mere fact that the instrument of gift contains a clause restraining alienation or anticipation. Dictum, in *Baggett* v. *Meux* (1 Coll. 138) approved. *Stogdon* v. *Lee*, 60 L. J., Q. B. 669; [1891] 1 Q. B. 661; 64 L. T. 494; 39 W. R. 467; 55 J. P. 533—C. A.

"Own Use and Benefit."]—A trust for the wife's own use and benefit is not a trust for her separate use. *Beales* v. *Spencer*, 2 Y. & Coll. C. C. 651; 13 L. J., Ch. 67; 8 Jur. 236. And see *Barnes* v. *Forsyth*, 1 W. R. 142; *Blacklow* v. *Laws*, 2 Hare, 49; 6 Jur. 1121; *Roberts* v. *Spicer*, 5 Madd. 491; *Wills* v. *Sayers*, 4 Madd. 409; *Lewis* v. *Mathews*, 35 L. J., Ch. 638; L. R. 2 Eq. 177; *Foley* v. *Foley*, 18 W. R. 81.

"Only" for Wife.]—A trust "only" for a married woman, her executors, administrators, and assigns, is not a trust for her separate use. *Spirett* v. *Willows*, 3 De G. J. & S. 293; 34 L. J., Ch. 365; 11 Jur. (N.S.) 614; 11 L. T. 614; 13 W. R. 329.

"Sole" Use.]—The word "sole" is an operative word, and must be held in a will to mean separate, unless there be something to show an intention to apply it to something other than the marital right of a husband. *Tursey, In re*, 35 L. J., Ch. 452; L. R. 1 Eq. 561; 14 L. T. 15; 14 W. R. 474; but see *Massy* v. *Hayes*, L. R. 1 Eq. 110; 15 W. R. 375; *Massy* v. *Rowen*, L. R. 4 H. L. 288.

"Sole Use and Disposal."]—A legacy given to a married woman for her "sole use and disposal" vests in her as separate estate. *Bl end* v. *Dawes*, 50 L. J., Ch. 252; 17 Ch. D. 794; 43 L. T. 751; 29 W. R. 416.

"Independent of any Other Person."]—Testator gave his residuary estate to L. and A., share and share alike, for their own use and benefit, independent of any other person:—Held, that they were entitled to their shares for their separate use. *Margetts* v. *Barringer*, 7 Sim. 482.

Wife's "Proper Hands."]—Bequest in trust to pay the annual produce into the proper hands of a married woman is a bequest to her separate use. *Hartley* v. *Hurle*, 5 Ves. 545; 5 R. R. 113; but see *Blacklaw* v. *Laws*, 2 Hare, 49; 6 Jur. 1121; and *Trontbeck* v. *Baughey*, 35 L. J., Ch. 840; L. R. 2 Eq. 534; 12 Jur. (N.S.) 543; 14 W. R. 790.

Wife's Receipt to be a Discharge.]—When a legacy is given to a married woman, with a direction that her receipt shall, notwithstanding coverture, be a sufficient discharge, she takes the legacy for her sole and separate use. *Cooper* v. *Wells*, 11 Jur. (N.S.) 923; 13 L. T. 319. *Lee* v. *Prieaux*, 3 Bro. C. C. 381. *Molyneux, In re*, Ir. R. 6 Eq. 411.

"Solely and entirely for Her Own Use."]—Bequest of 1,000*l.* stock to a married woman "solely and entirely for her own use and benefit during her life" is a bequest to her for life to her separate use. *Inglefield* v. *Coghlan*, 2 Coll. 247.

"Absolute Use and Benefit."]—A bequest to a married woman of real and personal property "for her absolute use and benefit" is sufficient to create a separate estate. *Negus* v. *Jones*, 1 Cab. & E. 52.

"To be at Her Disposal."]—S. gave his daughter (bankrupt's wife) his watch, jewels, china, and household goods, to be at her disposal, and to do therewith as she should think fit. This is a bequest to her separate use, and shall not pass to the assignees. *Kirk* v. *Paulin*, 7 Vin. Abr. 95, pl. 43. *Prichard* v. *Ames*, Turn. & R. 222; 24 R. R. 31. And see *Graham, In re*, 20 W. R. 289.

"To and for Her Own Use"—Jewels and Trinkets.]—A mother gave by will to her daughter, a married woman, articles of plate, china, and glass, her workboxes, baskets, jewels, trinkets, and ornaments of the person, clothes, and wearing apparel "to and for her own use." The husband of the married woman subsequently died, having bequeathed his personalty upon certain trusts:—Held, that having regard to the nature of the articles, the gifts to the wife by her mother might be considered as having been made for her separate use. *Brymer, In re*, 24 L. T. 263.

Possession of Husband as Trustee—Marriage Settlement made Abroad.]—The rule that a husband is a trustee for his wife of her separate property when no other trustee has been appointed, applies to that which becomes her separate property by virtue of a marriage contract entered into in a foreign country. When, therefore, such property is in the possession of a husband at the commencement of his bankruptcy it does not pass to his trustee. *Sibeth, Ex parte, Sibeth, In re*, 54 L. J., Q. B. 322; 14 Q. B. D. 417; 33 W. R. 556—C. A.

No Trustee Interposed.]—A legacy to a feme covert "to her sole and separate use" does not vest in the husband, though no trustee be interposed. *Turnley* v. *Kelly*, Wall. Lyn. 311.

Ante-nuptial Settlement by Intending Wife.]—Settlement by a lady about to marry of property to trustees for her own sole use, benefit, and disposition, gives a separate estate. *Ray, Ex parte*, 1 Madd. 199.

Though the words "separate use" are not in a note given before marriage, the words "enjoy the profits" imply it. *Tyrrell* v. *Hope*, 2 Atk. 561.

The property of a married woman, settled by an ante-nuptial settlement for her separate use for life, with remainder as she should by deed or will appoint, with remainder in failure of appointment to her executors or administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire corpus in her for all purposes. *London Chartered Bank of Australia* v. *Lempriere*, 42 L. J., P. C. 49; L. R. 4 P. C. 572; 29 L. T. 186; 21 W. R. 513; 9 Moore, P. C. (N.S.) 426.

Offer of Settlement by Suitor.]—A suitor wrote to the mother of the young lady as follows:—"If your daughter has or may have money, my wish and intention would be that it should be settled for her sole and separate use." Consent to the marriage having been given, in the faith that the intention thus expressed would be fulfilled, and the marriage having taken effect without a settlement, the court ordered the wife's property to be settled in the usual way, and the costs of the suit and of the settlement to be paid out of the fund. *Alt* v. *Alt*, 4 Giff. 84; 32 L. J., Ch. 52; 8 Jur. (N.S.) 1075; 7 L. T. 266.

Reservation of Disposing Power—Presumption.]—Where a woman on her marriage reserves a power to dispose of her personal estate, all that she dies possessed of is to be taken to be her separate estate, or the produce of it, unless the contrary can be made to appear, and as she has power over the principal she may dispose of the interest. *Gore* v. *Knight*, 2 Vern. 535; Pre. Ch. 255; 1 Ir. Eq. R. 464.

Gift by Husband.]—A gift by will by a husband to his wife for her sole use and benefit is equivalent to a gift for her separate use. *Cox* v. *Lyne*, Younge, 562.

The mere gift of chattels to a married woman residing with her husband will not, in the absence of some expression of intention by the donor, enure for her separate use, so as to displace the husband's marital right to them, or withdraw them from liability to the claims of his creditors. *Fitzgibbon* v. *Pike*, 5 L. R., Ir. 487.

Conditional Gift—Performance of Condition.]—A testator promised his wife a piano, on condition that she would learn to play it; the condition was fulfilled:—Held, that this was a valid gift from the husband to the wife. *Whittaker* v. *Whittaker*, *Whittaker*, *In re*, 51 L. J., Ch. 737; 21 Ch. D. 657; 46 L. T. 802; 30 W. R. 787. See also *Parker* v. *Lechmere*, 12 Ch. D. 256; 28 W. R. 48.

—— By Will.]—A gift of real and personal estate by a testator to his wife "for her sole use and benefit" does not give her a separate estate in the event of subsequent coverture. *Gilbert* v. *Lewis*, 1 De G. J. & S. 38; 32 L. J., Ch. 347; 9 Jur. (N.S.) 187; 7 L. T. 164; 11 W. R. 223.

Freeholds—Agreement signed by Husband only.]—In order that a fee simple of an intended wife may be effected with a trust for her separate use by an agreement made between the intended husband and wife before marriage, the agreement must be in writing and signed by the wife as well as by the husband; if it is signed by the husband alone, it is, owing to the Statute of Frauds, s. 7, invalid as a declaration of trust for separate use as to the fee simple, a husband having in his wife's land only an estate for the joint lives of himself and his wife with a possible estate by the curtesy. *Dye* v. *Dye*, 53 L. J., Q. B. 442; 13 Q. B. D. 147; 51 L. T. 145; 33 W. R. 2—C. A.

"Are Married"—Use in Future Sense.]—Testatrix devised an estate to trustees, in trust for her brother Benjamin for life, and directed the trustees to sell it after her brother's decease, and to divide the produce amongst his children who should be living at his decease; and, after giving sums of money and shares of her residue to the children of her other brothers and sisters, she said: "I direct that the legacies and shares of such of my nieces as are married shall be to their separate use, free from the debts and control of any husband, and that my trustees shall have power to give effect to this my intent":—Held, that the testatrix had used the word "are" in a future sense, and that she intended that such of her nieces as should be married at the time when their legacies and shares became payable should take to their separate use. *Bayliss's Trust*, *In re*, 17 Sim. 178; 13 Jur. 1090.

Fund Paid to Trustees for Use of Wife—Second Marriage.]—A father gave his property to trustees on trust during the life of his son to pay, apply, and dispose of the annual produce of a portion of it for the maintenance and support of his son and his present or any future wife, and the maintenance, education, and support of their children, or any or either of them his son and his wife and children, in such manner and such proportions as the trustees should in their discretion think fit and proper, without being answerable or accountable to any person for the way in which they should apply the same; and, after the death of his son, to pay and apply the annual proceeds in like manner unto and for the benefit of any widow for life, and any children until they should attain twenty-one or marry, and subject to those trusts in trust for the children. The son died in 1849, leaving a wife and six children, the youngest of whom attained twenty-one in 1870. In 1851 the widow married again. The settlement made on the marriage did not comprise the above annual proceeds, and the trustees continued to pay them to the wife as part of her separate estate and on her separate receipt. The second husband, who was living apart from his wife, claimed to be entitled to the income during her life:—Held, that the trustees had a discretion to pay the wife the income for her separate use. *Austin* v. *Austin*, *Austin* v. *Boyce*, 46 L. J., Ch. 92; 4 Ch. D. 233; 36 L. T. 96; 25 W. R. 346.

Gift for Separate Use, Remainder Over—Residue for Separate Use.]—Gift by will of a fund to trustees for A., a widow, for life, for her separate use, with remainder over, followed by a gift of the residue to A. for her own sole use and benefit absolutely. A. subsequently married again:—Held, that the marital right of the husband in the residue was excluded. *Tarsey*, *In re*, 35 L. J., Ch. 452; L. R. 1 Eq. 561; 14 L. T. 15; 14 W. R. 474.

Widow's Pension from East India Company.]—Under a trust deed providing pensions to be paid for the maintenance of widows and children of clerks in the East India Company's service, and stipulating that any recipient of a pension who should dispose of or incumber it should lose all right to such pension, a widow became entitled to a pension. She married a second husband, who claimed to be entitled to a pension in his marital right:—Held, that the pension provided for the petitioner was intended by the trust deed to be for her separate use, and the money was ordered to be paid to her upon her sole

receipt. *Peacock's Trusts, In re*, 48 L. J., Ch. 265; 10 Ch. D. 490; 39 L. T. 661; 27 W. R. 500.

French Husband—Fund to Separate Use of Wife.]—A father gave his residuary estate to trustees upon trust to pay the income to his daughter for life for her separate use, and after her death to pay the fund to the children of the daughter as she should by deed or will appoint, and in default of appointment amongst them equally. The daughter appointed by deed the whole of the fund amongst her children, giving the plaintiff, who was one of them, a specified sum for her separate use absolutely. The plaintiff, after the death of her grandfather, and before the date of the appointment by her mother, married a Frenchman domiciled in France. He died before the date of the appointment, and there was one child only of the marriage. There was no settlement on the marriage, and the French law of community applied, under which the child became entitled, in the absence of any contrary declaration by the donor, to half the property acquired by her mother during the marriage:—Held, that the plaintiff must be considered to have acquired the appointed fund from the date of the appointment only, and that the fund not having been acquired during the marriage, did not become subject to the law of community. *De Serre* v. *Clarke*, 43 L. J., Ch. 821; L. R. 18 Eq. 587; 31 L. T. 161; 23 W. R. 3.

Held, also, that the fact of the gift being expressed to be for the separate use was a sufficient declaration to exclude the law of community. *Ib.*

Legacy to Married Woman—Separate Estate—Seizure by Husband—Trustee—Statute of Limitations.]—In 1876 a husband took from his wife by force a legacy bequeathed to her separate use, which she had, to his knowledge, just received on her separate receipt. The wife repeatedly demanded the money from her husband until his death in 1894, but did not obtain it. In 1895 she brought an action against her husband's executors for the amount:—Held, that the husband knew or was affected with notice that the legacy was his wife's separate property, and had, by taking possession of it, made himself a trustee for her; that as he had retained the money and not accounted for it, his executors could not under the Trustee Act, 1888, s. 8, claim the benefit of the Statute of Limitations, and that his estate was liable to refund the amount. *Wassell* v. *Leggatt*, 65 L. J., Ch. 240; [1896] 1 Ch. 554: 74 L. T. 99; 44 W. R. 298.

Settlements—Ante-nuptial—Post-nuptial—Construction.]—By an ante-nuptial settlement, a mortgage for 4,000*l.*, the property of the wife, was assigned to trustees, as to one moiety, on the usual trusts, and as to the remaining moiety of 2,000*l.* in trust only for the wife, her executors, administrators, and assigns, and when realised, be paid over to her, and them, in the same manner as she or they would have been entitled to receive the same, in case the assignment and settlement had not been executed. By a settlement after the marriage, the last-mentioned moiety was settled by the husband and wife, upon the usual trusts, for themselves and their children. Shortly afterwards the husband was adjudicated bankrupt on the petition of a creditor, whose debt was contracted before the settlement, at the date of which the husband retained enough to pay his creditors:—Held, that in the first settlement no separate use was created, in the wife's favour, of the second moiety. *Spirett* v. *Willows*, 5 Giff. 49; 34 L. J., Ch. 365; 11 Jur. (N.S.) 870; 11 L. T. 614; 13 W. R. 329.

"Savings out of Income."]—By an ante-nuptial settlement an annuity was assigned to trustees in trust to the lady for her sole and separate use for her life, with a provision that all savings arising from her income should be held by the trustees subject to her appointment, and in default of appointment in trust for her next of kin. The lady died in May, 1847, without having made any appointment, and the last payment to her in respect of the annuity had been made in the December preceding her death:—Held, that the portion of the annuity remaining in the hands of the trustees between the last payment to and the death of the lady constituted "savings out of income" within the meaning of the settlement, and that her administrator was not entitled to it as against the next of kin. *Rosenthall's Settlement, In re*, 6 W. R. 139.

And see *Calvert* v. *Johnston*, 3 K. & J. 556.

Trust—When Arising.]—By a post-nuptial settlement made in pursuance of ante-nuptial articles, certain policies of insurance on the life of the husband were assigned to trustees upon trust to receive the money and pay the income to the wife during her life for her separate use, independently of any future husband whom she might marry. There was no restraint on anticipation. During the life of her first husband the wife made promissory notes in favour of the plaintiff, and the plaintiff, the first husband being still alive, brought an action claiming a charge on the policies:—Held, that the trust for separate use did not arise till after the death of the husband, and that as the contracts of a married woman can only be enforced against property which formed part of her separate estate at the date of the contract, the action could not be maintained. *Gaffee, In re* (1 Mac. & G. 541), *Molyneux's Estate, In re* (Ir. R. 6 Eq. 411), and *Sturgis* v. *Corp* (13 Ves. 190) discussed. *King* v. *Lucas*, 23 Ch. D. 712; 49 L. T. 216; 31 W. R. 904—C. A.

ii. *Power of Disposition.*

Wife a Feme Sole.]—A feme covert is considered in equity as a feme sole in respect of her separate property. *Headen* v. *Rosher*, M'Clel. & Y. 90.

A wife may dispose of her separate personal estate by act in her lifetime, or by will. *Peacock* v. *Monk*, 2 Ves. 190.

A married woman is considered as feme sole, as to the property settled to her separate use, whether in possession or reversion, and as such, therefore, may sell, if not particularly restrained by the instrument. Her consent, on examination, required only to waive her equity to have a settlement out of her equitable interest, not to pass her separate property. *Sturgis* v. *Corp*, 13 Ves. 190; 9 R. R. 169.

The moment a woman takes personal property to her sole use, she has the sole right to dispose

of it. *Fettiplace* v. *Gorges*, 1 Ves. J. 48; 1 R. R. 79.

Alimony received by a wife under a decree for judicial separation from her husband is not separate estate, and cannot be charged by a wife with payment of her debts. *Anderson* v. *Hay*, 55 J. P. 295.

Assent of Trustees not Necessary.]—A married woman may bind her separate property without the trustees, unless their assent is rendered necessary by the instrument giving her that property. *Essex* v. *Atkins*, 14 Ves. 542.

Unless the joining of her trustees is made necessary, there is no occasion for that. *Grigby* v. *Cox*, 1 Ves. 518.

Freehold Property.]—A married woman can dispose of freeholds settled to her separate use, as if she were a feme sole. *Adams* v. *Gamble*, 12 Ir. Ch. R. 102. Reversing 11 Ir. Ch. R. 269.

A feme covert having a freehold of inheritance settled to her separate use may dispose of it as if she were a feme sole, by deed or will, without a deed acknowledged, and not the less so that a specific power of appointment in a particular way over the property is given her by the instrument settling it to her separate use. *Taylor* v. *Meads*, 4 De G. & Sm. 597: 34 L. J., Ch. 203; 11 Jur. (N.S.) 166; 13 W. R. 394.

—— **Life Estate.**]—Devise of freehold in trust to pay rents as they should become due and payable into the hands of testator's wife, and not otherwise, for her life for her separate use, and receipts of his wife alone for what should be actually paid into her own proper hands should be good discharges of trustees:—Held, wife had power to alienate her life estate. *Acton* v. *White*, 1 Sim. & S. 429; 24 R. R. 203.

Reversionary Interest.]—A feme covert, to whose sole and separate use a reversionary interest in property has been given, may assign that interest as if she were a feme sole, and her assignment will bind her right in case she survives her husband. *Krene* v. *Johnston*, 1 Jon. & C. 255; 1 Ir. Eq. R. 464.

Estate Tail for Separate Use—Enlargement into Fee.]—A wife having an estate tail settled to her separate use without power of anticipation as to the income may by a disentailing deed enlarge her estate tail into a fee simple, and limit the fee to her separate use, with a power to dispose of it so as to defeat her husband's title by the curtesy, notwithstanding the bankruptcy of her husband. *Cooper* v. *Macdonald*, 47 L. J., Ch. 373; 7 Ch. D. 288; 38 L. T. 191; 26 W. R. 377—C. A.

Contingency—Limitation of Separate Estate upon.]—A married woman has no power of disposition over an interest in realty limited to her separate use upon a contingency, viz. the insolvency of her husband, until the event has happened upon which her estate arises. *Bestall* v. *Bunbury*, 13 Ir. Ch. R. 318.

No Power of Disposition Reserved.]—Where a married woman stipulates that in the event of her surviving the property shall be hers, reserving no power of disposition over it during the coverture, there are no means by which she can dispose of it while covert. *Lee* v. *Muggeridge*, 1 Ves. & B. 118.

Separate Property Gives no General Power of Contracting.]—Wife, by equitable possession of separate estate, cannot acquire power to contract generally; she has incidentally a power to dispose of that property, and an actual appointment or disposition thereof will bind her. *Aguilar* v. *Aguilar*, 5 Madd. 418. *See* col. 1095.

Annuity—General Power of Appointment.]—An annuity was assigned to trustees in trust to pay the same to such persons as Lady B. should, by any writing signed by her, notwithstanding her coverture, appoint, but so as not to deprive herself of the benefit thereof, by sale or other anticipation, and for want of such appointment, in trust to pay the same to Lady B. for her separate use:—Held, that Lady B. had not only a limited power of appointment, but also, under the latter part of the clause, the general uncontrolled dominion over the annuity. *Barrymore* v. *Ellis*, 8 Sim. 1.

Voluntary Settlement—Draft Declaration of Trust—Locus pœnitentiæ.]—Upon evidence that a married woman desiring to execute a voluntary settlement transferred stock, to which she was entitled for her separate use, into the names of trustees, and approved of a draft declaration of trust:—Held, that there was a locus pœnitentiæ, and that the trusts did not attach, unless the draft had been finally authorised before the transfer to the trustees; and an inquiry to that effect being answered in the negative, the fund ordered on the petition of the married woman to be retransferred to her separate use. *Sykes, In re*, 2 John. & H. 415.

Gift to Person in Confidential Relation.]—A married woman, having separate estate, joined with her trustee, who was her confidential medical attendant, in granting annuities secured on her separate estate for his benefit. She afterwards sought to set them aside as against the grantees:—Held, that the onus of proving their invalidity was on her; and it appearing that she understood the transaction, and no undue persuasion or coercion having been proved, it was held that they could not be impeached:—Held, also, that the principle of *Archer* v. *Hudson* (7 Beav. 551) did not apply to the case. *Blackie* v. *Clark*, 15 Beav. 595; 22 L. J., Ch. 377.

iii. *Savings of.*

When Separate Estate.]—The savings of a married woman's separate estate, like the income itself, become her separate estate in equity. *Duncan* v. *Cashin*, 44 L. J., C. P. 225; L. R. 10 C. P. 554; 32 L. T. 497; 23 W. R. 561.

Furniture was settled upon a married woman to her separate use, and with money, also her separate property, she from time to time renewed such as wore out. The whole was seized by the sheriff for a debt of her husband:—Held, that, as a court of equity would under the circumstances have restrained the sheriff from selling the accretions as well as the original furniture, a court of law, upon an interpleader summons, must take notice of the equitable claim of the wife's trustee, and direct the sheriff to withdraw. *Ib.*

Money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, and in-

vested by her in her own name, belongs to her husband. *Barrack* v. *M'Culloch*, 3 Kay & J. 110.

Secus as to money saved by her out of the income of her separate estate, and so invested. *Ib.*

Where such investment had been made by her husband for her, upon its being impeached by his creditors after his death:—Held, that the onus was upon her to prove that the moneys were the savings of her separate estate. *Ib.*

She proved that they were saved out of rents of furnished houses, which were settled to her separate use:—Held, that threw back upon the creditors the onus of proving that the furniture belonged to the husband, and, also, what part of the rents were to be attributed to the furniture. *Ib.*

Purchases out of Savings.]—The savings of the income of lands settled to the separate use of a married woman, and chattels purchased by her out of such income, are primâ facie her separate property. *Pike* v. *Fitzgibbon*, 6 L. R. Ir. 486.

A feme covert who has pin-money, or a separate maintenance settled on her, may, by writing in nature of will, dispose of what she saves out of it, and such disposition shall bind the husband. *Herbert* v. *Herbert*, Pre. Ch. 44; 1 Eq. Abr. 66.

Where a woman by marriage agreement is to have the separate use of any estate during coverture, she shall have that and its produce after marriage, and, if invested in any purchase, equity will regard it as the produce of what she ought to have. *Eastby* v. *Eastby*, 2 Eq. Abr. 148.

A married woman having real property settled to her separate use, with a testamentary power over it, may dispose of leaseholds and other chattels purchased with the produce of it, but not of real estate so purchased. *Churchill* v. *Dibben*, 9 Sim. 447, n.

The savings of a wife's separate estate were invested in the joint names of husband and wife. The fund was afterwards applied in the purchase of a real estate. After the death of the husband, the court, on the evidence, held that the estate belonged to the wife. *Darkin* v. *Darkin*, 17 Beav. 578; 23 L. J., Ch. 890; 2 W. R. 135.

Purchase of Stock in names of Children—Presumption.]—Where a married woman, out of the savings of her separate estate, purchased stock in the names of her son and daughter, it was presumed that she did so to exclude her husband's rights, and not as an advancement to her children. *De Visme, In re*, 12 W. R. 140.

Shares—Advances to pay Calls.]—Shares were settled on a married woman for life with remainders over. At the request of the trustees, who had no money available for the purpose, she advanced sums out of her separate estate for the payment of calls on the shares. On her death a bill was filed by her legal personal representative, claiming a lien on the shares for the amount advanced, together with interest from her death:—Held, that he was entitled to have the amount advanced and interest raised by sale of the shares. *Todd* v. *Moorhouse*, L. R. 19 Eq. 69; 32 L. T. 8; 23 W. R. 155.

Where the calls on new shares allotted to trustees of a marriage settlement, in respect of original railway shares held by them upon the trusts of the settlement, had been paid out of the wife's separate income:—Held, that stock purchased with the proceeds of the sale of such new shares was subject to the trusts of the settlement as corpus, and that the wife had a lien for the amount so paid for calls, by analogy to the case of tenant for life advancing money for fines payable on renewal of leaseholds. *Rowley* v. *Unwin*, 2 Kay & J. 138.

Wife of Lunatic.]—The savings of an annual allowance for her separate maintenance, paid to the wife of a lunatic living apart from her husband, under an order in lunacy, are her separate property, although the order does not expressly state that the allowance is for her separate use. *Tharp, In goods of*, 3 P. D. 76; 38 L. T. 867; 26 W. R. 770—C. A.

Husband and Wife living Separate.]—Husband and wife had, for many years, lived and were still living separate. The husband remitted money for her maintenance and support. She saved a considerable portion:—Held, that the husband could not recover back these savings. *Brooke* v. *Brooke*, 25 Beav. 342; 27 L. J., Ch. 639; 4 Jur. (N.S.) 472.

Gift of Savings.]—A wife separated from her husband may make a gift of the savings of her separate allowance as a feme sole (*Gage* v. *Lister*, 2 Bro. P. C. 4), or she may dispose of them by will (*Georges* v. *Chancie*, Toth. 97). S. P., *Pridgeon* v. *Pridgeon*, 1 Ch. Ca. 118; *Bletsow* v. *Sawyer*, 1 Vern. 244; *Humphery* v. *Richards*, 25 L. J., Ch. 442; 2 Jur. (N.S.) 432; 4 W. R. 432.

—— **Will—Construction.**]—Under a testamentary appointment by a married woman of "all funds and property which have been or shall be purchased out of the savings of property to which I have been or shall be entitled to my separate use":—Held, that savings out of separate estate standing to her account at her banker's did not pass. *Askew* v. *Booth*, 43 L. J., Ch. 368; L. R. 17 Eq. 426; 30 L. T. 155; 22 W. R. 524.

Covenant to allow Wife to dispose of Personal Estate—After-acquired Property.]—Covenant that wife shall be at liberty to dispose of her personal estate does not extend to property acquired after marriage. *Pilkington* v. *Cuthbertson*, 2 Bro. P. C. 7.

But if wife conceals such after-acquired property till after husband's death, so that he cannot know of, or reduce the same into possession, her disposition of it shall not be set aside, even in favour of creditors. *Ib.*

Agreement to Settle Savings.]—Stock was settled in trust for a widow for life, and after her death, in trust for any husband with whom she might intermarry, for life; and after the death of the survivor, in trust for her children. The lady, during her widowhood, had accumulated a considerable amount of savings. When about eighty she intermarried with A., a member of the English and Irish bar. Prior to such marriage a long correspondence took place between A. and the lady, in the course of which the lady insisted that her savings should be settled upon her; to which A. ultimately assented, and he undertook to prepare a settlement according to the lady's wishes. No such settlement was prepared or

executed, but on the day of the marriage A. signed a document, prepared by himself, by which he agreed to consent to a deed or document by which the lady "would be fully authorised and empowered, notwithstanding her coverture, to make such disposition as might be agreed and directed therein of such dividends or funds, amounting to 2,000*l*., out of whatever funds or dividends she should be entitled to, be possessed of, or have legally acquired at the time of her decease." No appointment was made by the lady of any part of her savings. After her death, her son and only child by her former marriage filed a bill praying a declaration that he was entitled to his mother's savings:—Held, that the correspondence showed that it was agreed that the whole of the lady's savings should be put into settlement, and that, looking at the correspondence, the only settlement which a conveyancer would have prepared, or which the court would have sanctioned, would have been one under which A. would have taken no interest in the lady's savings otherwise than by her appointment, and that her son was therefore entitled to the whole of her savings. *Corley* v. *Stafford (Lord)*, 26 L. J., Ch. 865; 3 Jur. (N.S.) 1225; 5 W. R. 646.

Bequest of Savings of Alimony.]—A married woman, divorced à mensâ et thoro, bequeathed the savings of alimony by will:—Held, that the legatee was entitled to such bequest, to the exclusion of the surviving husband. *Moore* v. *Barber*, 5 Giff. 43; 34 L. J., Ch. 667; 11 Jur. (N.S.) 539; 12 L. T. 664; 13 W. R. 935.

In Scotland.]—*See* 43 & 44 Vict. c. 26, and 44 & 45 Vict. c. 21.

iv. *Separate Trading by Wife.*

Husband Permitting his Wife to make a Profit.]—A husband voluntarily and after marriage permits the wife, for her separate use, to make profit of all butter, eggs, &c., beyond what is used in the family; out of which the wife saves 100*l*., which the husband borrows and dies; the court will allow of this agreement to encourage the wife's frugality, and the wife shall come in as a creditor for this 100*l*., especially where there is no deficiency of assets. *Slanning* v. *Style*, 3 P. W. 337.

So, where the husband agreed that the wife should take two guineas of every tenant that renewed a lease with the husband, beyond the fine which the husband received, that was allowed to be the wife's separate money. *Ib.*

A wife conducted the business of a lodging-house keeper at two houses, one of which belonged to her husband, the other being settled to her separate use:—Held, that he might permit her to appropriate the net profits of both houses to her separate estate. *Lumley* v. *Timms*, 28 L. T. 608; 21 W. R. 494.

Subsequent Interference of Husband.]—When a husband, by a post-nuptial deed, has settled a house and business to the separate use of his wife, to be managed by her for the benefit of herself as if a feme sole, he can be restrained from in any way interfering with the business, and even from entering the house. *Wood* v. *Wood*, 19 W. R. 1049.

Goodwill of Wife's Ante-nuptial Business.]—The goodwill of a business, carried on by a wife before marriage, and afterwards by the husband and wife, survives to her; she may dispose of it, and receive the purchase-money for her own benefit, even though it is carried on upon leasehold premises, forming a part of the estate of the testator, which were disposed of by his will. *Morris* v. *Moss*, 25 L. J., Ch. 194.

Earnings of Wife — Married Women's Property Act, 1870.]—A woman in 1855 entered the service of a man as housekeeper in a house which was in his occupation but was not his ordinary place of residence. He shortly afterwards engaged to marry her. In 1861 she commenced the business of preserving fruit, which was begun upon a small scale, but gradually became a large wholesale business. It was carried on by her in her own name; she kept a separate banking account; and he admitted that it was her own business, and was managed solely by her, though he sometimes assisted. In 1874 he married her. After the marriage the business was carried on by her as before, in her maiden name; her husband resided in the house where it was carried on, but it did not appear that he took any further part in it than he had done before the marriage. He shortly afterwards died intestate:—Held, that the stock-in-trade and capital of the business belonged to the widow, and were not part of the husband's estate. *Ashworth* v. *Outram*, 46 L. J., Ch. 687; 5 Ch. D. 923; 37 L. T. 85; 25 W. R. 896—C. A.

Semble, that the Married Women's Property Act, 1870, s. 1, applies not only to the earnings of a separate business carried on by a married woman, but also to the business and stock-in-trade from which the earnings are made. *Ib.*

—— **Executor, no Right of Retainer against.**]—The separate estate of a married woman in earnings, under the Married Women's Property Act, 1870, becomes upon her death equitable assets and divisible amongst her creditors pari passu, so that her executor has no right to retain in full his own debt thereout. *Poole, In re, Thompson* v. *Bennett*, 46 L. J., Ch. 803; 6 Ch. D. 739; 37 L. T. 119; 25 W. R. 862.

Business carried on "separately" from the Husband.]—A., a butcher (not within the city of London), was removed to the workhouse infirmary suffering from delirium tremens. A friend lent his wife sums of money to enable her to purchase meat wherewith to carry on the business for the support of her family. She continued to do so for several months, her husband on his return from the infirmary not interfering, and residing for part of the time in an upper room of the house. Meat which had been so purchased by the wife was seized in execution for a debt of the husband; and upon an interpleader summons the county court judge held that the case was not within the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93). Upon appeal to a divisional court, it being agreed that the court should draw inferences from the facts stated:—Held, that the case disclosed such a separate trading by the wife as to warrant them in holding that the goods seized were the property of the wife. *Lovell* v. *Newton*, 4 C. P. D. 7; 39 L. T. 609; 27 W. R. 366.

If a husband takes such a part in his wife's business as to make himself personally liable, the business is not carried on separately from

the husband, within the meaning of 33 & 34 Vict. c. 93. *Laporte* v. *Costick*, 31 L. T. 434; 23 W. R. 131.

A separate business may be carried on by a wife while residing with her husband. *Ib.*

Wife Letting Lodgings.]—A husband furnished a house over which his wife had a general power of appointment, and subject thereto a life interest in the rents for her separate use. The wife, with the husband's consent, managed the property, and received all the profits of letting the house in lodgings:—Held, that the husband, after the wife's death, was not entitled to an inquiry as to how much of the profits of the lodgings arose from the furniture. *Beecher* v. *Major*, 13 L. T. 54.

A wife conducted the business of a lodging-house keeper at two houses, one of which belonged to her husband, the other being settled to her separate use:—Held, that he might permit her to appropriate the net profits of both houses to her separate estate. *Lumley* v. *Timms*, 28 L. T. 608; 21 W. R. 494—L.JJ.

Liability to Bankruptcy—"Carrying on Business separately from Husband."]—A married woman does not "carry on business separately from her husband" within the meaning of s. 1, sub-s. 5, of the Married Women's Property Act, 1882, because she has an interest in the business which is carried on, which is her separate property. The test is whether she is trading independently of her husband, and without being accountable to him for the profits of the business. *Edwards, In re, Harvey, Ex parte*, 15 R. 362; 43 W. R. 509; 2 Manson, 182. And see *Gilchrist, Ex parte, Armstrong, In re*, col. 1035, *and* col. 1115.

v. *Property Acquired during Separation.*

Transportation of Husband—Share as Next-of-kin.]—Where the husband was attainted of felony, and pardoned on consideration of transportation, and afterwards the wife became entitled to some personal estate as orphan to a freeman of London, this personal estate decreed to belong to the wife as to a feme sole. *Newsome* v. *Bowyer*, 3 P. W. 37.

Earnings of Wife.]—What the wife acquires during the time her husband has deserted her, to subsist herself and family, is her separate property, and not liable to the disposition of the husband; and what he has forcibly taken he must deliver in specie, but if disposed of he must pay her the value set by the master. *Cecil* v. *Juxon*, 1 Atk. 278.

Annuity—Desertion by Husband—Appropriation of Accumulations.]—A husband deserted his wife immediately after her marriage, in 1846, and she was supported by her sister. In 1848 an annuity was bequeathed to her for her life, which the trustee accumulated until 1862, when the wife obtained a decree for a judicial separation. In 1863 the court, on the petition of the wife and her sister, ordered the accumulations to be paid over to the sister, to the exclusion altogether of the husband. *Ford, In re*, 32 Beav. 621; 33 L. J., Ch. 180; 9 Jur. (N.S.) 740; 8 L. T. 652; 11 W. R. 45.

Judicial Separation—Effect of—Property subsequently acquired.]—A wife who has obtained a decree for judicial separation is to be considered as a feme sole with respect to such property only as she may acquire or which may come to or devolve upon her after the decree: s. 25 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), not applying to property to which the wife was entitled in possession at the date of the decree. *Cooke* v. *Fuller* (26 Beav. 99) distinguished. *Waite* v. *Morland*, 57 L. J., Ch. 655; 38 Ch. D. 135; 59 L. T. 185; 36 W. R. 484—C. A. *See* col. 798.

vi. *Money at Bank.*

Account Opened at Bank by Wife—Moneys Paid in by Husband.]—An account was opened at a bank by a wife in her own name as an executrix, the moneys she received as such executrix being placed to that account. The husband from time to time paid in moneys of his own to the account, cheques being drawn on it by the wife for the payment of household expenses. The husband died, and then the wife, the account still continuing:—Held, that as the husband had allowed the account to be opened in the name of the wife, and had from time to time paid in moneys of his own to the account, he showed an intention that, if the wife survived him, whatever was then remaining to the credit of the account should form part of her estate. *Lloyd* v. *Pughe*, L. R. 14 Eq. 241; 27 L. T. 474.

But, on appeal, the court held that the wife was merely the agent of her husband, and that the money belonged to his estate, and not hers. *S. C.*, 42 L. J., Ch. 282; L. R. 8 Ch. 88; 28 L. T. 250; 21 W. R. 346.

The uncle of a married woman intimated his intention to give her 10,000*l.*, "to be settled as should be most agreeable" to her and her husband. No settlement was agreed upon, and, after an interval, the donor paid the money to a separate account which the wife had at a bank. A small balance was spent by her, but the greater portion was invested, by her direction and in her name, in securities, which she subsequently, without advice, transferred into her husband's name. He continued to pay the interest to her separate account for some years, but afterwards claimed to be entitled to the securities, jure mariti:—Held, that there was a settlement to the separate use of the wife, and her rights had not been abandoned. *Carnegie* v. *Carnegie*, 30 L. T. 460; 22 W. R. 595. Affirmed on appeal, 31 L. T. 7; 22 W. R. 783.

Wife's Cheque Paid into Husband's Bank.]—A wife, to whom a legacy had been bequeathed to her separate use, received an uncrossed country banker's draft, payable in London, for the amount, less the duty, and she indorsed the draft, and handed it over to her husband, and his bankers received the amount and placed it by his direction to his deposit account. The husband died suddenly a few days afterwards. There was evidence pointing to the fact that the wife did not intend to give the draft to her husband. In an action against his executors:—Held, that the widow was entitled to be paid the sum claimed. *Green* v. *Carlill*, 46 L. J., Ch. 477; 4 Ch. D. 882.

Joint Account—Advancement for Wife.]—A man had for a series of years lodged money in two several banks on deposit receipts, some of which were in his own name, and others in the joint names of himself and of his wife, and he frequently changed deposits already made in

his own name into their joint names. There was some evidence of statements made by him to his wife, but resting on her testimony, that he had acted thus with the object of enabling the survivor to take the principal. At his death there were in the two banks four deposit receipts in their joint names and one in his own name alone:—Held, that the joint lodgments were advancements for the wife, who survived. *Talbot* v. *Cody*, Ir. R. 10 Eq. 138.

Receipts in the joint names of husband and wife at law and in equity considered. *Ib.*

—— **Resulting Trust.**]—A husband, who was in failing health, opened a new banking account in the joint names of himself and wife, authorising the bank to cash cheques drawn by either of them, and telling the bank manager that the balance of the account would belong to the survivor of himself and his wife. Cheques were thenceforward drawn by the wife only, and were applied by her in payment of household and other expenses, the husband paying in sums of money from time to time to the credit of the account. At the time of his death there was a large sum standing to the credit of the account, which the wife claimed to be entitled to for her own use:—Held, that the evidence of circumstances was not sufficient to rebut the presumption of a resulting trust in favour of the testator. *Marshal* v. *Cruttwell*, 44 L. J., Ch. 504; L. R. 20 Eq. 328.

Payments out of Income to Trust Account at Bankers.]—A testator gave certain property to trustees upon trust for his wife for life for her separate use, and after her death for her children. After the testator's death the widow married again. The trustees opened an account in their name at a banker's, to which they paid the produce of the trust property. The widow paid certain sums to this account from time to time out of her income. She died in the lifetime of her second husband, who claimed the sums paid in by his wife as her administrator:—Held, in the absence of express evidence of her intention, that the money was held by the trustees in trust for the children. *Metcalf* v. *Fisher*, 2 W. R. 326.

Husband Entitled as Administrator.]—A wife with a separate estate, over which she had power of disposition notwithstanding coverture, gave by will the whole of the funds constituting such separate estate upon trust for her nephews and nieces, and also bequeathed all funds purchased out of the savings of her separate estate upon the like trusts. She died leaving a large balance on her current account at her bankers:—Held, that she had not purchased any funds out of the savings at her bankers, and that such savings were undisposed of, and passed to her husband as administrator. *Askew* v. *Rooth*, 43 L. J., Ch. 368; L. R. 17 Eq. 426; 30 L. T. 155; 22 W. R. 524. *See* col. 1051.

Where the wife becoming entitled to separate property joined with her husband in appointing an agent to receive the rents, who by husband's direction paid them into the bankers of his family, with whom he opened an account, and the husband drew cheques on them, part of which he applied for his own purposes, and the rest in keeping down incumbrances on the estate; and at his death a large balance remained in the banker's hands, which was transferred to the account of the wife as his sole executrix, in which character she also drew on them:—Held, that by her acquiescence during his lifetime, the fund at his death was to be deemed his estate, and not to belong to her. *Beresford* v. *Armagh (Archbishop)*, 13 Sim. 643; 13 L. J., Ch. 235; 8 Jur. 262.

Wife's Overdraft—Lien of Bankers.]—A wife having property settled to her separate use for life, with remainder as she should, notwithstanding coverture, by deed or will appoint, with remainder to her executors or administrators, opened two accounts with her bankers, a private and an administration account, and directed the bankers, by the joint letter of herself and her husband, to consider any overdraft on her private account secured by the administration account. The administration account was subject to the trusts of the settlement. At her death the private account was overdrawn:—Held, that she had contracted so as to bind her separate estate, and that the bankers had a lien on the administration account in respect of the overdrawn private account. *London Chartered Bank of Australia* v. *Lempriere*, 9 Moore, P. C. (N.S.) 426; 42 L. J., P. C. 49; L. R. 4 P. C. 572; 29 L. T. 186; 21 W. R. 513.

Interpleader.]—A married woman lodged several sums of money in a bank in her own name upon deposit receipts representing herself to be a widow. Her husband and a transferee from her both afterwards claimed and brought actions for the recovery of the deposits:—Held, a proper case for interpleader. *Costello* v. *Martin*, 15 W. R. 548.

b. Statutory Separate Property—Married Women's Property Acts.

Married Women's Property Act, 1882, s. 1, sub-s. 1.]—*A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property in the same manner as if she were a feme sole, without the intervention of any trustee.*

Married Women's Property Act, 1882, s. 5.]—*Every woman married before the commencement of this act shall be entitled to have and to hold, and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.*

Title of Married Woman accrued before 1882 — Property Falling into Possession after.]—Sect. 5 of the Married Women's Property Act, 1882, applies only to property of a married woman her title to which accrues for the first time after the commencement of the act; it does not, therefore, include an interest to which she was contingently entitled before, but which falls into possession after the act. *Adames' Trusts, In re*, 54 L. J., Ch. 878; 53 L. T. 198; 33 W. R. 834. *Tench's Trusts, In re*, L. R. 15 Ir. 406.

Property to which a married woman was, at the commencement of the Married Women's Property Act, 1882, entitled for a vested interest

in remainder, and which afterwards became an interest in possession, is not property "her title to which has accrued after the commencement of the act" within the meaning of s. 5. *Tucker, In re, Emanuel* v. *Parfitt*, 54 L. J., Ch. 874; 52 L. T. 923; 33 W. R. 932.

Property to which at the time of the commencement of the Married Women's Property Act, 1882, a woman married before the act was entitled subject to a life estate, but not for her separate use:—Held, not to become her separate estate by falling into possession after the commencement of the act. *Reid* v. *Reid*, 55 L. J., Ch. 294; 31 Ch. D. 402; 54 L. T. 100; 34 W. R. 332—C. A.

If a woman married before the commencement of the Married Women's Property Act, 1882, has before the commencement of the act acquired a title, whether vested or contingent, and whether in reversion or remainder, to any property, such property is not made her separate estate by s. 5 of the act, though it falls into possession after the act. *Baynton* v. *Collins* (53 L. J., Ch. 1112; 27 Ch. D. 604) overruled. *Ib.*

Property to which a married woman was, at the commencement of the Married Women's Property Act, 1882, entitled for a vested interest in remainder, and which, on the 4th of October, 1884, became an interest in possession, is not property "her title to which has accrued after the commencement of the act" within the meaning of s. 5. *Tucker, In re, Emanuel* v. *Parfitt* (54 L. J., Ch. 874), and *Adames' Trust, In re* (54 L. J., Ch. 878) followed. *Baynton* v. *Collins* (27 Ch. D. 604) not followed. *Hobson, In re, Webster* v. *Rickards*, 55 L. J., Ch. 300; 34 W. R. 195.

N., a lady married in 1860, became entitled, as one of the next of kin of C., who died without children in 1885, to a share of a fund settled by a deed of 1830, in trust for C. for life, and after her death to her children, and in default of children, for such person or persons as should, on the failure of children, be the next of kin of C. under the Statute of Distributions:—Held, that N.'s title accrued before the Married Women's Property Act, 1882, and that she did not take a separate estate under s. 5 of that act, in her share, but that it went to the assignee in bankruptcy of her husband, subject to her equity to a settlement. *Beaupré's Trusts, In re*, 21 L. R. Ir. 397—C. A.

A testator, who died in 1875, devised his real estate to his wife for life, with remainder to his children. One daughter married in 1878, and the tenant for life died in 1884:—Held, that under the operation of s. 5 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the married woman's share in the estate was her separate property, and could be disposed of by her without the concurrence of her husband. *Thompson and Curzon, In re*, 54 L. J., Ch. 610; 29 Ch. D. 177; 52 L. T. 498; 33 W. R. 688.

—— **Spes Successionis—Contingent Interest or mere Expectancy — Gift to possible Next of Kin.**]—A spes successionis is not a title to property by English law. A woman, married before the Married Women's Property Act, 1882, who has a mere spes successionis to property, as one of a class of possible next of kin, has not a "contingent title" within the meaning of s. 5 of that act. *Parsons, In re, Stockley* v. *Parsons*, 59 L. J., Ch. 666; 45 Ch. D. 51; 62 L. T. 929; 38 W. R. 712.

A woman, being executrix and residuary legatee, married in 1880. She had discharged all her duties quâ executrix, save that she had not obtained payment of a sum of money which fell due to her testator's estate in September, 1879, for which sum she brought an action in 1883:—Held, that the wife's title quâ legatee accrued before the Married Women's Property Act, 1882, came into operation, and that the husband was entitled to this money jure mariti. *Edwards* v. *Edwards*, 1 Cab. & E. 229.

Marriage Settlement.]—A marriage settlement made in 1862 contained an agreement for the settlement of any future-acquired property of the wife to a specified amount (except interests settled and limited to her separate use). The wife, after the commencement of the Married Women's Property Act, 1882, became entitled absolutely to a bequest above the specified amount, without any limitation as to separate use:—Held, that, by s. 19 of the above act, the marriage settlement was exempted from the 5th and other sections; and that the bequest to the wife came within the covenant to settle future-acquired property, and must be dealt with as if the act had never been passed. *Stonor's Trusts, In re*, 52 L. J., Ch. 776; 24 Ch. D. 195; 48 L. T. 963; 32 W. R. 413.

Settlement on First Marriage—Life Estate—General Power of Appointment — Remarriage.]—By a settlement made in 1878, upon a former marriage of Mrs. P., a fund was settled in trust for her during her life, and during her said intended coverture, for her separate use without power of anticipation; and then upon trust, in the events which happened, for such persons as she should during coverture by deed or will appoint, and when not under coverture by deed or will appoint, and, in default of appointment, upon trust for her executors, administrators, and assigns. Mrs. P., having survived her former husband, married again after the passing of the Married Women's Property Act, 1882, without having exercised her power of appointment under the settlement:—Held, that the operation of the Married Women's Property Act was not excluded by s. 19, and that the act applied so far as to add the incident of separate use to her interest under the settlement, and that she and her husband were entitled to have the fund transferred to them. *Onslow, In re, Plowden* v. *Gayford*, 57 L. J., Ch. 940; 39 Ch. D. 622; 59 L. T. 308; 36 W. R. 883.

Life Interest for Wife's Separate Use—Remainder as she should by Will appoint, and in default to her Executors, Administrators, and Assigns—Absolute Interest.]—A testator gave property on trust for his daughter for life for her separate use, with remainder as she should by will appoint, and in default of appointment, to her executors, administrators, and assigns. Subsequently to the Married Women's Property Act, 1882, she married:—Held, that by virtue of the act the interests for life and in ultimate remainder were both for her separate use, and the doctrine of *Whittle* v. *Henning* (2 Ph. 731) was no longer applicable for her protection, and that, therefore, these interests coalesced, giving her an absolute right to the property, and entitling her to release the power. *Davenport, In re, Turner* v. *King*, 64 L. J., Ch. 252; [1895] 1 Ch. 361; 13 R. 167; 71 L. T. 875; 43 W. R. 217.

Alimony.]—Alimony received by a wife under a decree for judicial separation from her husband is not separate estate, and cannot be charged by a wife with payment of her debts. *Anderson* v. *Hay*, 55 J. P. 295. *See* col. 845.

Damages awarded to Wife—Action by Husband and Wife for Personal Injuries to Wife.]—A husband and wife recovered a verdict for damages in an action brought by them in respect of personal injuries sustained by the wife, the jury awarding a certain sum to the wife, and a further sum to the husband for expenses. The amount of the verdict having been paid into the hands of their solicitor, a judgment creditor of the husband sought to attach the whole of the money:—Held, that the amount awarded to the wife became her separate property by virtue of s. 5 of the Married Women's Property Act, 1882, and could not therefore be attached to answer a judgment debt of the husband. Semble, that such amount was also the separate property of the wife under s. 1, sub-s. 2, of the Married Women's Property Act, 1882. *Beasley* v. *Roney*, 60 L. J., Q. B. 408; [1891] 1 Q. B. 509; 65 L. T. 153; 39 W. R. 415; 55 J. P. 566.

Bankruptcy of Married Woman trading separately.]—"Separate property" in s. 1, sub-s. 5, of the Married Women's Property Act, 1882, does not include a general power of appointment by deed or will of which the married woman is donee, but which she has not exercised. *Gilchrist, Ex parte, Armstrong, In re*, 55 L. J., Q. B. 578; 17 Q. B. D. 521; 55 L. T. 538; 34 W. R. 709; 3 Morrell, 193—C. A. See *Edwards, In re, Harvey, Ex parte*, col. 1029. *And see* col. 1115.

Marriage Settlement prior to Married Women's Property Act—Will of Father made Subsequent thereto — Contingent Interest under Will — Addition of Separate Use by the Act.]—By a marriage settlement made prior to the Married Women's Property Act a fund was settled upon a lady for life to her separate use without power of anticipation, and after her decease, in the event of her surviving her husband, for herself, her executors, administrators, and assigns, but in the event of the husband surviving her, as she should appoint, and in default of appointment to her next of kin. By his will, made subsequently to the act, her father bequeathed a third of his residuary estate to the trustees of the settlement to be held upon the trusts therein expressed and declared. On a summons being taken out by the lady asking for a declaration that her contingent interest under the will was held by her to her separate use:—Held, that the incident of separate use was added by the statute, and that her contingent interest under the will was therefore disposable by her. *Williams, In re, Williams* v. *Grant*, 76 L. T. 150.

Separate Examination — Settled Estate.] — Where a married woman, married before the commencement of the Married Women's Property Act, 1882, is a petitioner under the Settled Estates Act, 1877, as to property her interest in which was acquired after the commencement of the act of 1882, she need not be separately examined as provided by s. 50 of the act of 1877. *Batt's Settled Estates, In re*, 66 L. J., Ch. 635; [1897] 2 Ch. 65; 45 W. R. 614.

Gift to Husband and Wife and Third Person.]—A testatrix, by her will dated in 1880, gave her residuary personal estate "to C. J. M. and J. H. and E. his wife to and for their own use and benefit absolutely"; and appointed "C. J. M. and J. H. and E. H. his wife" her executors. The testatrix died in 1883, after the commencement of the Married Women's Property Act, 1882. J. H. and E. H. married in 1864:—Held, that, as the will was made before the Married Women's Property Act, 1882, came into operation, it must be construed in accordance with the law at that time, and that the three residuary legatees were entitled to the personal estate as joint tenants, C. J. M. taking one moiety, and J. H. and E. H. his wife taking the other moiety, between them, J. H. in his own right, and his wife for her separate use. *March, In re, Mander* v. *Harris*, 54 L. J., Ch. 143; 27 Ch. D. 166; 51 L. T. 380; 32 W. R. 241—C. A. *See* col. 1265.

Question as to Property—Inquiry by Registrar.]—A wife who had obtained a decree for a judicial separation, claimed certain furniture as her separate property, but her husband denied that she had a title to it:—The court made an order under s. 17 of the Married Women's Property Act, 1882, directing the registrar to inquire whether the furniture formed part of the wife's separate estate. *Phillips* v. *Phillips*, 57 L. J., P. 76; 13 P. D. 220; 59 L. T. 183; 37 W. R. 224; 52 J. P. 407.

Administratrix.]—Under the Married Women's Property Act, 1882, a married woman is competent to accept the office of administratrix, and it is no longer necessary that her husband should consent or join in the administration bond. *Ayres, In goods of*, 52 L. J., P. 98; 8 P. D. 168; 31 W. R. 660; 47 J. P. 440.

As to investments to which wife entitled at commencement of Married Women's Property Act, 1882, *see* ss. 6, 7, 8 of the act.

Married Women's Property Act, 1870—Personal Property not Exceeding £200—Different Sums under same Instrument.]—In a case coming under the operation of s. 7 of the Married Women's Property Act, 1870, where a married woman has become entitled to separate sums of money at the same time and under the same will, but coming under different titles, such sums cannot be aggregated so as to make up the total to an amount over 200*l.*; and the married woman will be entitled to any less sum than 200*l.* for her separate use. *Middleton's Will, In re* (16 W. R. 1107), followed. *Davies, In re, Harrison* v. *Davis*, 66 L. J., Ch. 512; [1897] 2 Ch. 204.

—— **"Deed or Will."**]—The limit of 200*l.*, fixed by s. 7 of the Married Women's Property Act, 1870, applies only to money coming to the married woman by "deed or will," and not to personal estate to which she may have become entitled as next of kin of an intestate; consequently such personal estate, whatever may be its amount or value, belongs, where unaffected by any settlement, to her for her separate use, and may be transferred or paid to her upon her separate receipt, without the necessity of any examination. *Voss, In re, King* v. *Voss*, 13 Ch. D. 504; 42 L. T. 78; 28 W. R. 565.

Quære, whether s. 8 does not apply to corpus,

as the "rents and profits" therein mentioned are not limited to those arising during the life of the married woman. *Ib.*

—— **Business and Stock-in-Trade.**]—A woman in 1855 entered the service of a man as housekeeper in a house which was in his occupation but was not his ordinary place of residence. He shortly afterwards engaged to marry her. In 1861 she commenced the business of preserving fruit, which was begun upon a small scale, but gradually became a large wholesale business. It was carried on by her in her own name. She kept a separate banking account, and he admitted that it was her own business and was managed solely by her, though he sometimes assisted. In 1874 he married her. After the marriage the business was carried on by her as before, in her maiden name. Her husband resided in the house where it was carried on, but it did not appear that he took any further part in it than he had done before the marriage. He shortly afterwards died intestate:—Held, that the stock-in-trade and capital of the business belonged to the widow, and were not part of the husband's estate. *Ashworth* v. *Outram*, 46 L. J., Ch. 687; 5 Ch. D. 923; 37 L. T. 85; 25 W. R. 896—C. A.

Semble, that the Married Women's Property Act, 1870, s. 1, applies not only to the earnings of a separate business carried on by a married woman, but also to the business and stock-in-trade from which the earnings are made. *Ib.*

—— **School—Marriage before 1870—Earnings during Coverture.**]—A lady, who was carrying on the business of a ladies' school, was married in 1862. A settlement was executed on the marriage, which did not in any way refer to or affect to deal with the business carried on by her or the goodwill thereof. After the marriage she continued to carry on the school. Her husband lived in the house, but he did not take any part in the business, nor assist in any manner in the tuition. The prospectuses, &c., of the school were in her name. Out of the earnings of the school the wife contributed to, if she did not substantially pay, the household expenses. Some of the earnings were invested by the husband in his own name, and another portion was invested in the purchase of the lease of the premises in which the school was carried on. The husband died in 1877. He did not in any way affect to deal with the school property by his will, and he had not ostensibly by any act of his treated it as his own property. Upon his death, the question arose between the executors of his will, under which his infant children were interested, and his widow, who survived him, as to who was entitled to the goodwill, property, and effects of the business:—Held, upon the evidence, that the business was carried on by the wife separately from her husband within the meaning of s. 1 of the Married Women's Property Act, 1870; that it made no difference that the marriage took place before the passing of that act, and that the goodwill, stock, and effects belonging to the business, and all investments out of the earnings of the business made since the passing of the act, were the property of the wife. *Dearmer, In re, James* v. *Dearmer*, 53 L. T. 905—Kay, J.

—— **Retainer by Executor—Separate Property—Equitable Assets.**]—The separate estate of a married woman in earnings under the Married Women's Property Act, 1870, becomes upon her death equitable assets and divisible amongst her creditors pari passu, so that her executor has no right to retain in full his own debt thereout. *Poole, In re, Thompson* v. *Bennett*, 46 L. J., Ch. 803; 6 Ch. D. 739; 37 L. T. 119; 25 W. R. 862.

—— **Stock and Funds in Court.**]—A fund in court, to which a married woman was entitled to her separate use, ordered, with the consent of her husband, to be transferred to her name, pursuant to the Married Women's Property Act, 1870, s. 3. *Frank* v. *Mackay*, Ir. R. 8 Eq. 93.

A fund in court belonging to a married woman was ordered to be transferred in the books of the Bank of England to her name as a married woman, entitled to her separate use, according to the provisions of the Married Women's Property Act, 1870, s. 3. *Butlin, In re*, 23 L. T. 523; 19 W. R. 241.

A married woman and her daughter were entitled to a fund in court, subject to a power of appointment by the married woman over her life interest. An order was made with the consent of both, that the fund be transferred to the separate use of the mother. *Bartholmew* or *Bartholomew, In re*, 23 L. T. 433; 19 W. R. 95.

The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), does not empower a married woman, entitled under s. 7 to stock for her separate use, to transfer such stock without the concurrence of her husband, unless and until the stock has been placed, under s. 3, in her name as a married woman entitled for her separate use. *Howard* v. *Bank of England*, 44 L. J., Ch. 329; L. R. 19 Eq. 295; 31 L. T. 871; 23 W. R. 303.

Consols were standing in the names of three persons, one of whom was a married woman who had been deserted by her husband, and was entitled beneficially to the stock under the Married Women's Property Act, 1870, s. 7. Those persons applied to the Bank of England to be permitted to transfer the stock without the concurrence of the husband of the married woman; and the bank having refused:—Held, that the bank could not be compelled to permit such a transfer. *Ib.*

c. Policies of Insurance.

Statute.]—*See* Married Women's Property Act, 1870, s. 10, and Married Women's Property Act, 1882, s. 11.

For "Wife and Children"—Joint Tenancy.]—A husband effected a policy for the benefit of his wife and children under the Married Women's Property Act, 1870. The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate. *Mellor's Policy Trusts, In re*, 47 L. J., Ch. 246; 7 Ch. D. 200; 26 W. R. 309.

A husband effected a policy for the benefit of his wife and children under the Married Women's Property Act, 1870, and died insolvent. His wife and one child of the marriage predeceased him. Upon a petition by his surviving children, under s. 10 of the act for the appointment of a trustee of the policy-money and for a

declaration as to the rights of the petitioners:—Held, that the court had, under that section, no jurisdiction to do more than make the order appointing a trustee; but since under the policy there was a trust either for the wife for life with remainder to the children, or, in the alternative, for the wife and children as joint tenants, the order was directed to be prefaced with an expression of opinion that the wife took no interest and that the surviving children took as joint tenants. *Mellor's Policy Trusts, In re* (6 Ch. D. 127; 7 Ch. D. 200), not followed. *Adam's Policy Trusts, In re*, 52 L. J., Ch. 642; 23 Ch. D. 525; 48 L. T. 727; 31 W. R. 810.

Semble, a policy effected by a husband under s. 10 of the Married Women's Property Act, 1870, "for the benefit of his wife and children," should be read in conjunction with that section, and should, by virtue of the words "separate use" in the section, be construed as giving the wife a life interest only, with remainder to the children. *Ib. See also* 45 & 46 Vict. c. 75, s. 11.

A policy was taken out on the life of the assured for the benefit of his wife and children:—Held, that his widow and children took as joint tenants. *Mellor's Policy Trusts, In re* (7 Ch. D. 200), explained: *Adam's Policy Trusts, In re* (23 Ch. D. 525), dissented from. *Seyton, In re, Seyton* v. *Satterthwaite*, 56 L. J., Ch. 775; 34 Ch. D. 511; 56 L. T. 479; 35 W. R. 373.

Under a policy of life assurance effected for the benefit of the wife and children of the assured pursuant to the provisions of the Married Women's Property Act, 1870, his widow and children become entitled to the policy moneys as joint tenants. *Seyton, In re* (34 Ch. D. 511), followed. Dictum in *Adam's Policy Trusts, In re* (23 Ch. D. 525), not followed. *Davies' Policy Trusts, In re*, 61 L. J., Ch. 650; [1892] 1 Ch. 90; 66 L. T. 104.

For Benefit of Wife—Contingent Interest of Husband—Withdrawal.]—A policy of insurance on the life of a husband for the benefit of his wife was, in 1876, effected with an insurance company which carried on business at New York, through their branch office in London. The application for the policy was made by him on behalf of his wife. The premiums were made payable in London. By the policy the company promised to pay the amount assured to the wife for her sole use, if living, and, if she were not living, to the children of the husband, or, if there should be no such children, to the executors or assigns of the husband, at the London office. The policy also provided that, on the completion of a period of ten years from its issue, provided it should not have been previously terminated by lapse or death, the legal owner should have the option of withdrawing the accumulated reserve and surplus appropriated by the company to the policy. The husband paid the premiums until July, 1883, when he filed a liquidation petition under the Bankruptcy Act, 1869. In 1884 he obtained his discharge. After 1883 the wife paid the premiums out of her separate estate. In 1886 the wife exercised the right of withdrawal, and the company paid 2,959*l.* in respect of the policy:—Held, that, even if the sum thus paid did not by virtue of the policy belong to the wife for her separate use, the husband's contingent interest in it at the time when he obtained his discharge was a mere possibility, and that, consequently, it did not pass to the trustee in the liquidation. *Dever, Ex parte, Suse, In re*, 56 L. J., Q. B. 552; 18 Q. B. D. 660—C. A.

Discharge — Appointment of Trustee.] — A policy of insurance effected by a husband on his own life for the benefit of his wife and children previously to the passing of the Married Women's Property Act, 1870, is not affected by the provisions of s. 11 of the act of 1882 so as to enable the moneys payable thereunder to be paid to the legal personal representative of the insured; but a trustee must be appointed under s. 10 of the act of 1870 to give a good discharge for such moneys. *Adam's Policy Trusts, In re* (52 L. J., Ch. 642; 23 Ch. D. 525), followed; *Soutar's Policy Trust, In re* (54 L. J., Ch. 256; 26 Ch. D. 236), distinguished. *Turnbull, In re, Turnbull* v. *Turnbull*, 66 L. J., Ch. 719; [1897] 2 Ch. 415; 77 L. T. 47; 46 W. R. 3.

Policy in Wife's Name—Voluntary Settlement of—Payment of Premiums.]—On 5th November, 1844, a policy of insurance for 2,000*l.* was effected upon the life and in the name of B. the wife of A. By a post-nuptial settlement dated 27th November, 1844, reciting that B. was desirous of making provision for her husband and children, and that A. had agreed to join in the deed for the purpose of assuring "all his interest, if any," in the policy, A. and B. assigned to C. and D. the policy and all sums payable thereunder upon trust to invest the same and pay the income to A. and his assigns during his life, and after his decease to divide the trust funds equally among the children of A. and B. The settlement contained no power of revocation, A. predeceased his wife, having paid all premiums during his lifetime. Upon the death of B., the question arose whether the policy moneys were subject to the trusts declared by the settlement:—Held, that the policy was intended by the husband to be and was the separate property of the wife at the date of settlement, in which the husband concurred only for conformity and to bind such interest, if any, as he had; that the settlement was valid, and that the policy moneys were bound by the trusts of the settlement. *Winn, In re, Reed* v. *Winn*, 57 L. T. 332.

Appointment of Trustees—Petition.]—A petition (presented since the coming into operation of the Married Women's Property Act, 1882) for the appointment of trustees of the proceeds of a life policy effected by a husband, under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, ought to be entitled in the matter of the act of 1882. *Soutar's Policy Trust, In re*, 54 L. J., Ch. 256: 26 Ch. D. 236; 32 W. R. 701.

Application for the appointment of trustees of a policy of life assurance, effected under the provisions of the Married Women's Property Acts, for the benefit of the wife and children of the assured, may be made by petition. *Atkinson's Policy Trusts, In re*, 13 R. 285.

—— **Summons.**]—Upon a motion, under s. 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), to appoint trustees of a policy of assurance effected for the benefit of the insurer's wife and children, there is no jurisdiction to adjudicate upon the rights of the widow and children inter se. An application for that

purpose may be made on summons under Gen. Ord. LV. *Graham's Policy Trusts, In re*, 29 L. R. Ir. 498.

Direction to Exchange Policy for one Fully-Paid up.]—The defendant effected a policy on his life for the benefit of his wife and children under s. 10 of the Married Women's Property Act, 1870. He became bankrupt and mentally deranged, and was unable to pay the premiums. By the rules of the insurance society the policy could be exchanged for a fully paid-up policy of smaller value, and thus preserved from lapsing. The wife and only child of the defendant brought this action, claiming the appointment of a trustee of the policy, and that such trustee might be authorised to exchange the policy for one fully paid up:—Held, that the court under its general jurisdiction had power to appoint two trustees; and judgment was given to that effect, and otherwise as claimed. *Schultze* v. *Schultze*, 56 L. J., Ch. 356; 56 L. T. 231.

Conviction of Wife for Murder of Husband—Failure of Trust in favour of Wife—Resulting Trust in Favour of Husband's Estate.]—A husband insured his life for the benefit of his wife under the provisions of s. 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). He died, and his wife was tried for and convicted of his murder:—Held, that the effect of s. 11 was to create a trust in favour of the wife in respect of the sum insured, but that inasmuch as it was against public policy for the wife to benefit by her own criminal act, the trust in her favour failed, and a resulting trust arose in favour of the deceased husband's estate, in respect of which his executors were entitled to recover the sum insured from the insurance company. *Cleaver* v. *Mutual Reserve Fund Life Association*, 61 L. J., Q. B. 128: [1892] 1 Q. B. 147; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180—C. A.

d. Receipt by Husband.

Accountability.]—Where a married woman has been supported by her husband, no retrospective account is given of her separate estate against his assets, and there is no distinction whether it be pin-money or not, or whether it is secured by articles remaining in fieri, or an executed trust. *Arthur* v. *Arthur*, 11 Ir. Eq. R. 511.

A., having lands and a personal estate before her marriage, conveys all her estate to her separate use, to which the intended husband was a party, and he covenanted that he would not interfere with it. On this estate there was a mortgage for 300*l*., which before these conveyances executed (the word executed is not in the original) he verbally promised to discharge. During the coverture the mortgage was assigned over, and he covenanted thus: "That I or my wife shall pay it." The husband and wife lived with great affection together, and he constantly received all the profits of this separate estate. He died, never having paid off the mortgage, leaving fortunes to children, which he had by a former wife: these the wife maintained after his decease. She brings her bill, to have an account of the profits of her separate estate received by the baron. Decreed, that the husband's effects should not be accountable for the profits of her separate estate received by him. On a rehearing, decree affirmed. *Christmas* v. *Christmas*, Sel. Ch. Ca. 20.

A married woman entitled for her separate use to the dividends of certain stock standing in the names of trustees, of whom her husband was one, permitted these dividends for a number of years to be paid to the husband's bankers to his separate account; it appeared also, by the evidence, that he made use of these funds as his own property:—Held, that a course of dealing was proved, as existing between the husband and wife, which showed that the money was paid to the husband as husband, and not as trustee; and that this being done with the assent and acquiescence of the wife, disentitled her from claiming any part of the money as against the estate of the husband. *Caton* v. *Rideout*, 1 Macn. & G. 599; 2 H. & Tw. 33.

Where a wife is living with, and is maintained by, her husband, the court will not grant an account of the arrears of the income of her separate estate, which, in the absence of a demand by her, have been paid to her husband. *Leach* v. *Way*, 5 L. J., Ch. 100.

The court proceeds, in such case, on the assumption, that some arrangement has been made between the husband and wife; but in the case of *Digby* v. *Howard*, the house of lords refused the account, although there, from the wife being a lunatic, her acquiescence could not be presumed. *Ib.*

Husband is not to account for the income of his wife's separate estate, which she permitted him to receive. *Smith* v. *Camelford* (*Lord*), 2 Ves. J. 698.

Where husband receives interest of wife's separate property, no account against his representatives. *Squire* v. *Dean*, 4 Bro. C. C. 326.

Account of wife's separate estate, or pin-money, never carried back beyond the year. *Peacock* v. *Monk*, 2 Ves. 190.

Testator gave leasehold premises to his daughter for life, if his term or terms and interest should therein so long subsist, for her sole and separate use, notwithstanding her present and future coverture; and after her decease, to her children equally, their executors, &c., during all the remainder of the estate, term or terms and interest therein, which should be then to come and unexpired. No trustees being interposed, the husband, having possession, was held accountable, according to the uses of the will, both as to the original leases, and also as to reversionary leases granted to him, as the person entitled under the will of the former tenant upon favourable terms; and the equity was established against a purchaser from him, with notice. *Parker* v. *Brooke*, 9 Ves. 583.

Wife having specific effects to her separate use disposes of her separate property by will. After her death, her husband sells part of these effects and dies; his representative is accountable to the wife's administratrix with the will annexed. *Peacock* v. *Monk*, supra.

The wife after the death of the husband, not admitted in equity to recover the arrears of her separate estate. *Power* v. *Hankey*, 2 P. W. 82.

Maintenance of Insane Wife.]—In an account of dividends of the wife's separate property, directed against husband's estate, consideration should be had of his extra expenses in the

maintenance, in consequence of her being insane. *Att.-Gen.* v. *Parnther*, 4 Bro. C. C. 409.

One Year's Arrears only.]—Wife permitting her husband to receive her separate income, the account shall go back only one year. *Parkes* v. *White*, 11 Ves. 205.

A wife can only claim as a creditor one year's arrears of her separate estate, as in the case of pin-money. *Townshend* v. *Windham*, 2 Ves. 1.

Transfer of Stock Procured by Fraud.]—Agreement on marriage to settle stock and other property of the wife to the use of the wife; husband having by fraud made her transfer the stock to him, decreed upon a bill for performance, to transfer the stock, and assign the rest under the direction of the master, to trustees for her use, who should receive the dividends due and to become due till the transfer and assignment. Costs on account of fraud. *Lampert* v. *Lampert*, 1 Ves. J. 21.

Ante-nuptial Agreement.] — Husband and wife agreed before marriage that the wife should have the disposal of her own estate; the agreement was put into the hands of S., the wife's agent, who received the rents, and paid them to the husband with the wife's consent; S. shall not be answerable for what he received and paid during the coverture; for an agreement between husband and wife only is determined by the marriage. Sed quære, *Darcy* v. *Chute*, 1 Ch. Ca. 21.

—— **Husband Procuring Breach of Trust — Appointment to.**]—Stock was settled on a wife, for her separate use for life, with a power of appointment by will. The trustees, at the request of the husband and wife, sold out the stock, and paid the proceeds to the husband, who afterwards became bankrupt. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into court, and they were allowed time to transfer the remainder. The wife died, having, by her will, appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees and his assignees, claiming the stock under the appointment, and praying the same relief as his wife might have had. But as he had received the proceeds of the stock sold out, his bill was dismissed. *Nail* v. *Punter*, 5 Sim. 555. And see *Whistler* v. *Newman*, 4 Ves. 129. See as to the authority of this case, 5 Ves. 17, n. and 694, n.

Estates Purchased by Husband out of Wife's Money—Lien of Wife.]—Money settled to separate use of wife, and in event of no children to her absolutely on surviving husband, with power to trustees with her consent to invest it in land: —Held, that no lien existed on estates purchased by husband, having obtained the money from trustees, the circumstances not raising the presumption, as if he had been under an engagement to purchase, that his purchases were in pursuance of engagement; and upon evidence, the fact of the application of trust fund or the inability of husband by other means not being made out. *Lench* v. *Lench*, 10 Ves. 511.

A wife's separate estate was invested in shares in the joint names of herself and her husband. The husband induced his wife to join in selling them upon his promise to reinvest the produce in their joint names. The husband alone received the produce, and, unknown to his wife, employed it in part payment for the purchase of a real estate conveyed to him alone. The wife survived her husband:—Held, that she was entitled to a lien on the real estate for the amount. *Scales* v. *Baker*, 28 Beav. 91; 6 Jur. (N.S.) 1134; 8 W. R. 287.

Direction to Pay to Husband — Death — Rents not Received.]—Feme covert, by deed, directed rents and profits, her separate property, to be paid, during her life, to her husband, for his own proper use and benefit (the intention being only to give him the administration during coverture, without account), the widow is entitled, after his death, to the future rents, and to those accrued in his life and not received. If her interest had passed, it must, upon the circumstances of the transaction, have been set aside. *Milnes* v. *Busk*, 2 Ves. J. 488.

Stock-in-Trade of Wife used by Husband.]—A husband carried on the business of a victualler with stock, &c., which formed the separate estate of the wife; in carrying on the business he disposed of the consumable stock and substituted similar articles, and at a subsequent period he sold the stock and business; by the decree an account was directed against the husband of the stock comprised in the settlement, and sold:—Held, that the master properly included the substituted stock in the account. *England* v. *Downs*, 6 Beav. 269; 12 L. J., Ch. 85; 6 Jur. 1075.

Receipt of Legacy—Concurrence of Wife.]—A husband, with his wife's concurrence, received a legacy bequeathed upon trust for her separate use. Some time afterwards he made his will, bequeathing to her a much larger sum, and directing his executor, who was also his residuary legatee, to pay all his just debts:—Held, first, that the concurrence of the wife in the receipt of the legacy by the husband was not a gift of it to him; secondly, that the bequest by the husband to the wife was not a satisfaction of the wife's claim against his estate in respect of the first-mentioned legacy. *Rowe* v. *Rowe*, 2 De G. & Sm. 294; 17 L. J., Ch. 357; 12 Jur. 909.

Annuity of Wife Charge on Husband's Estate.]—A married woman being entitled to an annuity charged on an estate belonging to A., but of which her husband was, as she knew, in receipt of the rents under a power of attorney from A., made no demand upon A. in respect of the annuity, for several years. The husband being indebted to A., in respect of his receipts, becomes bankrupt:—Held, that as the wife had lived with her husband, and enjoyed the benefit of his expenditure, she had no claim upon A. or his estate, in respect of the arrears of the annuity. *Carter* v. *Anderson*, 3 Sim. 370; 8 L. J. (O.S.) Ch. 91. *See also* 1 L. J. (O.S.) Ch. 132; and *Payne* v. *Little*, 26 Beav. 1.

—— **Payment to Husband.**]—An annuity given to the separate use of the wife is discharged by payments made to the use of her husband, and sums allowed him in account, the circumstances of the transactions being such as to satisfy the court that the mode of dealing between the person who was bound to pay the annuity and the husband was with the acquiescence of the wife, or with her authority, either

express or implied. *Bartlett* v. *Gillard*, 3 Russ. 149 ; 6 L. J. (O.S.) Ch. 19.

An annuity given to the separate use of the wife, being discharged by payments made to the use of her husband with her acquiescence, where husband took the bond of tenant for life of real estate, on which it was charged, for arrears of such annuity :—Held, that such bond, if accepted by the person entitled to the annuity, would be a good discharge in respect to the remainderman, and would, therefore, also bind the surviving wife, if she assented ; but an inquiry was directed as to the fact, whether the taking the bond was by her authority or with her consent. *Kelly* v. *Dawson*, 2 Moll. 87.

Lease Bought with Wife's Money—Outlay by Husband.]—A husband contracted for a lease of some premises, and he afterwards induced the trustees of his marriage settlement, who held moneys for the separate use of his wife, without power of anticipation, to act in breach of their trust, and to purchase the property. The property was conveyed to the trustees, and, by a deed executed by the husband and wife, it was declared that it should be held for their indemnity, and on the trusts of the settlement. The husband laid out very considerable sums of money in building and repairs, and, with the consent of the wife, was permitted to receive the rents. After some years, disputes arose ; the trustees insisted on receiving the rents, and proceeded at law to enforce their rights, whereupon the husband filed a bill against the trustees and his wife, claiming a lease under the agreement, and asking for a sale of the property, and for the application of the produce, first, in replacement of the trust funds, and afterwards in reimbursing the plaintiff his outlay. A motion for a receiver was refused with costs. *Wiles* v. *Cooper*, 9 Beav. 294 ; 15 L. J., Ch. 129.

Premiums on Settled Policies paid by Wife.]—A feme covert, out of her separate income, pays the premiums on certain policies of assurance, which, by a settlement made previously to her marriage, were assigned as a collateral security for a provision settled upon her under that instrument by the covenant of her husband :—Held, that upon the money secured by the policies becoming payable, she was entitled to a lien on the policy fund for the amount of the premiums so paid. *Burridge* v. *Row*, 1 Y. & Coll. C. C. 183, 583 ; 11 L. J., Ch. 369 ; 6 Jur. 12, 499. Affirmed, 13 L. J., Ch. 173 ; 9 Jur. 299.

Joint Appointment of Receiver.]—A married lady became entitled to an estate for her separate use under her grandfather's will, and she and her husband joined in appointing a person to receive the rents as their agent, who, by the husband's direction, paid them to an account opened by him with H. & Co., the bankers of his wife's family, and he drew cheques on H. & Co. for sums, some of which he applied for his own purposes, and the rest to keep down the interest of incumbrances on the estate. At the husband's death, a large balance remained in the hands of H. & Co., which they transferred to the account of his executors ; and his wife, who was his sole executrix, drew on H. & Co. in that character, and died about ten months after her husband :—Held, that the balance belonged not to her, but her husband's estate. *Beresford* v. *Armagh* (*Archbishop*), 13 Sim. 643 ; 13 L. J., Ch. 235 ; 8 Jur. 262.

Wife's Legacy Employed in Husband's Business.]—A. during her husband's (G.'s) lifetime became, under a will, entitled to a legacy of 1,000*l.* for her separate use. The executors paid the money to her, and she and her husband executed a release to them. Immediately after the payment the money came into the hands of G., and he paid it to his own account at his banker's, employing it partly in his business and partly in the family expenditure, with the knowledge and assent of his wife. There was no evidence to show in what manner or under what circumstances the money came into G.'s hands, or was so dealt with by him, nor did it appear that A. intended that the legacy should be a gift to her husband, or be held in trust for her separate use ; but it appeared that no communication took place between G. and his wife on the subject after the payment. G. died intestate, and A. claimed to be paid out of his assets the sum paid to him, on the ground that he was a trustee of the same for her separate use :—Held, that the employment of the money by G. in the manner set forth, with the assent of A., rendered it impossible for her to claim the money out of the assets of G. *Gardner* v. *Gardner*, 1 Giff. 126 ; 28 L. J., Ch. 903 ; 5 Jur. (N.S.) 975 ; 7 W. R. 692.

Written Acknowledgments of Wife's Right.]—Two promissory notes and a gas share were left to a feme sole for her separate use. She married, but they were not settled, and they were subsequently transferred into the name of the husband. There being written recognitions of the husband that they were the wife's :—Held, after his death that they belonged, as separate estate, to her. *Darkin* v. *Darkin*, 17 Beav. 578 ; 23 L. J., Ch. 890 ; 2 W. R. 135.

Declaration of Trust by Husband.]—M. allowed his wife to have a separate banker's account, to which moneys belonging to her, settled to her separate use, and also moneys not so settled, were paid in. M. also allowed her to draw cheques upon such account in her own name. She from time to time paid such cheques to her husband, who always gave her a memorandum at the time, and at the end of the year gave a promissory note, including all the amounts so received. The last of such promissory notes was dated the 1st January, 1848. M. died in August, 1848, having left all his property to trustees to convert into money, at such times as they might think proper, with full power to postpone such sale ; and his wife was made tenant for life in the proceeds of such sale, and in the other items of his estate, until the same should be so converted into money. Part of the property consisted of Mexican mine shares not yet sold :—Held, first, that such promissory note operated as a good declaration of trust by the husband in favour of the wife ; secondly, that the wife was entitled to have the dividends and bonuses (the same having arisen out of profits) declared since the testator's decease ; thirdly, that she was not entitled to insist upon the said Mexican shares being left in their then state of investment, against the wish of the trustees. *Murray* v. *Glasse*, 17 Jur. 816.

Discharge of Husband's Debts.] — S. G., a married woman, by deed-poll, in execution of a power reserved to her in her marriage settlement, appointed certain estates, which had been settled to her separate use, to a trustee, in trust

to sell and apply the proceeds to pay costs, incumbrances, and mortgages created thereon by the husband, to discharge the debts of the husband, and the residue in trust for S. G.'s own separate use. The husband sold the greater part of the premises comprised in the deed-poll, and the proceeds of the sales, and the rents unsold, were received by him. The husband having died, a bill was filed by his trustees and executors (one of whom was the trustee of the deed-poll) for administration of the estate. The decree ordered an account of the estates comprised in the deed-poll, and of the rents and profits of such estates, and the proceeds of any sales thereof, and an inquiry whether the testator had applied any of his moneys in payment of incumbrances, and whether anything was due to his estate in respect thereof. The master had not taken an account of the produce of the sales, and of the rents and profits of the unsold estates, as between the trustee of the deed-poll and the testator's estate. On further directions, the representatives of S. G. urged an inquiry as to the proceeds of the sales, and the rents and profits of the estates received during the husband's lifetime :—Held, that no direction for an account to charge the husband's estate, for the benefit of those interested in the separate estate of the wife, could be given, on the ground of acquiescence by the wife. *Lea* v. *Grundy*, 1 Jur. (N.S.) 951.

Solicitor Paying Cheque for Wife to Husband.]—A married woman, to whom a sum of money was payable for her separate use, received a cheque from the accountant-general, and handed it over to her solicitor, who accompanied her. The solicitor was, on motion, ordered to pay the balance to his client, and :—Held, that the onus being on the solicitor to show cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt out of it. *Mawhood* v. *Milbanke*, 15 Beav. 36.

Contract of Marriage in Scotch Form.]—A domiciled Scotchman, with the intention of continuing domiciled in Scotland, entered into a contract of marriage according to the Scotch form, but prepared in England. Some years subsequent to the marriage the Scotch domicil was relinquished, and an English one acquired. After the change of domicil the wife acquired property under her father's will, the greater portion of which was paid over to the husband by the trustee under the will, upon the joint receipt of himself and wife. The husband then became bankrupt, when another portion was paid to his assignees ; a third portion remained undistributed. The wife, by her next friend, filed a bill against the trustee, seeking to make him liable to make good the sums so paid :—Held, that although prepared in England, and a valid English contract, the contract was to be governed by the Scotch law ; that the change of domicil did not superinduce a disability in the wife not existing by the Scotch law, and that consequently the payments to the husband upon the joint receipt of husband and wife were good ; that the payments made to the assignees were bad, and must be refunded by them, or be made good by the trustee ; and that all future sums which might become payable must be treated as the separate property of the wife, subject to the life estate of the husband therein ; and that the dividends payable under the bankruptcy could not be impounded to make good the contract of the husband. *Duncan* v. *Cannan*, 23 L. J., Ch. 265 ; 18 Jur. 736 ; 2 Eq. R. 593.

Wife Separating from Husband.]—Wife entitled for life to income of settled property for her separate use, without power of anticipation. The trustees allowed the husband to use 1,000*l.*, part of the trust funds, for four years ; shortly after which period the wife separated from her husband, and then, for the first time, claimed interest on the 1,000*l.* for four years. She admitted she had allowed her husband to receive her income, so long as he behaved to her as a husband ought to do :—Held, that the wife was not entitled to the interest claimed. *Rowley* v. *Unwin*, 2 Kay & J. 138.

Wife becoming Lunatic—Payment of Income to Husband for Support.]—Property was settled upon a lady for her separate use for life ; and after the death of herself and her husband, upon certain trusts for their children. The lady, after the marriage, became lunatic. The husband requested the trustees of the settlement to pay the annual income of the property to him to maintain his wife. A petition was presented to the vice-chancellor, by the trustees, under s. 30 of 22 & 23 Vict. c. 35, for his advice in the matter, and he desired the application to be made to the lords justices :—Held, that the income might be paid to the husband, he undertaking to apply it for the support of his wife and children ; the costs of the petition to come out of the income. *Spiller*, *In re*, 6 Jur. (N.S.) 386 ; 2 L. T. 74—L.JJ.

Trustee paying to Husband with Wife's Consent—Liability of Trustee's Estate.]—Where a husband, entitled to the interest of a fund for life, with remainder to his wife for life, induced the acting trustee to pay him the money, on the written consent of the wife ; the trustee having died, his estate was held liable to make good the moneys so paid, on a bill filed by the widow and the surviving trustee. *Cresswell* v. *Dewell*, 4 Giff. 460 ; 3 N. R. 148 ; 10 Jur. (N.S.) 357 ; 10 L. T. 22 ; 12 W. R. 123.

Arrears of Pin Money.]—The rule of the court of chancery, that an arrear of a wife's separate estate or pin-money cannot be recovered against the husband, being founded on the presumption that it has been applied to the maintenance of the wife, or the general purposes of the family with the assent of the wife, does not apply where there is a receiver over the property liable to pay it. Nor has it any application against a purchaser for valuable consideration of the separate estate or pin-money. *Foss* v. *Foss*, 15 Ir. Ch. R. 215. *See* PIN-MONEY, col. 1260.

Settlement on Husband procured by his Fraud.]—Money which had been bequeathed to a married woman for her separate use was, during the coverture, by her husband, at her request, lent on mortgage. The mortgage was prepared by the solicitor of the mortgagor from instructions given by him and the husband, and it recited, untruly, that the money belonged to the wife before marriage and was not comprised in any settlement, and it was made payable to the husband and wife, and to the survivor of them, his or her executors or administrators, or their, his, or her assigns. The wife had no

separate solicitor, and executed the deed without its being read over to her. The husband deserted his wife, and was subsequently, on her petition, divorced from her on the grounds of adultery and cruelty. Upon a bill by the wife against her husband and the mortgagor, the deed was declared to be void, so far as it purported to be a settlement on the husband, and a new deed was ordered to be executed in favour of the wife alone. *Knight* v. *Knight*, 5 Giff. 26; 11 Jur. (N.S.) 617; 12 L. T. 699.

Joint Power of Attorney—Restraint on Anticipation.]—When a married woman, who was entitled to the income of property held on trust for her separate use, with a restraint on anticipation, joined with her husband in a power of attorney to receive and to sue for any moneys due to them or either of them:—Held, that the trustee was not justified in not paying the attorney the wife's separate income. Neither would the power entitle the attorney to institute an administration suit in the name of the wife by himself as next friend. *Kenrick* v. *Wood*, L. R. 9 Eq. 333; 19 W. R. 57.

Wife may Contract with Husband as to Separate Property.]—A wife can contract in respect of her separate estate with her husband; and if she hands him money, part of the income of her separate estate, upon a contract of loan, she may sue him upon that contract. *Woodward* v. *Woodward*, 3 De G. J. & S. 672; 9 Jur. (N.S.) 882; 8 L. T. 749; 11 W. R. 1007.

Circumstances under which a wife was held upon the evidence to have lent and not given to her husband a sum of money, part of the income of her separate estate, and to be entitled to prove upon his estate in an administration suit as a creditor in respect of the loan. *Ib.*

Husband Speculating on Stock Exchange with Wife's Bonds—Notice to Broker.]—A husband entered into speculations on the stock exchange partly with money which was settled upon his wife for her separate use, without power of anticipation. The transactions were carried out through his broker, with whom he deposited, as a security against risks, Spanish bonds which had been purchased with the settlement funds. The broker had no direct notice that these bonds were settlement property, but he had received from the husband from time to time cheques payable to his wife or order, these cheques being indorsed by her. The bonds having been realised by the broker to cover losses incurred by him in the course of the transactions, the wife filed a bill against the broker to recover the value of the bonds and cheques on the ground that the amount constituted her separate estate, and that the broker had notice of the fact:—Held, that the broker had neither actual nor constructive notice of the settlement, and that, therefore, the bill must be dismissed with costs. *Macbryde* v. *Eykyn*, 24 L. T. 461. Affirmed, 25 L. T. 192—L.JJ.

Wife giving Cheque for Legacy to Husband to Cash—Death of Husband.]—A wife, to whom a legacy had been bequeathed to her separate use, received an uncrossed country banker's draft, payable in London, for the amount, less the duty, and she indorsed the draft and handed it over to her husband, and his bankers received the amount and placed it by his direction to his deposit account. The husband died suddenly a few days afterwards. There was evidence pointing to the fact that the wife did not intend to give the draft to her husband. In an action against his executors:—Held, that the widow was entitled to be paid the sum claimed. *Green* v. *Carlill*, 46 L. J., Ch. 477; 4 Ch. D. 882.

Goods of Wife Warehoused with Auctioneer.]—Goods, the separate property of a married woman, were placed by her husband in a hired warehouse, and entrusted to auctioneers for the purpose of sale:—Held, that the auctioneers became possessed of the goods: so that on receipt of notice of the wife's claim before sale, they were liable to the wife for the value of both the goods sold and the goods not sold but afterwards removed by the husband. *Davis* v. *Artingstall*, 49 L. J., Ch. 609; 42 L. T. 507; 29 W. R. 137.

Presumption as to Wife's Assent.]—The trustee of stock for the separate use of a married woman having improperly transferred it into the joint names of her husband and himself, the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock, and applied the proceeds to his own use. Some time afterwards he left her:—Held, that, though the wife might have been presumed to have assented to the husband's actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced. *Dixon's Trusts, In re, Dixon* v. *Dixon*, 48 L. J., Ch. 592; 9 Ch. D. 587; 40 L. T. 208; 27 W. R. 282.

Presumption of Gift.]—By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband: with this difference, that by Scotch law she has the privilege of revoking the donation, even after her husband's death, and reclaiming the subject of her gift in so far as it had not been consumed. The same circumstances which are in England held to imply donations between husband and wife are sufficient to sustain a similar inference in Scotland. *Edward* v. *Cheyne*, 13 App. Cas. 385—H. L. (Sc.)

A married woman living with her husband in Scotland was entitled to the income of a fund settled for her separate use, which stood in the names of trustees, of whom her husband was one; and he also acted as factor of the trust. Payments of income were at first lodged in a bank to the credit of the wife's separate account, then to the credit of an account in the names of both husband and wife; but for many years previous to the husband's death, both before and after he became sole trustee, the income was paid into the husband's private banking account, and mixed with his own funds:—Held, that these circumstances inferred a complete gift, and, in respect it had not been revoked by the wife, that her representatives were not entitled to an account of the husband's intromissions with her separate estate. *Ib.*

And see GRANTS AND GIFTS TO AND BETWEEN HUSBAND AND WIFE, infra, 1264.

e. Death of Wife—Rights of Husband.

Chattels Real of Wife not vested in Possession during Coverture.]—A wife entitled to a term, subject to a life estate therein, predeceased her husband during the subsistence of the life estate: —Held, that it was not necessary for the husband to take out letters of administration to her in order to complete his title to the leaseholds. *Bellamy, In re, Elder* v. *Pearson*, 53 L. J., Ch. 174; 25 Ch. D. 620; 49 L. T. 708; 32 W. R. 358.

—— **Equitable Interest.**]—On the death of a wife her husband, in the absence of any disposition by her, becomes entitled jure mariti to her equitable interest in chattels real settled to her separate use. *Archer* v. *Lavender*, Ir. R., 9 Eq. 220.

Devolution of Separate Estate — Married Women's Property Act, 1882.] — The Married Women's Property Act, 1882, does not affect the right of the husband to succeed, on the death of the wife, to her undisposed-of separate personalty. *Lambert, In re, Stanton* v. *Lambert*, 57 L. J., Ch. 927; 39 Ch. D. 626; 59 L. T. 429.

A married woman who died on the 13th of September, 1887, leaving a husband and three children surviving, made a will on the 7th of September, 1887, in exercise of a power of appointment, and appointed executors. The will did not purport to dispose of any other property. At her death she was entitled to separate personal estate not included in the power. Probate of the will was granted under the Amended Probate Rules of April, 1887, in the ordinary form without any exception or limitation:—Held, that the executors were trustees for the husband of the undisposed-of property, and that the probate duty and the costs connected with probate ought to be apportioned ratably between the appointed and the undisposed-of property. *Ib.*

Debts of Deceased Wife — Administration not taken out—"Legal Personal Representative."]—A husband who, jure mariti, succeeds to leasehold property which belonged to his deceased wife as separate estate, without taking out administration, is her "legal personal representative" within the meaning of s. 23 of the Married Women's Property Act, 1882, so as to be liable to the extent of such separate estate for his wife's debts. *Surman* v. *Wharton*, 60 L. J., Q. B. 233; [1891] 1 Q. B. 491; 64 L. T. 866; 39 W. R. 416.

See col. 1103.

Executor of Wife—Retainer for Funeral Expenses—Estate insufficient.]—A husband, executor of his wife's will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral though such estate was insufficient for creditors, and her will did not contain any charge of debts and funeral expenses. *McMyn, In re, Lightbown* v. *McMyn*, 55 L. J., Ch. 845; 33 Ch. D. 575; 55 L. T. 834; 35 W. R. 179.

Money—Husband entitled as Next of Kin.]—It was stipulated in marriage articles that moneys in the funds, the property of the intended wife, should be for sole and separate use, to all intents and purposes, as if she were sole and unmarried: —Held, upon the death of the wife without issue and without having made any appointment of the property, that the husband was entitled to it as her administrator, and not her next of kin. *Proudley* v. *Fielder*, 2 Myl. & K. 57.

Where the wife living separate at the time of her death was possessed of money arising from funds settled to her separate use, and had made no disposition of them:—Held, that the husband was entitled to the moneys saved jure mariti, without taking out administration. *Moloney* v. *Kennedy*, 10 Sim. 254; 3 Jur. 793.

If no disposition of wife's separate property, husband succeeds as next of kin, not by marital right. Sed quære. *Fettiplace* v. *Gorges*, 1 Ves. J. 49; 1 R. R. 79. See Bro. C. C. 3, 10, n.

Undisposed-of separate Property—Bankruptcy of Husband.]—The wife of a bankrupt, having separate property, died in France, in possession of other property there, which was claimed by the creditors as belonging to the husband. She by will disposed of all her separate estate except 1,500*l.* consols (which, in default of appointment, was held in trust for her executors or administrators), and appointed a lady resident in France her executrix. Injunction granted at the suit of the assignees to restrain the transfer of the consols, but refused as to the rest of the separate estate. *Stead* v. *Clay*, 1 Sim. 294; 4 Russ. 550; 6 L. J. (o.s.) Ch. 138; 28 R. R. 169.

Next of Kin.]—By a settlement, executed on the second marriage of the Countess of K., to which her husband was a party, her property, consisting of her jointure settled on her first marriage, a life interest in a money charge, and certain furniture, was assigned to trustees in trust for her separate use, without power of anticipation; but if he should survive her, then after her decease, as to all such part of the moneys as should not have been spent or disposed of by her in her lifetime, as she should by will appoint, and, in default of appointment, in trust for the persons who would have been entitled as her next of kin under the statute of distributions, if she had died without being under coverture. The Countess of K., after her second marriage, retained that title, having contracted debts before and after marriage. She died intestate, entitled to apportioned parts of the jointure and interest on the charge, and some personal estate not included in the settlement. Her husband, who survived her, became her administrator. Her daughter by her first marriage was her next of kin:—Held, first, that the trust in favour of the next of kin, as to the part of the separate estate which she should not spend or dispose of, was valid against the husband. Secondly, that the debts contracted before the second marriage should be paid pari passu out of the apportioned parts of the separate estate and the general personal estate. Thirdly, that the debts contracted after the marriage should be paid out of the separate estate. *Turner* v. *Caulfield*, 7 L. R., Ir. 347.

The Married Women's Property Act, 1870, does not free the husband from liability to be sued as the wife's administrator for debts contracted before the marriage. *Ib.*

Illegitimacy of Wife.]—By a marriage settlement, a fund belonging to the wife was assigned to trustees for her separate use for life, with remainder to the children of the marriage with power of appointment, and, in default, to her next of kin. On her death without issue and

intestate, not having exercised the power of appointment, it appearing that she was illegitimate, the husband was held entitled to the fund in his marital right, as all the trusts of the settlement which intercepted the marital right had failed. *Anon.*, 1 Giff. 392. And see *Hawkins* v. *Hawkins*, 7 Sim. 173; 4 L. J., Ch. 9.

Scotland—Married Women's Property Act, 1881—Retrospective Operation.]—The 6th section of the Married Women's Property (Scotland) Act, 1881, enacts, "After the passing of this act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her movable estate which is taken by a widow in her deceased husband's movable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be." A woman, married before the passing of the above-cited act, succeeded to movable property, some before and some after the date of the act, which was settled upon her for her personal use, and free from the jus mariti of her husband. She died, without issue, intestate, and domiciled in Scotland. In a claim by A., her husband, against her executrix:—Held, that s. 6 of the Married Women's Property (Scotland) Act, 1881, applies to marriages entered into before the passing of that act as well as to those contracted after that date; and that, therefore, A. was entitled in accordance with that section to half his wife's personal estate. Also that sub-s. 2 of s. 3 applies only to the preceding sections. *Paterson* v. *Poe*, 8 App. Cas. 678—H.L. (Sc.)

2. Dealings With.

Contracting as a Feme Sole.]—By 45 & 46 Vict. c. 75, s. 1—(1.) *A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.*

(2.) *A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.*

By Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1, *every contract hereafter entered into by a married woman otherwise than as an agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter whilst discovert be possessed of or entitled to* (other than property subject to a restraint on anticipation). *See* col. 1064.

Trading Separately.]—By Married Women's Property Act, 1882, s. 1 (5), *every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.* *See* col. 1029.

Property held as Feme Sole.]—By s. 2 (Married Women's Property Act, 1882), *every woman who marries after the commencement of this act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.*

By s. 3, *every woman married before the commencement of this act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether, vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act, including any wages, earnings, money and property so gained or acquired by her as aforesaid.*

Alienation of.]—A feme covert, having freehold of inheritance, settled to her separate use, may dispose of it as if she were a feme sole, by deed or will, without a deed acknowledged, and not the less so that a specific power of appointment in a particular way over the property is given her by the instrument settling it to her separate use. *Taylor* v. *Meads*, 34 L. J., Ch. 203; 11 Jur. (N.S.) 166; 13 W. R. 394.

Power to Dispose must be Strictly Pursued.]—Where a wife has a power to dispose of her separate estate, her disposition of it must be by acts strictly pursuing the power. *Ross* v. *Ewer*, 3 Atk. 157.

In most cases the court will direct the trustees to hold or to convey, and transfer, according to the wife's appointment. See *Roupe* v. *Atkinson*, Bunb. 162.

Mortgage—Inquiry as to Settlement.]—When a married woman executes a mortgage there is no obligation on the mortgagee to inquire whether a settlement was made on her marriage. *Lloyd's Banking Co.* v. *Jones*, 54 L. J., Ch. 931; 29 Ch. D. 221; 52 L. T. 469; 33 W. R. 781.

Power of Tenant for Life to direct Trustees to Repair Property.]—Certain property, comprising freeholds and leaseholds, was settled on trust for a married woman for life for her separate use without power of anticipation, with power of appointment by deed with the consent of the trustees. The settlement also provided that the trustees should at her discretion (inter alia) direct repairs to be done to the property, and that all expenses properly incurred by the trustees in

carrying out the trusts or powers of the settlement should constitute a charge on the premises in their favour. The plaintiff, at the direction of the tenant for life, did certain repairs to the property:—Held, that the trustees were bound to carry out any repairs directed by the tenant for life, provided the cost of them did not exceed the value of the property. *Skinner* v. *Todd*, 51 L. J., Ch. 198; 46 L. T. 131; 30 W. R. 267.

Held, also, that the tenant for life herself directing the repairs to be done was in substance an exercise of her power to direct the trustees to do them. *Ib.*

Held, also, that the trustees must raise the amount of the plaintiff's bill for the repairs, by way of charge on the property, and pay it to him. *Ib.*

Authority to Pay and Receive Income.]—When a married woman, who was entitled to the income of property held on trust for her separate use with a restraint on anticipation, joined with her husband in a power of attorney to receive and to sue for any moneys due to them or either of them:—Held, that the trustee was not justified in paying the attorney the wife's separate income. Neither would the power entitle the attorney to institute an administration suit in the name of the wife by himself as next friend. *Kenrick* v. *Wood*, 39 L. J., Ch. 92; L. R. 9 Eq. 333; 19 W. R. 57.

A husband brought an action in the names of himself and wife to recover 200*l.* due on a mortgage made to his wife before her marriage. The mortgagor obtained an order that on payment of the principal and interest into court the action should be stayed; that a reconveyance should be executed, and that on its execution the money should be paid out of court. An arrangement was made that the wife should receive 100*l.*, and the husband the residue, and the mortgagor, on being informed by the plaintiffs' attorney that they had settled their differences on those terms, consented to the payment out of court to their attorney. The money was accordingly paid out to him; but he, claiming a lien on the 100*l.* for costs, offered the wife only 83*l.*, which she would not receive. The wife survived her husband, and died without having received any part of the money, and without having executed a reconveyance. A suit for foreclosure having been instituted by her executors and devisees:—Held, that, independently of the 7 Geo. 2, c. 20, the mortgagor and his estate were discharged from the debt, inasmuch as the receipt of the attorney in the action was a good discharge. *Bourton* v. *Williams*, 39 L. J., Ch. 800; L. R. 5 Ch. 655; 18 W. R. 1089.

Mortgage by Husband and Wife—Death of Husband.]—A mortgage by husband and wife of her estate is void after the husband's death, and not merely voidable, though in the form of a lease. *Goodright* d. *Carter* v. *Straphan*, Lofft, 763; Cowp. 201; 1 Dougl. 53, n.

Husband's Power over.]—When a husband, by a post-nuptial deed, has settled a house and business to the separate use of his wife, to be managed by her for the benefit of herself as if a feme sole, he can be restrained from in any way interfering with the business, and even from entering the house. *Wood* v. *Wood*, 19 W. R, 1049.

When a wife became entitled after marriage to a fund to her separate use and was induced by her husband to lend it on mortgage by a deed reciting that it was her property before marriage, and securing repayment of the loan to the survivor of husband and wife, the court set the deed aside, and directed a new one to be executed. *Knight* v. *Knight*, 5 Giff. 26.

Contract with Husband.]—A wife can contract in respect of her separate estate with her husband; and if she hands him money, part of the income of her separate estate, upon a contract of loan, she may sue him upon that contract. *Woodward* v. *Woodward*, 3 De G. J. & S. 672.

Circumstances under which a wife was held upon the evidence to have lent and not given to her husband a sum of money, part of the income of her separate estate, and to be entitled to prove upon his estate in an administration suit as a creditor in respect of the loan. *Ib.*

Wife's Conveyance—Specific Performance of.]—A married woman was entitled by an antenuptial settlement to a jointure rent-charge after her husband's death secured upon his real estates in Ireland. The wife having left him, the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation a document was drawn up and signed by the husband, which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification that no further steps were to be taken in the matrimonial suit, but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise and was executed by the husband, but the wife refused to execute it or to return to her husband, and the husband afterwards died:—Held, that the wife was not, when she signed the document, in all respects in the same position as a feme sole, and that even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by 4 & 5 Will. 4, c. 92, ss. 68, 71; and that specific performance of the agreement to release her jointure could not be decreed against her. *Hunt* v. *Hunt* (4 De G. F. & J. 221) and *Besant* v. *Wood* (12 Ch. D. 605) commented on by Selborne, L.C. *Cahill* v. *Cahill*, 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861—H. L. (Ir.) See also *Williams* v. *Walker*, post, col. 1057.

Husband dealing with Improperly—Innocent Third Party.]—A husband entered into speculations on the Stock Exchange, partly with money which was settled upon his wife for her separate use without power of anticipation. The transactions were carried out through his broker, with whom he deposited, as a security against risks, Spanish bonds which had been purchased with the settlement funds. The broker had no direct notice that these bonds were settlement property, but he had received from the husband from time to time cheques payable to his wife or order, these cheques being indorsed by her. The bonds having been realised by the broker to cover losses incurred by him in the course of the transactions, the wife filed a bill against the broker to recover the value of the bonds and cheques on the ground that the amount constituted her separate estate, and that the broker had notice of the fact:—Held, that

the broker had neither actual nor constructive notice of the settlement, and that, therefore, the bill must be dismissed with costs. *Macbryde* v. *Eykyn*, 24 L. T. 461. Affirmed on appeal, 25 L. T. 192—L.JJ.

The trustee of stock for the separate use of a married woman having improperly transferred it into the joint names of her husband and herself, the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock, and applied the proceeds to his own use. Some time afterwards he left her:—Held, that, though the wife might have been presumed to have assented to the husband's actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced. *Dixon's Trusts, In re*, 48 L. J., Ch. 592; 9 Ch. D. 587; 40 L. T. 208; 27 W. R. 282.

By a marriage settlement, the husband had the wife's estate for life, with a power to grant leases for 21 years but no longer. In breach of the power, he granted a lease to A. for 99 years, determinable upon lives. The wife survived him, and conveyed the fee to B.; and in the conveyance was recited the lease to A., who was recognised as being then tenant in possession of the estate, at the yearly rent reserved. In an ejectment by B. against the assignee of the lease:—Held, that the lease being void, and the recital only matter of description, no demand of possession was necessary to sustain the action. *Doe* d. *Biggs* v. *White*, 2 D. & R. 716; 1 L. J. (o.s.) K. B. 170.

Wife divesting herself of.]—A woman married after the passing of the Married Women's Property Act, 1870, became during her marriage entitled in possession to a sum of money to which before her marriage she was entitled in expectancy. She then joined with her husband in a petition to the court of chancery to pay the money to him in her right, and the money was paid to the husband's solicitor under a power of attorney from the husband:—Held, that the money was the husband's, as the wife had divested herself of her property in it by the petition to the court of chancery. *Lane* v. *Oakes*, 30 L. T. 726; 22 W. R. 709.

Separate Life Interest in Dividends of Stock—Assignment.]—Trust to permit married woman to receive interest or dividends of stock to her own use for life, independent of husband:—Held, she is absolutely entitled for her life to her separate use, and upon the rule that feme covert is to be considered sole as to her separate property, her assignment to secure an annuity with her husband was established. *Wagstaff* v. *Smith*, 9 Ves. 520.

Trust as Wife should Appoint.]—Trust, by marriage settlement, to pay the rents and profits according to the appointment of the wife from time to time; in default of appointment, to her for her sole and separate use; the receipts of herself or the person she should appoint from time to time, to be from time to time effectual releases, &c.; sale by her and her husband of her separate interest established. *Witts* v. *Dawkins*, 12 Ves. 501.

Separate Reversionary Rent-charge for Life.]—A married woman, to whom a rent-charge for life in reversion is devised to her separate use, without the intervention of trustees, joins with her husband in assigning it for a valuable consideration; she is bound by that assignment after the death of her husband. *Major* v. *Lansley*, 2 Russ. & M. 355; 9 L. J. (o.s.) Ch. 102.

A feme covert made a disposition of property as to which it was doubtful whether it was settled to her separate use. The husband disclaimed:—Held, that whether separate property or not, the husband's disclaimer gave effect to the disposition of the wife. *Rycroft* v. *Christy*, 3 Beav. 238; 4 Jur. 599.

Separate Life Interest Coupled with Power.]—Married woman having a life interest in stock for life to her separate use, with a power of appointment by will together with her husband, conveys it to one of the trustees by an instrument purporting to be an execution of her power:—Held, after her husband's death, not binding. *Scott* v. *Davies*, 4 Myl. & C. 87; 2 Jur. 1057.

Purchase of Annuity.]—A feme covert having an interest for life to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death to trustees, upon trust to invest the fund in the immediate purchase of an annuity for her life. The court ordered a transfer of the fund to the new trustees accordingly. *Lynn* v. *Ashton*, 1 Russ. & M. 188; Taml. 328.

Life Interest not settled to Separate Use.]—Semble, a husband and wife cannot effectually dispose of the life interest of the wife, in a fund not settled on her separate use, beyond the duration of the coverture. *Stiffe* v. *Everitt*, 1 Myl. & C. 37; 5 L. J., Ch. 138.

Reversionary Interest and Money Fund.]—A money fund was vested in trustees upon trust to permit the intended wife, during the joint lives of herself and her intended husband, to take the interest thereof for her separate use; and after the decease of the husband in trust for the wife and her assigns during her life, in case she should survive him; and after the decease of the wife, as to one moiety of the property, upon trust for the sole and absolute use of the wife, to be disposed of by her in such manner as she might by deed or will, notwithstanding her coverture, appoint; and in default of any such appointment upon trust as therein mentioned. The wife cannot, during the coverture, make an absolute disposition of the moiety of the trust fund. *Nixon* v. *Nixon*, 2 Jo. & Lat., 416; 8 Ir. Eq. R. 254.

Life Interest—Power of Alienation.]—Devise and bequest of real and personal estate in trust to pay the rents, dividends, and interest from time to time, as the same should become due, and be received unto and for the only use and behoof of the testator's daughter, for and during the term of her natural life, and to pay the same into her own hands, independent of her present or future husband, and not in any manner subject to the debts, control, or engagements of such present or future husband, and her receipt to be a sufficient discharge to the trustees, as if she

were sole and unmarried :—Held, that the wife had a power of alienation of her life interest. *Glyn* v. *Baster*, 1 Y. & J. 329.

Joint Transaction—Reduction into Possession.]—A wife, entitled to property for her separate use, was desirous of raising money for the improvement of her estate, while her husband also wished to raise money to discharge a debt. They accordingly arranged, through their solicitor, to borrow money upon mortgage of the separate estate, and upon policies on the lives of each of them. The money was to be advanced by instalments, and when the first instalment was due, the husband and wife signed a joint authority for the solicitor to receive it for them. He, however, received the money, and claimed to retain part of it in respect of a separate debt due to him as solicitor of the husband :—Held, that he could not retain the money, or set it off as a debt due from the husband, as it was received by him upon the express understanding that it was to be held for the husband and wife jointly, so that there never was any reduction into possession on the part of the husband. *Jones* v. *Cuthbertson*, 41 L. J., Q. B. 145 ; L. R. 7 Q. B. 218 ; 26 L. T. 359 ; 20 W. R. 381. Affirmed, 42 L. J., Q. B. 221 ; L. R. 8 Q. B. 504 ; 28 L. T. 673 ; 21 W. R. 919.

Post-nuptial Contract with Husband.]—A married woman, immediately after the marriage, and in consideration thereof and of her husband undertaking the management of lands and tenements of which she was seised in fee, and of his paying off incumbrances and defraying the expense of managing and keeping the premises in repair, verbally agreed to convey the lands and tenements to him, and to settle them upon him absolutely, and to do all such acts as might be legally necessary for effectuating such conveyance and settlement. The husband performed his part of the agreement, but the wife died without having executed or acknowledged a deed :—Held, that this contract could not be set up as an equitable defence to a claim by her heir-at-law to recover the land. *Williams* v. *Walker*, 9 Q. B. D. 576 ; 31 W. R. 120.

Attachment of Debts.]—Judgment having been signed in an action against the defendants, a man and his wife, it was sought to attach in execution moneys, in the hands of trustees, forming part of the income of trust funds payable to the wife to her separate use, which had accrued since the judgment. The will by which the trust was created contained a clause restraining anticipation by the wife. It appeared that the action was for the amount of a promissory note made by the husband and wife jointly during the coverture :—Held, that the moneys in question could not be attached in execution. *Chapman* v. *Biggs*, 11 Q. B. D. 27 ; 48 L. T. 704 ; 47 J. P. 485.

House settled—Husband claiming right to.]—On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, and the husband and wife continued to reside in the house. Differences arose between them, they ceased to cohabit, and the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to and to use the house when and as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. In an action by the wife against the trustees and her husband claiming administration of the trusts of the settlement and an injunction to restrain the husband from entering the house :—Held, that, under the circumstances, the wife was entitled to an interim injunction. *Symonds* v. *Hallett*, 24 Ch. D. 346 ; 49 L. T. 380 ; 32 W. R. 103—C. A.

Transfer of Stock standing to separate Use of Wife.]—The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), does not empower a married woman, entitled under s. 7, to stock for her separate use, to transfer such stock without the concurrence of her husband, unless and until the stock has been placed, under s. 3, in her name as a married woman entitled for her separate use. *Howard* v. *Bank of England*, 44 L. J., Ch. 329 ; L. R. 19 Eq. 295 ; 31 L. T. 871 ; 23 W. R. 303.

Consols were standing in the names of three persons, one of whom was a married woman who had been deserted by her husband, and was entitled beneficially to the stock under the Married Women's Property Act, 1870, s. 7. Those persons applied to the Bank of England to be permitted to transfer the stock without the concurrence of the husband of the married woman ; and the bank having refused :—Held, that the bank could not be compelled to permit such a transfer. *Ib.*

Registration of Stock in Name of Wife.]—Under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 4, on an application by a wife to a joint-stock or an incorporated company to register stock in her name as a "married woman entitled to her separate use," the company must investigate the title ; and if it refuses to register, the court, unless a flaw in the title is shown, will compel the company by mandamus to register. *Reg.* v. *Carnatic Ry.*, 42 L. J., Q. B. 169 ; L. R. 8 Q. B. 299 ; 28 L. T. 413 ; 21 W. R. 621.

Grant of Annuity—Promise to Provide for Grantee.] — An annuity granted by a feme covert, having a power to dispose of her separate estates to A., a young lady, upon her marriage, for whom she promised to provide, is a specific lien on the grantor's estate. *Power* v. *Bailey*, 1 Ball & B. 49.

Conveyance to bonâ fide Purchaser—Setting Aside—Lapse of Time.]—Conveyance to a bonâ fide purchaser, under a decree against a feme covert for a sale of part of her separate estate, cannot after an acquiescence of twenty-two years, be set aside, notwithstanding the purchase money may have been misapplied. An order, disposing of the real estate of a feme covert, made on her consent and acquiesced in during her life, will not be set aside on a doubtful case made many years afterwards by her representatives. *Burke* v. *Crosbie*, 1 Ball & B. 489.

Assignment by Wife—Confirmation by Husband.]—E. B., a single woman, transferred certain stock, her property, into the joint names of herself and two trustees ; and on the day of the transfer, she and the trustees, without reference to any marriage on her part, executed an indenture, by which it was declared, that the trustees should hold the property in trust, to pay

the dividends to E. B. for her life, for her sole and separate use, independent of any husband she might marry; and, after her death, upon such trusts as E. B. should by will, notwithstanding her coverture, appoint; and in default of such appointment in trust for E. B., her executors, administrators, and assigns. E. B. afterwards married, and by a deed, reciting the settlement, and executed by her husband and herself, she, by the direction of her husband, assigned the dividends of the stock in trust, for the punctual payment of an annuity granted by the husband:—Held, that whether or not, under the deed of settlement, the wife had power to make this assignment, the husband having joined in the deed of assignment, was a confirmation of the deed of settlement, and consequently the assignment by wife was valid. *Maber* v. *Hobbs*, 2 Y. & Coll. 317; 6 L. J., Ex. Eq. 12.

Transfer of Fund in Court.]—A fund in court, to which a married woman was entitled to her separate use, ordered, with the consent of her husband, to be transferred to her name, pursuant to the Married Women's Property Act, 1870, s. 3. *Frank* v. *Mackay*, Ir. R. 8 Eq. 93.

Charges on Wife's separate Estate.]—A husband paying off an incumbrance, subject to which the estate stands limited to his wife for life for her separate use with remainder as she shall by will appoint, is, in the absence of evidence of a contrary intention, entitled to the charge as against the estate. Whether it is a charge on the husband's estate which is paid by the wife, or a charge on the wife's estate paid by the husband, the same presumption attaches to the transaction. *Outram* v. *Hyde*, 24 W. R. 268.

Sale of Dividends.]—Under a bequest of stock, in trust to permit a woman to receive the dividends for life for her sole and separate use, &c., and to pay the same into her own proper hands, and that her receipt and receipts should from time to time be sufficient discharges, a sale by her of part of the dividends established. A bonâ fide sale of dividends of stock is not within the Annuity Act. *Brown* v. *Like*, 14 Ves. 302.

Sale of Goods by Auctioneer after Notice from true Owner.]—Goods, the separate property of a married woman, were placed by her husband in a hired warehouse, and intrusted to auctioneers for the purpose of sale:—Held, that the auctioneers became possessed of the goods; so that on receipt of notice of the wife's claim before sale, they were liable to the wife for the value of both the goods sold and the goods not sold, but afterwards removed by the husband. *Davis* v. *Artingstall*, 49 L. J., Ch. 609; 42 L. T. 507; 29 W. R. 137.

Wife of Unsound Mind — Investment.]—A married woman, of unsound mind, was entitled for her separate use to the income of certain trust funds. Her written consent was also required to the investments by the trustees. Upon a petition under the Trustees Relief Act, it was held, that the whole income might be paid to the husband on his undertaking to apply it to the maintenance of the wife, and that her consent to investments might be dispensed with. *T——, In re*, 15 Ch. D. 78; 29 W. R. 42.

Improper Investment at request of Wife—Remedy against Trustees.]—A fund was settled in trust for a married woman for life for her separate use without power of anticipation, and she had a power of appointment by deed or will over the reversion. Her consent in writing was required to any change of the investments. Part of the fund was at her request improperly advanced upon a security which proved deficient. She concurred in the mortgage deed, and her execution of it was attested as required by the power:—Held, that she could maintain a suit to have the deficiency in the fund made good, and that the trustees had no claim to be indemnified out of the reversion subject to the power of appointment. In a suit to realise the deficient security, a fund was paid into court and invested, and then sold out at a profit:—Held, that the trustees were answerable only for the deficiency, after taking into account this profit. *Fletcher* v. *Green*, 3 N. R. 626.

Disposing by Will.]—Under a testamentary appointment by a married woman of "all funds and property which have been or shall be purchased out of the savings of property to which I have been or shall be entitled to my separate use":—Held, that savings out of separate estate standing to her account at her bankers did not pass. *Askew* v. *Rooth*, 43 L. J., Ch. 368; L. R. 17 Eq. 426; 30 L. T. 155; 22 W. R. 524.

By a marriage settlement, the income of certain property was settled on the wife, for her life, for her separate use, without power of anticipation; and the corpus, if there were no children of the marriage, and she survived her husband, on her absolutely, for her separate use; if she should not survive her husband, then as she should by deed or will appoint. She made a will in pursuance of the power in her husband's lifetime, and survived him, but did not republish the will after his death. There were no children of the marriage:—Held, that the will passed her separate property. *Bishop* v. *Wall*, 45 L. J., Ch. 773; 3 Ch. D. 194; 25 W. R. 93. See also *Mayd* v. *Field*, 45 L. J., Ch. 699; 3 Ch. D. 587; 34 L. T. 614; 24 W. R. 660.

—— **Grant of Probate.**]—Since the coming into operation of the amended rules 15 and 16 of the Probate Rules, which provide that probate of the will of a married woman shall take the form of ordinary grants of probate without any exception or limitation, a husband who obtains probate of his wife's will in general form is not deemed to have assented to the will as a disposition of the property which she had no right to dispose of by will without his assent. *Atkinson, In re, Waller* v. *Atkinson*, 67 L. J., Ch. 349; [1898] 1 Ch. 637.

—— **Bequest of Savings of, by Wife.**]—A bequest by a woman divorced a mensâ et thoro of the savings of alimony awarded by the ecclesiastical court, is good against the marital right. *Moore* v. *Barber*, 5 Giff. 43; 11 Jur. (N.S.) 539; 12 L. T. 664; 13 W. R. 935.

—— **Assent of Husband—Future Separate Estate.**]—The will of a married woman who had no personal estate belonging to her for her separate use at the date of the will, made without the assent of her husband, is effectual to dispose of personal estate to her separate use which she afterwards acquires and is entitled to at her

death. *Charlemont* (*Earl*) v. *Spencer*, 11 L. R. Ir. 490—C. A.

—— **Renunciation of Marital Rights—Real Estate.**]—Mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. And upon the death of the wife without issue during her husband's lifetime, her heir-at-law, and not her devisee, will be entitled to the land of which she is seised in fee simple. *Rippon* v. *Dawding* (Ambl. 565) commented on. *Dye* v. *Dye*, 53 L. J., Q. B. 442; 13 Q. B. D. 147; 51 L. T. 145; 33 W. R. 2—C. A.

—— **Property acquired after Coverture.**]—S. 1, sub-s. 1, of the Married Women's Property Act, 1882, gives a married woman power to dispose by will only of property of which she is seised or possessed while she is under coverture. Consequently, notwithstanding s. 24 of the Wills Act, her will made during coverture is not, unless it is re-executed after she has become discovert, effectual to dispose of property which she acquires after the coverture has come to an end. *Price, In re, Stafford* v. *Stafford*, or *Price* v. *Stafford*, 54 L. J., Ch. 509; 28 Ch. D. 709; 52 L. T. 430; 33 W. R. 20.

Banking accounts were kept in the joint names of husband and wife, and investments in railway stock were made in their joint names. The wife survived her husband five days, having executed a will during coverture:—Held, that the balances of the joint accounts and the joint investments survived to the wife, but did not pass under her will. *Young, In re, Trye* v. *Sullican*, 54 L. J., Ch. 1065; 28 Ch. D. 705; 52 L. T. 754; 33 W. R. 729.

Statute for promoting Erection of Churches—Married Women, without their Husbands, excepted.]—Under the statute 43 Geo. 3, c. 108, which contained a power to all persons having an interest in any lands or in any goods or chattels, to give by deed enrolled, or will executed, three months before death, lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for or towards the erecting of any church, with a proviso that the act should not extend to any persons being within age, nor women covert without their husbands to make any such gift:—Held, that the proviso was not affected by the Married Women's Property Act, 1882, which by s. 1, sub-s. 1, gave power to married women to dispose by will of any real or personal property as her separate property in the same manner as if she were a feme sole. Consequently a gift by a married woman, by will executed three months before death, to the vicar and churchwardens of a church of a sum of 300*l.* to be applied by them in the erection of a new church, and to be paid out of personal estate which was legally applicable for the purpose, was held to be invalid. *Smith's Estate, In re, Clements* v. *Ward*, 56 L. J., Ch. 726; 35 Ch. D. 589; 56 L. T. 850; 35 W. R. 514; 51 J. P. 692.

—— **Appointment by Will — Conversion.**]—There is a distinction between a will made by a married woman under a power and when disposing of property in her own right as a feme sole. The power must be looked at to see in what character the property was held when disposed of by the testator, and where by virtue of the power it has been converted into personalty, she is in fact disposing of personalty. *Gunn, In goods of*, 53 L. J., P. 107; 9 P. D. 242; 33 W. R. 169; 49 J. P. 72.

—— **Rent-charge.**]—A married woman, entitled under her marriage settlement to a rent-charge for life for her separate use, made a will operative to pass separate estate, became a lunatic, survived her husband, and died without having republished her will or made another. Her rent-charge was accumulated by her husband during his life to the amount of 13,000*l.*, which sum on his death was handed over to the trustee of the marriage settlement. The rent-charge and the income of the 13,000*l.* were both accumulated by the trustee after the husband's death:—Held, that the 13,000*l.* and all accumulations passed under the will; but that the rent-charge payable after the death of the husband did not pass. *Wilson, In re, Menteath* v. *Campbell*, 26 W. R. 848.

The will purported to be, but was not, in exercise of a power of appointment; the fund purported to be appointed, except so much as passed as separate estate, fell into the general residue; —Held, that the fund which passed by the will was liable to the costs of letters of administration with the will annexed. *Ib.*

Transfer to Husband obtained by his Fraud—Costs.]—Where a husband had by imposition induced his wife to transfer part of her separate property to him, on a bill by her against him for a specific performance of an agreement before marriage, he was made to pay costs on account of the fraud. *Lampert* v. *Lampert*, 1 Ves. J. 21.

3. Restraint on Anticipation.

a. Creation of.

No Particular Form of Words Necessary.]—No particular form of words is necessary to impose a restraint on anticipation in a limitation to the separate use of a married woman, the question being one of intention. *Baker* v. *Bradley*, 7 De G. M. & G. 597; 25 L. J., Ch. 7; 2 Jur. (N.S.) 98; 4 W. R. 78.

Intention.]—By an instrument giving property in trust for a married woman and her assigns for her life, for her separate use, it was declared that the receipts of the married woman alone, or of some person or persons authorised by her to receive any payment of the rents and income after such payment should have become due, should alone be good discharges:—Held, that she was restrained from anticipation. *Ib.*

Field v. *Evans* (15 Sim. 375) approved of. *Ib.*

A marriage settlement directed the trustees, during the lady's life, to receive the income of the settled property when and as often as the same should become due, and to pay it to such person or persons as she might from time to time appoint, or to permit her to receive it for her separate use; and it declared that her receipts, or the receipts of any person or persons to whom she might appoint the same, after it should become due, should be valid discharges for it:—Held, that the lady was restrained from antici-

pating the income provided for her. *Field* v. *Evans*, 15 Sim. 375.

Lands were devised to trustees "for the use and benefit of T., the daughter of the testatrix, the rents and profits of which estate she should receive from the tenants herself while she lives, whether married or single." In a later part of the will, which did not contain anything authorising a sale or mortgage, the testatrix directed that no sale or mortgage of the estate or its rents should take place during the life of T., followed by a direction to the daughter, or the executor of the testatrix, to pay 3*s.* a week to her mother while she lived. T. was unmarried when the will was made, but married after the death of the testatrix:—Held, that she took an estate for life, for her separate use, without power of anticipation, and that a mortgage made by her and her husband was therefore invalid. *Goulder* v. *Camm*, 1 De G. F. & J. 146; 6 Jur. (N.S.) 113; 1 L. T. 224; 8 W. R. 156.

S., by her will, gave to her niece J. 3,000*l.*, and also the residue of her personal estate equally between her nieces, J., A., and C.; and she directed that any pecuniary legacy or share of her residuary estate thereinbefore given to such of her nieces as should be married at the time of her death should be paid into the proper hands of such respective nieces, or into the hands of such person or persons as such nieces should respectively appoint, so as that the same, or any part, should not in any respect be subject or liable to the control, debts, or incumbrances of their husbands, nor be alienable by them and their husbands, and that the receipts of her nieces alone, signed with their proper hands (notwithstanding coverture), or of their appointees, should from time to time be sufficient discharges to her executors. J. married, and a settlement was made on her marriage, in which was contained a covenant by the husband to settle future acquired property of the wife. The testatrix afterwards died, and her executors paid J.'s share into court. J. petitioned, by a next friend, to have it paid to her on her separate receipt:—Held, that the true construction of the direction in the will was that, during coverture, the share of J. was not alienable by her; that such share was not therefore included in the covenant, and that the fund must be retained in court, and the dividends only paid to J. during her coverture. *Sarel, In re*, 10 Jur. (N.S.) 876; 10 L. T. 691; 4 N. R. 231.

—— **Omission of Words "for her separate use" —Life Estate without Impeachment of Waste.**]—Separate estate created by the operation of the Married Women's Property Act, 1882, is sufficient to support a restraint on anticipation, although the words "for her separate use" are not used. The words "without impeachment of waste" are not inconsistent with a restraint on anticipation. *Lumley, In re, Hood-Barrs, Ex parte*, 65 L. J., Ch. 837; [1896] 2 Ch. 690; 75 L. T. 236; 45 W. R. 147—C. A.

—— **Negative Words.**]—It is not necessary in all cases that negative words should be introduced in the receipt clause, to complete the restraint on anticipation, for that clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement.

Where the former part of a settlement gave the income to the wife or her appointee, so and in such manner that she should not have power to anticipate her interest, and the following clause enabled her to give receipts without restrictive words:—Held, that such clause did not displace the restraint which the gift plainly imposed. *Harrop* v. *Howard*, 3 Hare, 624; 14 L. J., Ch. 182; 9 Jur. 82.

"Inalienable Provision."]—A declaration, concerning funds in settlement that they are to be "a separate, personal, and inalienable provision for A. during the intended coverture," operates as a restraint on anticipation during the coverture, although a subsequent clause in the settlement gives to A. a general power of disposition by deed or will. *Spring* v. *Pride*, 10 Jur. (N.S.) 646; 12 W. R. 892.

Absolute gift by will to a married woman for her separate and inalienable use. The property having been paid into court under the Trustee Relief Act:—Held, that it could not be parted with during coverture, but the dividends only should be paid to the wife. *Gaskell, In re*, 12 L. T. 763.

"Free from her Debts and Engagements."]—A testator bequeathed his property to trustees upon trust to pay a third of the income arising from it to G. during the whole of her natural life free from her debts or engagements, whether any such might be contracted by herself or any husband or husbands whom she might marry:—Held, that these words imported a restriction on anticipation, and, consequently, that a charge on her annual income created by her in favour of certain creditors of her husband could not be sustained. *White* v. *Herrick*, 21 W. R. 454.

Receipt Clause.]—Devise of freehold in trust to pay trusts, as same should become due and payable, into the hands of testator's wife, and not otherwise, for her life, for her separate use, and her receipts alone, for what should be actually paid into her own proper hands, should be good discharges to trustees:—Held, wife had no power to alienate her life estate. *Acton* v. *White*, 1 Sim. & S. 429; 24 R. R. 203.

Under a marriage settlement certain money and stock in the funds were vested in trustees upon trust, during the joint lives of the husband and wife, to pay the interest to such persons and for such purposes as the wife should, notwithstanding the coverture, by any writing under her hand, except in any mode of anticipation, direct or appoint; or in default of such direction or appointment, into her own hands, for her own sole and separate use, independently of her husband; and so that her receipts, notwithstanding the coverture, or the receipts of the appointee, might be good discharges:—Held, that the effect of this instrument was to restrain the wife from anticipation, whether by an appointment under the power, or by an assignment independent of the power. *Moore* v. *Moore*, 1 Coll. 54; 13 L. J., Ch. 124; 8 Jur. 139.

A testator bequeathed property to trustees from time to time during the life of B. (a married woman), to pay the clear rents, interest, dividends, &c., unto such person or persons, for such intents and purposes as she by any writing should appoint, but not by way of assignment or other anticipation; and, in default of appointment, into her proper hands, for her sole and separate use, her receipts or those of her

appointees to be good discharges to the trustees :—Held, that the general limitation in default of appointment did not enable B. to anticipate; and that the case did not depend on the form of the receipt clause. *Brown* v. *Bamford*, 1 Ph. 620 ; 15 L. J., Ch. 361 ; 10 Jur. 447.

Under several bequests to living persons for life, with remainder to their children born and unborn, with a general proviso that the shares of females shall be for their separate inalienable use :—Held, that the restriction against anticipation applied only to the tenants for life, in consequence of a direction for payment to the children, and a proviso that their receipts should be good discharges. *Armitage* v. *Coates*, 35 Beav. 1.

Receipt Clause Omitted.]—A testator bequeathed the sum of 20,000*l.*, after the death of R. S., to the child or children of R. S., who should survive him, the testator, equally to be divided between them if more than one. R. S. died in the testator's lifetime, leaving two daughters, one of whom was married. The will contained a proviso that every bequest thereby made for any female during her coverture should be "for her separate use and without power of anticipation or alienation." There was no clause declaring that the receipt of a married woman should be a sufficient discharge. Upon the question whether the married woman was entitled to have her moiety of the 20,000*l.* paid to her on her separate receipt, notwithstanding the proviso :—Held, that she was so entitled. *Taber, In re, Arnold* v. *Kayess*, 51 L. J., Ch. 721 ; 46 L. T. 805 ; 30 W. R. 883. *See* col. 1084.

Without Liberty to Assign During Life.]—Bequest to testator's natural daughter, then a feme sole, but married before the death of testator, of money, leaseholds, plate, furniture, &c., for her own absolute use, without liberty to sell or assign during life :—Held, an absolute gift ; but with a restriction against alienation during her life. *Baker* v. *Newton*, 1 Beav. 112 ; 8 L. J., Ch. 306 ; 3 Jur. 649.

Settled Realty — Mortgage of Income of.]—By a settlement dated in 1864, freehold property was conveyed to trustees upon trust to let the same, and pay the rents and annual proceeds to C. S. W., a married woman, during her life for her own sole and separate use, free from the debts, control, or engagements of her present or any future husband ; and "the receipts of her . . . for the said rents and annual proceeds to be given after the same shall become due" to be "good and effectual discharges" to the trustees for the same ; and from and after the decease of C. S. W. then upon trust to pay the rents and annual proceeds to the husband, in case he survived her, during his life, with ultimate trusts for sale and division amongst the children and issue of C. S. W. by her then present or any future husband, as should be living at the time of such division. In 1881, C. S. W. and her husband mortgaged the income of the settled property to secure a loan of 1,000*l.*, and in 1883 they further charged such income together with other property, with the payment of 500*l.* Notices of the mortgage and further charge were duly given to the trustees of the settlement. C. S. W. did not receive any of the moneys secured thereby, but her husband received the same, and applied the whole in payment of his own debts. The question was whether the mortgage was a valid charge upon the income of the settled property, and who was entitled to be paid such income :—Held, that C. S. W. was restrained from anticipation and her receipt was the only discharge which the trustees could accept. *Baker* v. *Bradley* (7 De G. M. & G. 597) followed. *Smith, In re, Chapman* v. *Wood*, 51 L. T. 501.

By a settlement, a jointure was granted to K., "without the power of anticipation"—"the sole and separate receipt of K. to be a complete and only discharge for each gale" :—Held, that K. took an estate to her sole and separate use, with a restraint on anticipation. *Molyneux, In re*, Ir. R. 6 Eq. 411.

By settlement, a jointure was limited to the sole and separate use of K. in case she should survive M., her intended husband, with a restraint on anticipation : — Held, that such limitation referred as well to the then intended marriage as to every future coverture, so as to prevent her from incumbering or otherwise dealing with the jointure during her life. *Ib.*

Settlement to Enjoy Income during her Life for her Separate Use.]—A father gave real and personal property to trustees for his daughter, and directed that, if she should marry, it should be so settled that she might enjoy the income during her life for her separate use :—Held, that the trust for the separate use during life, being merely executory, should be carried into execution with a restraint upon anticipation. *Dunnill's Trusts, In re*, Ir. R. 6 Eq. 322. Affirmed, *ib.*, 326—Ch. Ap.

A court of equity will give effect during coverture to a clause in restraint of alienation, annexed a gift to a married woman for her separate use, whether the subject of the gift is real or personal estate, or whether it is in fee or only for life. *Baggett* v. *Meux*, 1 Coll. 138 ; 13 L. J., Ch. 228 ; 8 Jur. 391. Affirmed, 1 Ph. 627 ; 15 L. J., Ch. 262 ; 10 Jur. 213.

—— **Attaches to Real or Personal Estate.**]—Real estate may be devised a married woman, in fee-simple, for her separate use, yet in such a manner as to disable her, during the coverture, from making any sale, mortgage, charge, or incumbrance to take effect against it during her life, or during her coverture. *Ib.*

Gift of mixed Residue.]—Gift by a testatrix of real and personal estate to trustees upon trust to convert and invest, and to stand possessed of the stocks, funds, and securities representing the same in trust for her children who, being male, attained twenty-one, or, being female, attained that age or married under that age ; with a declaration that the shares of daughters should be for their sole and separate use without power of anticipation. Power was given to the trustees, upon the marriage of any of the daughters, to revoke the trusts so far as related to the share of any daughter so marrying, and to settle the same for the benefit of the daughter, and her issue as to the trustees should seem fit. The residuary estate was represented by a sum of cash and certain leasehold houses :—Held, that the gift being of an income-producing fund with a restraint upon anticipation, the trustees could not pay to the daughters

during coverture their shares upon their separate receipt. *Benton, In re, Smith* v. *Smith*, 51 L. J., Ch. 183 ; 19 Ch. D. 277 ; 45 L. T. 786 ; 30 W. R. 242.

Mortgage—Marshalling.]—C., a widow, was entitled to the income of one-third of a fund in court for her life for her separate use without power of anticipation, and was also entitled to the income of the remaining two-thirds of the fund for her life, but subject to certain deductions. She mortgaged all her interest in the fund, and some policies of assurance on her life to F., and an order was made for payment of the income of the mortgaged property to him. C. then married M. ; and after her marriage she charged all her interest in the fund in favour of P. After this T. obtained a judgment against her, and the appointment of a receiver of her separate estate. The income received by F. was more than sufficient for payment of the interest on his mortgage and the premiums on the policies, and he did not desire to reduce his principal :—Held, that as between F. and the subsequent incumbrancers of the fund, there ought to be a marshalling of securities, and that F. ought to pay the interest on his mortgage and the premiums on the policies out of the income of the one-third with respect to which the restraint on anticipation existed, so as to leave the income of the remaining two-thirds to satisfy the subsequent incumbrances. *Loder's Trusts, In re*, 56 L. J., Ch. 230 ; 35 L. T. 582 ; 35 W. R. 58.

Income-bearing Fund.] — Where a testator makes a bequest to a married woman for her separate use absolutely, and follows it by a clause restraining her from anticipation, the question whether the restraint on anticipation is effectual does not depend on the question whether it is a gift of an income-bearing fund or of a sum of cash, but whether the testator has or has not shown an intention that the trustees should keep the investment and pay the income to the married woman. *Croughton's Trusts, In re* (47 L. J., Ch. 795 ; 8 Ch. D. 460), followed. *Ellis' Trusts, In re* (L. R. 17 Eq. 409 ; 43 L. J., Ch. 444), disapproved. *Clarke's Trusts, In re* (51 L. J., Ch. 855 ; 21 Ch. D. 748), questioned. *Bown, In re, O'Halloran* v. *King*, 53 L. J., Ch. 881 ; 27 Ch. D. 411 ; 50 L. T. 796 ; 33 W. R. 58. *See* col. 1083.

Legacy and Share of Residue "to be paid" to Married Woman, with Restraint upon Anticipation—Absolute Unfettered Gift.]—A bequest of a fund in trust for a married woman "to be paid to her for her separate use without power of anticipation," there being no further indication that the income only is to be paid to her during coverture, will be construed as a direction that the corpus is to be forthwith paid to her, and the words "in restraint of anticipation" will be disregarded. *Bown, In re, O'Halloran* v. *King* (53 L. J., Ch. 881 ; 27 Ch. D. 411) followed. *Fearon, In re, Hotchkin* v. *Mayor*, 45 W. R. 232.

Alienation not prohibited.]—A testator, after having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it should remain, during her life, and be, under the order of the trustees, made a duly administered provision for her, and the interest of it given to her, on her personal appearance and receipt by any banker the trustees might appoint :—Held, that the wife was not prohibited from alienating her interest in the stocks. *Ross's Trusts, In re*, 1 Sim. (N.S.) 196 ; 20 L. J., Ch. 293 ; 15 Jur. 241.

Appointment by Deed not to come into operation till Death.]—Although a bequest of stock for a married woman for her separate use for her life, and after her decease for her appointees by deed or will, directs that any appointment by deed shall not come into operation until after her death, the married woman is not thereby restrained from anticipation, or prevented from appointing the fund by an irrevocable deed. *Alexander* v. *Young*, 6 Hare, 393 ; 12 Jur. 996.

Free from Marital Contract.]—Where articles for a settlement directed the property to be conveyed on trust to pay the income to the wife, or such person as he should appoint, during her life, "for her own absolute use and benefit, free from marital control and liability" :—Held, that in the settlement a restraint against anticipation should not be inserted. *Symonds* v. *Wilkes*, 11 Jur. (N.S.) 659 ; 12 L. T. 598 ; 13 W. R. 1026 —L.JJ.

A testator, after giving annuities and legacies, gave all the rest and residue of his property to his three children, naming them, equally, wishing his daughters' shares to be vested in the hands of trustees in government securities, the interest only to be payable to them, and neither they nor any husband they contracted marriage with, to have any control over the principal, except that his daughters should have power to will at their decease, the son to receive his share on attaining twenty-five, with clauses for maintenance :—Held, that the daughters took an absolute interest. *Bousfield* v. *Bousfield*, 21 L. T. 136.

Devise and bequest of real and personal estate in trust to pay the rents, dividends, and interest, from time to time, as the same should become due and be received, unto and for the only use and behoof of the testator's daughter, for and during the term of her natural life, and to pay the same into her own hands, independent of her present or future husband, and not in any manner subject to the debts, control, or engagements of such present or future husband, and her receipt to be sufficient discharge to the trustees, as if she were sole and unmarried :—Held, that the wife had a power of alienation over her life interest. *Glyn* v. *Baster*, 1 Y. & J. 329.

Devise of Freeholds—Wish that they should not sell.]—A testator gave, devised, and bequeathed all his freeholds and leaseholds to two of his daughters equally between them as tenants in common to and for their several and respective sole and separate use and benefit absolutely, and stated that it was "his wish and request that they should not sell or dispose of any part of his said freehold or leasehold premises." In a subsequent part of his will, there was a bequest of a sum of stock to trustees in trust to pay the income to another daughter for her life, "for her own sole and separate and inalienable use and benefit, and without power of anticipation." The two daughters, one of them being married, contracted to sell some of the freehold property. On sum-

mons under the Vendor and Purchaser Act on behalf of the purchaser:—Held, that the words of the devise, even if they stood alone, would have been insufficient to operate as a restraint on anticipation; that the cases as to precatory trusts did not apply, as there was no trust imposed in favour of some other person; that the subsequent bequest strengthened this construction; and that a good title was shown as to the moiety of a married woman. *Hutchings to Burt, In re*, 59 L. T. 490—C. A.

Covenant while Sole to Settle.]—E. H. appointed by deed, in pursuance of a will, that after her death the trustees of the will should hold her share in certain real and personal estate, as to 1,000*l.* upon trust for and to be paid and transferred to her daughter M., and as to a certain residue of the same share upon trust for M. and two others equally to be divided, with a proviso that M.'s share as well as the 1,000*l.* should be for her sole and separate use, and that her receipts should from time to time after the same became due, and not by way of anticipation, be a sufficient discharge for the income. M. married in 1882, and by her marriage settlement she and her intended husband covenanted to settle the appointed property. E. H. died in 1889:—Held, that though the appointment created a restraint on anticipation, it was removed by the covenant. *Wood, In re, Wood* v. *Hooper*, 61 L. T. 197.

Legacy subject to Wife judicially Separated.]—A testator by his will dated the 2nd of July, 1870, gave a legacy to a married woman for her separate use without power of anticipation, and directed that "for the purpose of securing to her the separate enjoyment without power of anticipation against any husband for the time being, the trustee should settle the legacy in such manner as would carry out the said purpose." Previously to the date of the will the legatee had been judicially separated from her husband, and had ever since lived apart from him:—Held, that she was entitled to have the legacy paid to her. *Munt* v. *Glynes*, 41 L. J., Ch. 639; 27 L. T. 366; 20 W. R. 823.

Invalidity.]—A widow, having under her marriage settlement a power of appointment amongst the children of the marriage, executed the power by giving to one of her five daughters who was married, a fifth share of the fund for her separate use, independently of her then or any future husband, but without power of anticipation; and after her decease as she should generally by deed or will appoint, and in default of appointment, for her executors and administrators absolutely:—Held, that the whole appointment was not void, and that it was a valid execution of the power, except as to the restraint upon anticipation, but that the attempted restraint upon anticipation was ineffectual and void. *Teague, In re*, L. R. 10 Eq. 564; 22 L. T. 742; 18 W. R. 752.

—— **Restraint on Alienation—No gift over.**]—Testator gave a sum of money for the separate use of his daughter, a feme sole, and declared that she should not be at liberty to sell or dispose of it, and if she attempted so to do, that such sale should be void. The daughter afterwards married:—Held, that the restraint on alienation was void, there being no gift over. *Newton* v. *Reid*, 4 Sim. 141.

—— **Remoteness.**]—Under an ante-nuptial settlement, by which the husband had a power of appointing a sum of money among the children of the marriage, he appointed the fund to the separate use of a married daughter, with a restriction against alienation:—Held, that the appointment to the separate use of his daughter was valid, discharged of the restraint upon alienation, which was too remote and void. *Cunynghame, In re*, 40 L. J., Ch. 247; L. R. 11 Eq. 324; 24 L. T. 124; 19 W. R. 381.

—— **Rule against Perpetuities.**]—Bequest of a fund in trust for A. for life, and after her death in trust for her children living at her death, and the issue then living of any child then dead, in equal shares, the issue to take their parent's share; any legatees, being females, to take for their sole and separate use without power of anticipation. A. survived the testator, and died leaving two married daughters who were born in the testator's lifetime:—Held, reluctantly following previous decisions, that the restraint on anticipation was void as infringing the rule against perpetuities and that the daughters were accordingly entitled to have the fund paid to them in moieties, on their separate receipts, discharged from such restraint. *Ridley, In re, Buckton* v. *Hay*, 48 L. J., Ch. 563; 11 Ch. D. 645; 27 W. R. 527.

By indenture made in December 1874, S. and J. S., wife and husband, who had at the date of the indenture been married many years, and had two children, daughters, both married, assigned to trustees a sum of money in trust to invest for the benefit of the settlors, and after their deaths the trustees were to stand possessed of the moneys upon trust for their children as they or the survivor should appoint, and in default of appointment, for all the children or any the child of S. by J. S. who being a son should attain twenty-one, or being a daughter should attain twenty-one, or marry under that age, if more than one in equal shares, and if daughters for their separate use, and without power to alienate or anticipate the same. There were no other children of the marriage. S. died in 1876, and J. S. in 1879, without having made any appointment:—Held, that, notwithstanding the rule against perpetuities, the shares of the two daughters were subject to restraint on anticipation. *Herbert* v. *Webster*, 49 L. J., Ch. 620; 15 Ch. D. 610.

A testator gave his property to trustees to pay the income to two persons for life, and after the death of the survivor to divide the capital between the children of A. B. and C. D., two females, the shares of sons to be paid on their attaining twenty-one, and the shares of daughters to be invested and the interest paid to such daughters for life for their separate use without power of anticipation, and on their deaths the capital to go as the daughters should by will appoint. A. B. was dead at the date of the will, and C. D. was sixty years of age, and therefore past childbearing:—Held, that if the children of A. B. and C. D. had not necessarily been lives in esse at the date of the will, the restraint on anticipation in respect of the daughters' shares would have been bad, as infringing the rule against perpetuites; but as A. B. was dead and C. D. past childbearing, all the children were lives in esse, and the restraint on alienation was valid.

Cooper v. *Laroche*, 17 Ch. D. 368 ; 43 L. T. 794 ; 29 W. R. 438.

Liability for Debts.]—*See* infra, col. 1094.

b. During what Coverture.

Restraint annexed to the Separate Estate.]—The restraint on alienation is annexed to the separate estate only, and the separate estate has its existence only during coverture ; but whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage. *Tullett* v. *Armstrong*, 1 Beav. 1 ; 8 L. J., Ch. 19 ; 2 Jur. 912. Affirmed, 4 Myl. & C. 377 ; 9 L. J., Ch. 41.

—— **Operates during Life.**]—By a post-nuptial settlement, a sum of money, the property of the wife, was vested in trustees upon trusts, which were construed to operate as a direction to pay the dividends to the wife for her life, or to her appointees without anticipation :—Held, that the restraint against anticipation operated during the whole life of the wife, and was not restricted to an existing coverture by the introduction of additional words, which obviously applied only to such existing coverture. If the restriction forms part of the only sentence which gives any estate, and is in words made part of the gift, then the estate and the restriction must be commensurate. *Gaffee, In re*, 1 Mac. & G. 541 ; 1 H. & Tw. 635 ; 19 L. J., Ch. 179 ; 14 Jur. 277.

And see *King* v. *Lucas*, 23 Ch. D. 712 ; 49 L. T. 216 ; 31 W. R. 904. *Scarborough* v. *Borman*, 1 Beav. 34 ; 8 L. J., Ch. 22 ; 2 Jur. 915. Affirmed, 4 Myl. & C. 377, 407 ; 9 L. J., Ch. 48 ; 4 Jur. 38 ; and *Ashton* v. *McDougall*, 5 Beav. 56 ; 11 L. J., Ch. 344 ; 6 Jur. 447.

Revival on Second Marriage.]—A trust for the separate use of a woman, with a restriction against anticipation, though expressed to be independent of her then intended or existing husband, will operate against a future husband, if the limitation of the trust is for her life. *Hawkes* v. *Hubbard*, 40 L. J., Ch. 49 ; L. R. 11 Eq. 5 ; 23 L. T. 642 ; 19 W. R. 117.

By settlement, a jointure was limited to the sole and separate use of K. in case she should survive M., her intended husband, with a restraint on anticipation :—Held, that such limitation referred as well to the then intended marriage as to every future coverture, so as to prevent her from incumbering or otherwise dealing with the jointure during her life. *Molyneux, In re*, Ir. R. 6 Eq. 411.

A lady being entitled, subject to a prior life estate, to certain freehold and funded property, settled the same, on her first marriage, for her separate use, independent of her intended or any other husband. Her first husband died, and she married again :—Held, that the property still belonged to her as her separate estate. *Dixon* v. *Dixon*, 1 Beav. 40 ; 8 L. J., Ch. 25 ; 2 Jur. 960.

Gift by will of a fund to trustees for A., a widow, for life, for her separate use, with remainder over, followed by a gift of the residue to A. for her own sole use and benefit absolutely. A. subsequently married again :—Held, that the marital right of the husband in the residue was excluded. *Tarsey, In re*, 35 L. J., Ch. 452 ; L. R. 1 Eq. 561 ; 14 L. T. 15 ; 14 W. R. 474.

Purchase—Setting aside—Notice.]—Bequests of leaseholds to a married woman "for her whole and sole use during her life, free from the control of any future husband, and not to be sold or mortgaged, and after her decease to her heir or heirs ; and provided her child or children should die before her, then that she may at her decease leave them to whom she will for the remainder of the term." The husband and wife demised the premises to a purchaser, and the purchaser demised them to another. The wife then filed her bill to have the under-lease set aside :—Held, that the gift was to the separate use of the wife as well during the present as during a future coverture : that the under-lessees from the purchaser must be treated as having notice of the wife's interest, and that the under-lease to the purchaser should be set aside, but without costs. *Steedman* v. *Poole*, 6 Hare, 193 ; 16 L. J., Ch. 348 ; 11 Jur. 449.

An annuity was bequeathed to a lady, married at the death of testator, for her separate use, independent of any husband she might at any time marry and without power of anticipation. After death of testator, she married, became a widow, and married a second time :—Held, that the separate use and anticipation clauses attached to the annuity during the second marriage. *Clark* v. *Jaques*, 1 Beav. 36 ; 8 L. J., Ch. 25 ; 2 Jur. 915.

Limitation of Restraint to First Marriage.]—Real estate devised to A., the wife of B., her heirs and assigns for ever, independent of B., for her use and benefit, with power to appoint, and in default, remainder over. Personal estate to A., for her sole and separate use, independent of her husband, B. ; and her receipts alone to be sufficient discharges :—Held, that the limitations to the separate use of A. did not extend beyond the husband specifically named. *Moore* v. *Morris*, 4 Drew. 33 ; 3 Jur. (N.S.) 552 ; 5 W. R. 383.

Testator directed the interest of 10,000*l*. to be for the separate use of his daughter, then a feme covert, for her life, free from the debts of her husband. The daughter's husband died, and she married again :—Held, the trust for her separate use ceased on the death of her first husband. Quære, whether a trust for the separate use of a single woman is valid. *Benson* v. *Benson*, 6 Sim. 126 ; 4 L. J., Ch. 59. Affirmed, 4 L. J., Ch. 273.

By a marriage settlement, money and stock were assigned to trustees in trust, to receive the income during the life of the lady, and pay the same to her for her separate use, or as she should appoint, notwithstanding her coverture, but no payment to be made by anticipation ; and it was declared that the income should not be subject to the debts, &c., of R. G., her intended husband ; and, after her decease, in case he should survive, in trust to permit him to receive the income for his life, &c. The husband died in the lifetime of his wife, and she married again :—Held, that the provision for the separate use of the lady without anticipation was confined to the first marriage. *Knight* v. *Knight*, 6 Sim. 121 ; 3 L. J., Ch. 187.

By a marriage settlement a sum was limited by the father of the wife, in trust to raise an annuity during the life of his daughter, and to pay it after her marriage as she should appoint, and in default of appointment, into her hands for her separate use :—Held, that the annuity was given for life to the daughter, and that the trust

for the separate use did not arise on a second marriage. *Bradley* v. *Hughes*, 8 Sim. 149; 5 L. J., Ch. 355.

Divorce — Wife remarrying.] — A husband, being entitled in remainder to an estate for his life in real property, settled it during the joint lives of himself and his wife, for her separate use, independently of his control, and without power of anticipation. The wife subsequently obtained a divorce, and married again without a settlement:—Held, that, notwithstanding the special circumstances of the case, the trust for separate use and the restraint on anticipation revived on the second marriage. *Shafto* v. *Butler*, 40 L. J., Ch. 308; 24 L. T. 412; 19 W. R. 595.

By a settlement made upon the marriage of the defendant with P. her property was settled upon trust to pay the income to her for life for her separate use without power of anticipation, and there was an ultimate trust for her absolutely if she survived P. The defendant obtained a divorce from P. and subsequently married E. There was no evidence whether P. was alive or not. The plaintiff obtained judgment against the defendant as a married woman, and then obtained an order appointing a receiver of her interest under the settlement:—Held (allowing the appeal), that the restraint on anticipation became operative upon the second marriage, and that therefore an order for a receiver ought not to have been made. *Stroud* v. *Edwards*, 77 L. T. 280—C. A.

c. Effect of.

Judgment for Ante-nuptial Debt — Separate Estate—Restraint on Anticipation—Receiver.] —A judgment in respect of an ante-nuptial debt obtained against a married woman in the form settled in *Scott* v. *Morley* (20 Q. B. D. 120) cannot be enforced by the appointment of a receiver of her separate estate restrained from anticipation, or the income thereof. *Molony* v. *Harney*, [1895] 2 Ir. R. 169. *See* col. 1094.

Duration of Restraint—Arrears of Income.] —The restraint on anticipation of a married woman's separate income ceases to attach to such income as soon as it becomes due and payable to her under the trusts of the instrument under which she is entitled. *Hood-Barrs* v. *Catheart* (63 L. J., Q. B. 602; [1894] 2 Q. B. 567), and *Pillers* v. *Edwards* (71 L. T. 788) overruled. *Hood-Barrs* v. *Heriot*, 65 L. J., Q. B. 352; [1896] A. C. 174; 74 L. T. 353; 44 W. R. 481; 60 J. P. 612—H. L. (E.)

Judgment for Costs against Married Woman—Arrears of Income falling due after date of Judgment — Receiver.] — Apart from the provisions of the Married Women's Property Act, 1893, a judgment against a married woman cannot be enforced against arrears of her separate estate accruing due subsequent to the date of the judgment, and subject to restraint on anticipation. *Lowry* v. *Durham*, [1895] 2 Ir. R. 123—C. A.

Arrears of Income become due and payable before Date of Judgment—Receiver.] —A judgment against a married woman possessed of separate estate which is subject to restraint on anticipation cannot be enforced by the appointment of a receiver of arrears in the hands of her trustee of the separate income which she is restrained from anticipating, although those arrears had become due and payable to her before the date of the judgment. *Loftus* v. *Heriot*, 64 L. J., Q. B. 717; [1895] 2 Q. B. 212; 14 R. 510; 73 L. T. 167—C. A.

Judicial Separation—Settlement.]—The court cannot order a settlement under s. 3 of the Matrimonial Clauses Act, 1884, out of property subject to a restraint on anticipation. *Michell* v. *Michell*, 60 L. J., P. 46; [1891] P. 208; 64 L. T. 607; 39 W. R. 680—C. A.

Does not prevent Alienation during Discoverture.] — A clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age, and before marriage, from effectually assigning her whole interest in the legacy. *Brown* v. *Pocock*, 2 Russ. & M. 210; Coop. t. Brough. 70; 4 L. J., Ch. 15. Reversing, 2 Myl. & K. 189.

A gift for the separate use of a single woman, without anticipation, will not prevent alienation by her, unless it is made with reference to an intended marriage. *S. C.*, 5 Sim. 663.

Bequest of dividends of stock to a feme covert for life, not to be subject to the debts or control of her then present or any other husband, and without power to charge or anticipate the growing payments thereof:—Held, that the legatee on becoming discovert might validly dispose of her entire life interest. *Jones* v. *Salter*, 2 Russ. & M. 208.

Prevents Alienation during Coverture.] — When a fund producing income is given absolutely to a married woman, and the gift is followed by a restraint on anticipation, the married woman is prevented from alienating the fund during coverture. *Ellis's Estate, In re*, 43 L. J., Ch. 444; L. R. 17 Eq. 409; 22 W. R. 448.

A testatrix, by her will, gave to a married woman 500*l.* consols; and by a codicil directed that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female should be for her separate use, and (whilst she should be under coverture) without any power of anticipation. The executor transferred the fund into court under the Trustee Relief Act, and the married woman presented a petition for a transfer of the fund to herself:—Held, that she could only have the income paid to her during her coverture. *Ib.*

Wife cannot Pledge.]—A woman on her marriage settled furniture on trustees to allow her to use it during life, and to dispose of it by will or deed to operate after death:—Held, that she had no power to pledge the furniture, and her trustees might recover it from the pawnbroker. *Worsnop* v. *Benassi*, 21 W. R. 684.

Sequestration.] — By marriage settlement in 1856, property was settled to the separate use of the wife for life, without power of anticipation, with remainders over. In 1866, the wife left her husband, and he instituted a suit against her in the divorce court for restitution of conjugal rights. Judgment was given against the wife with costs. The wife withdrew from the jurisdiction, and declined to obey the judgment. In 1870, the husband procured from the divorce

court a writ of sequestration against the separate property of the wife for the costs of the suit. In October, 1869, dividends and interest on the settled property fell due, and were received by one of the trustees, who retained them in his hands. In December, 1869, a hostile suit was instituted by the wife against the trustee to compel the payment of the dividends and interest, and for the removal of the trustee, but not asking for the general administration of the fund. The trustee admitted that he had in his hands the greater part of the entire fund. A few days after his answer the trustee filed a bill in the rolls court for the administration of the trusts of the settlement. On motion by the wife, in the first of the two suits, that the trustee might be ordered to pay into court the entire sum admitted by him to be in his hands:—Held, that, regard being had principally to the restraint on anticipation contained in the settlement, the money ought to be paid into court, notwithstanding the writ of sequestration, and notwithstanding that the wife's bill had not prayed the general administration of the trust fund. *Miller* v. *Miller*, 18 W. R. 750.

The court will, upon petition, order dividends accrued due upon a fund in court, settled to the separate use of a wife for life, without power of anticipation, to be paid to the sequestrator of her estate. *Claydon* v. *Finch*, 42 L. J., Ch. 416; L. R. 15 Eq. 266; 28 L. T. 101.

Grant of Annuity in ignorance of Restraint.]—A married woman having personal property under a will for life and absolutely, a settlement is made of it to her separate use without power of anticipation, with a power of appointment by deed. Without adverting to the clause against anticipation, and in alleged ignorance of its existence, she and her husband grant an annuity in consideration of 215*l.*, and an order is made for payment of the dividends of her separate property to the grantee to secure the annuity, and he receives the dividends and hands over the surplus from time to time. The clause against anticipation is then discovered, and the wife petitions for discharge of the order for payment of the dividends to the grantee of the annuity, for restitution of the money received, and for costs against the grantee and his solicitor:—Held, that the order must be discharged, and, the restitution not being pressed for, no order made upon that part of the petition, but costs given against the grantee, his solicitor, and her husband. *Forty* v. *Reay*, 3 W. R. 317.

Election.]—In the case of a married woman, to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable. *Wheatley, In re, Smith* v. *Spence*, 54 L. J., Ch. 201; 27 Ch. D. 606; 51 L. T. 681; 33 W. R. 275.

——Covenant to Settle After-acquired Property—Election.]—The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument. Therefore, where a marriage settlement settled a fund for the separate use of the wife for life with restraint on anticipation, and contained a covenant by the wife (then an infant) to settle future property:—Held, that the wife could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both. *Vardon's Trusts, In re*, 55 L. J., Ch. 259; 31 Ch. D. 275; 53 L. T. 895; 34 W. R. 185.

And see *Bateman* v. *Faber*, 66 L. J., Ch. 721; [1897] 2 Ch. 223; 77 L. T. 71; 46 W. R. 151.

Barring Entail not prevented by.]—A married woman, under the limitations of a will made in 1846, was equitable tenant in tail to her separate use of freehold estates. By a clause in the will she was also restrained from alienation of rents and profits. Her husband became bankrupt, and after his order of discharge joined with his wife in barring the equitable entail and limiting the estate in fee to the separate use of the wife. The wife died, having by her will devised the estate for the benefit of her children, and the husband's assignees claimed the husband's estate by curtesy:—Held, that the restraint on anticipation did not prevent the wife from barring the entail and acquiring the equitable fee; and that the wife, having thereby acquired an equitable fee to her separate use, had power to defeat her husband's right to curtesy by devising the estate. *Cooper* v. *Macdonald*, 47 L. J., Ch. 373; 7 Ch. D. 288; 38 L. T. 191; 26 W. R. 377—C. A.

Restraint on Appointment—Assignment.]—Gift by will of leasehold and other personal estates to trustees in trust to pay the rents, &c., to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint, and in default of such appointment, so far as the same should not extend, into her proper hands for her sole and separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges, and after her death in trust for her children:—Held, upon the particular terms of the gift, that the restraint on anticipation applied to an assignment by the married woman of her separate estate, as well as to an appointment in execution of her power, notwithstanding the will did not provide that her receipts alone should be good discharges. *Brown* v. *Bamford*, 1 Ph. 620; 15 L. J., Ch. 361; 10 Jur. 447.

Restraining Clause—Appointment.]—Testator directed his trustees during the life of his daughter, who was married, to pay the interest of a share of his property to such person or persons as she should from time to time, during her life, either covert or sole, under her hand authorise and appoint to receive the same, and, in default of appointment, into her proper hands, for her sole and separate use, independently of her then or any future husband, and so as to be free from his debts, &c., and that the receipt or receipts of her, or of the person or persons whom she might authorise to receive the same, and proceeds or any part thereof, should be alone an effectual discharge to his trustees for the payment thereof; and that his trustees should always be at liberty to require from her a separate authority or receipt from time to time for each quarterly payment, it being his intention that the annual proceeds should not be sold, charged or other-

wise disposed of:—Held, that the restraining clause did not apply to the power of appointment given to the daughter, and therefore that an appointment of the interest of the share made by her for her life was good. *Medley* v. *Horton*, 14 Sim. 222; 13 L. J., Ch. 442; 8 Jur. 853, 949.

Scotch Law of Aliment.]—A testator in Scotland gave all his property to trustees, first, to pay his debts, secondly, to pay Mrs. R., a married woman, so much of the annual proceeds as they might deem necessary for the support of her and family during her life, declaring the same to be alimentary and exclusive to her husband, and not to be attachable nor assignable, nor subject to any deeds or debts of her or her husband. The acting trustee, with the consent of Mrs. R., assigned to her alimentary creditor the rents of the trust property, first, to pay debts affecting it, secondly, to pay part of the rents to Mrs. R. for aliment, thirdly, to apply the residue in payment of the debts due to the assignee:—Held, that the assignment was void on three grounds, viz.—(1) It was not competent to the trustee to substitute another person for himself in the trust, which was the effect of the assignment. (2) The rule of law in Scotland requiring the concurrence of the husband in his wife's deed could not be dispensed with by his absence abroad at the time for a temporary purpose only. (3) The assignment was void, as it violated the express prohibition against alienation; and in this respect the law in Scotland is the same as in England. *Rennie* v. *Ritchie*, 12 Cl. & F. 204.

Covenant by Married Woman Restrained from Anticipations whether a Valuable Consideration.]—A covenant by a married woman having property settled to her separate use, without power of anticipation, is not a sufficient consideration to support an agreement otherwise voluntary. *Walrond* v. *Walrond*, 1 Johns. 18; 28 L. J., Ch. 97; 5 Jur. (N.S.) 975; 7 W. R. 33.

The release and assignment, by a married woman, of her life interest in her separate estate, although fettered by a restriction against anticipation, was held to form a consideration for a settlement by another person; for, though the married woman could not pass her future interest, she might and did thereby release her past income; and the question of consideration moreover depended not upon the point whether her assignment passed her interest, but upon the question whether her concurrence enabled the settlement to be made. *Harman* v. *Richards*, 10 Hare, 81; 22 L. J., Ch. 1066.

A married woman was entitled to a gross sum, payable on the death of her father, for her separate use, subject to a restraint on anticipation. During her father's life she promised, by letters, to repay to D. out of the fund, when it fell in, advances made by him to her and her husband. After the death of her father the fund was paid into court, and she being still under coverture, verbally promised D. that he should be paid out of the fund if he would offer no opposition to her application for payment out of court; and it was accordingly paid to her:—Held, that D. had no charge on the fund, the letters being ineffectual by reason of the restraint on anticipation, and the subsequent parol promise being void for want of consideration, and void under the Statute of Frauds. *Sykes, In re*, 2 John. & H. 415.

Compromise by Married Woman Restrained from Anticipation.]—In a suit instituted by a married woman by her next friend against the trustees of a will for an account:—Held, that a married woman having property to her separate use, without power of anticipation, had power to bind the corpus of the estate by a compromise entered into by her. *Wilton* v. *Hill*, 25 L. J., Ch. 156; 4 W. R. 66.

Acquiescence by.]—Quære, whether a married woman who is entitled to the interest of a fund to her separate use, without restraint upon anticipation, can be bound by acquiescence in an improper investment of the fund. *Davies* v. *Hodgson*, 27 L. J., Ch. 449; 4 Jur. (N.S.) 252; 6 W. R. 355.

Release by.]—A married woman, restrained from anticipation, cannot agree to release her trustees from liability incurred by their disregard of that restraint. *Dickson* v. *Hook*, 14 W. R. 552.

Advancement to Husband Sanctioned by Court on Terms.]—Where there was a power of advancement in favour of an infant female legatee, to whom an interest for life for her separate use, without power of anticipation, was given, with remainder to her children, the court, after the legatee had attained twenty-one and married, ordered an advancement to be made for the purpose of enabling the husband to enter into a partnership, upon the husband insuring his life and entering into a bond for the payment of the sum advanced and the premiums on the policy. *Phillips* v. *Phillips*, Kay, 40; 23 L. J., Ch. 7; 18 Jur. 69.

Legacy to Wife — Settlement — Husband no Interest.]—A Scotch marriage settlement gave to the husband a life interest in all property belonging to the wife, or that might be acquired by her during the marriage, and the corpus to the wife herself. Afterwards, the wife became entitled, for life, to a legacy of 2,000*l.* for her separate use, without power of anticipation, with remainder to her children:—Held, that the husband and his assignees took no interest in the fund, notwithstanding the settlement, and that the result would have been the same if the clause against anticipation had been omitted. *Duncan* v. *Cannan*, 21 Beav. 307; 24 L. J., Ch. 460; 1 Jur. (N.S.) 291.

Joint Power of Appointment Subject to Restraint.]—By marriage settlement a fund was settled in trust as husband and wife should jointly appoint, but not so as to deprive themselves of the benefit thereof by charge or otherwise by way of anticipation. The fund was appointed to trustees to pay and divide the dividends equally between the husband and wife during their joint lives:—Held, that the appointment was valid and effectual, the husband and wife not having thereby deprived themselves of the benefit of the fund. *Linzee's Settlement, In re*, 23 Beav. 241.

Life Interest—Cesser—Restraint on Anticipation—Admission by Deed-Poll — Estoppel.]—A married woman was entitled under a settlement to certain rents and profits for her life for her separate use, with a restraint on anticipation, but subject to a proviso that in the event of her

succeeding to an income of a particular amount her life interest should cease. She subsequently executed a deed-poll under a misapprehension of fact that she had succeeded to the income in question, admitting that her life estate had determined, and releasing all claims to the rents and profits:—Held, that, as the restraint on anticipation was inseparable from the life interest of the married woman, the deed-poll could not operate as a cesser of her life estate, nor was she estopped, by the admission of fact, from still claiming the rents and profits under the settlement. *Bateman (Lady)* v. *Faber*, 66 L. J., Ch. 721; [1897] 2 Ch. 223; 77 L. T. 71; 46 W. R. 151.

Apportionment of Settled Legacy—Payment to Remainderman—Purchase of Annuity.]—A sum of stock was vested in trustees, upon trust to pay the dividends to A., a married woman, for her life for her separate use, without power of anticipation, and after her decease to pay the capital to B. On the petition of A. and B. the court ordered a transfer of a portion of the stock to B., and a sale of such other portion as would be sufficient to purchase a government annuity equal to the dividends of the two sums of stock, and that the sum thereby produced should be laid out in the purchase of such annuity, to be settled on A. for her separate use, without power of anticipation. *Dodd* v. *Wake*, 5 De G. & Sm. 226; 21 L. J., Ch. 356; 16 Jur. 776.

Unaccrued Dividends—Inability to Charge.]—Property was held in trust to pay the dividends to such person as a married woman should, not by way of anticipation, appoint, and in default of appointment, to her for her separate use; and it was declared that the receipts of her or her appointees should be good discharges:—Held, that she could not by anticipation charge the dividends not accrued due. *Harnett* v. *Macdougall*, 8 Beav. 187; 14 L. J., Ch. 173.

Payment out of Dividends.]—Form of order for payment of dividends to a married woman where the trust is for payment to her separate use with a restraint on anticipation and no gift over, discussed and stated. *Stewart* v. *Fletcher*, 57 L. J., Ch. 765; 38 Ch. D. 627; 36 W. R. 713.

Restraint Void by Law of Wife's Domicil.]—A testator bequeathed personal estate in trust for the use of a feme covert, and without power of anticipation. The legatee was, at the date of the will, domiciled abroad, and had continued so ever since. By the law of her domicil, the restraint against anticipation was disregarded, but the court nevertheless refused to give effect to a beneficial arrangement made by her anticipating her income. *Peillon* v. *Brooking*, 25 Beav. 218.

d. Fraud by Wife.

Restraint Cannot be Infringed by.]—There is no equity to apply income which a married woman is restrained from anticipating, to make good the consequences of her fraud, where the restraint on anticipation appears from the instrument in respect of which relief is sought. *Arnold* v. *Woodhams*, 42 L. J., Ch. 578; L. R. 16 Eq. 29; 28 L. T. 351; 21 W. R. 694.

A woman who had previously to her marriage settled property upon trust for herself during the joint lives of herself and her husband for her separate use, without power of anticipation, and after the death of one of them for the survivor for life and, after trusts for the benefit of the children of the marriage, upon such trusts as she should by deed or will appoint, and (there being no children of the marriage) had by deed irrevocably appointed her reversionary interest in favour of her mother, subsequently, and, as she alleged, under the compulsion of her husband, made another absolute irrevocable appointment of her reversionary interest in favour of her husband, without noticing the previous appointment. The husband deposited the appointment in his favour to secure a debt to himself:—Held, that, assuming the second appointment to be fraud on the part of the wife, inasmuch as it was not based upon any active misrepresentation by her, but disclosed the restraint on anticipation, and only attempted to deal with the reversionary interest, the assignee of the security was not entitled to impound the income during her life to make good his loss by such fraud. *Ib.*

A wife having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage of such property, concealing the restraint upon anticipation. The mortgagee obtained a judgment against her for the amount lent, and a charging order to charge her next accruing dividend:—Held, that such charging order must be discharged; for in no case and by no device could the restraint upon anticipation be evaded. *Stanley* v. *Stanley*, 47 L. J., Ch. 256; 7 Ch. D. 589; 37 L. T. 777; 26 W. R. 310.

The mortgagee, having discovered the fraud, obtained from the married woman a warrant of attorney, entered up judgment thereon, and afterwards obtained a charging order on a dividend due to her the very day it accrued due:—Held, that this was a mere device to make her future income a security for the mortgage debt, and an attempt to do indirectly what could not be done directly; and that, therefore, the charging order must be discharged. *Ib.*

Property limited to the separate use of a married woman without power of anticipation is not bound (at least during the coverture) by a charge fraudulently created by her in favour of a mortgagee without notice of the restraint. *Thomas* v. *Price*, 46 L. J., Ch. 761.

Therefore, when the property was a fund in court, and the mortgagee had by virtue of a power in his security obtained an order directing payment of future dividends to him, the order was upon the application of the married woman discharged. *Ib.*

Settlement by a husband, of money, in trust to pay the interest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by an assignment by the wife, of the interest to become due, and of the principal sum in the event of there being no children of the marriage:—Held, the surety not entitled to any remedy in equity under the assignment, in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement; a charge of fraudulent concealment not being sufficiently established; and even if fraud had been fully made out against the wife, it seems it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor. *Jackson* v. *Hobhouse*, 2 Mer. 483; 16 R. R. 200.

Mistake of Wife, as to Effect of.]—See *Bateman* v. *Faber*, 66 L. J., Ch. 721 ; [1897] 2 Ch. 223 ; 77 L. T. 71 ; 46 W. R. 151.

e. Payment to Wife.

When allowed.]—A testatrix, by her will, gave to a married woman 500*l.* consols ; and by a codicil directed that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female should be for her separate use, and (whilst she should be under coverture) without any power of anticipation. The executor transferred the fund into court under the Trust Relief Act, and the married woman presented a petition for a transfer of the fund to herself :—Held, that she could only have the income paid to her during her coverture. *Ellis, In re*, 43 L. J., Ch. 444 ; L. R. 17 Eq. 409 ; 22 W. R. 448.

—— **Before Marriage.**]—A testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, and independent of any husband she might happen to marry, and without power to sell or assign the same by anticipation. The M. R., upon the ground that the restraint against alienation or anticipation would be valid in case of future coverture, refused to order payment to the legatee of the price which would be paid for the annuity. But the lord chancellor held that she was entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation. *Woodmeston* v. *Walker*, 2 Russ. & M. 197 ; 9 L. J. (o.s.) Ch. 257.

—— **After Death of Husband.**]—Settlement in trust for the separate use of a married woman for life, but so as not to anticipate, with remainder as she should appoint by will, and in default of appointment to A. On the death of her husband, the restraint on anticipation ceases, and therefore she is entitled, with the concurrence of A., to a transfer of a fund. *Barton* v. *Briscoe*, Jac. 603.

—— **Absolute Gift not producing Income.**]—A testatrix bequeathed to a married woman by name, describing her as married, a reversionary share of a fund of mixed real and personal estate, expectant on a life interest. The will declared that every gift thereby made to a married woman should be for her separate use, without power of anticipation, and that her receipts alone should be good discharges for the same. The tenant for life died in the lifetime of the testatrix, who nevertheless did not alter her will. The married woman's share of the residue being represented by a sum of cash standing in court, uninvested, upon petition by the married woman to have the cash paid out to her, upon her separate receipt :—Held, that she was so entitled. *Croughton, In re*, 47 L. J., Ch. 795 ; 8 Ch. D. 460 ; 38 L. T. 447 ; 26 W. R. 574.

—— **Income-producing Fund—Right to Capital.**]—A testator bequeathed an annuity to his wife. And he directed his trustees and executors to provide for the same, either by setting apart a sufficient portion of the produce of his residuary personal estate, or by purchasing an annuity. And, after bequeathing some pecuniary legacies, he devised and bequeathed all his real estate, and the residue of his personal estate, to his two daughters, their heirs, &c., as tenants in common, so that the same might be enjoyed by them, during any and every coverture, as separate property free from marital control, and without power of anticipation. The executors paid the testator's debts, funeral and testamentary expenses, and legacies, and purchased an annuity for the widow. The residue of the estate then consisted of two sums of stock and a sum of cash. One of the daughters was married :—Held, that the will did not require the conversion of the residue into money, except so far as might be necessary to provide for the annuity. *Clarke's Trusts, In re*, 51 L. J., Ch. 855 ; 21 Ch. D. 748 ; 47 L. T. 43 ; 30 W. R. 778.

Held, also, that the married daughter's share of the stocks, they being income-bearing funds, could not be transferred to her, but that only the income arising from them could be paid to her. *Ib.*

But held, that her share of the cash might be paid to her on her separate receipt. *Ib.*

Ellis, In re, supra, followed. *Croughton, In re*, supra, distinguished. *Ib.*

Gift by a testatrix of real and personal estate to trustees upon trust to convert and invest, and to stand possessed of the stocks, funds, and securities representing the same in trust for her children who, being male, attained twenty-one, or, being female, attained that age or married under that age ; with a declaration that the shares of daughters should be for their sole and separate use without power of anticipation. Power was given to the trustees, upon the marriage of any of the daughters, to revoke the trusts so far as related to the share of any daughter so marrying, and to settle the same for the benefit of the daughter and her issue as to the trustees should seem fit. The residuary estate was represented by a sum of cash and certain leasehold houses :—Held, that the gift being of an income-producing fund with a restraint upon anticipation, the trustees could not pay to the daughters during coverture their shares upon their separate receipt. *Benton, In re, Smith* v. *Smith*, 51 L. J., Ch. 183 ; 19 Ch. D. 277 ; 45 L. T. 786 ; 30 W. R. 242.

A testator bequeathed the sum of 20,000*l.*, after the death of R. S., to the child or children of R. S., who should survive him, the testator, equally to be divided between them if more than one. R. S. died in the testator's lifetime, leaving two daughters, one of whom was married. The will contained a proviso that every bequest thereby made for any female during her coverture should be "for her separate use and without power of anticipation or alienation." There was no clause declaring that the receipt of a married woman should be a sufficient discharge. Upon the question whether the married woman was entitled to have her moiety of the 20,000*l.* paid to her on her separate receipt, notwithstanding the proviso :—Held, that she was so entitled. *Taber, In re, Arnold* v. *Kayess*, 51 L. J., Ch. 721 ; 46 L. T. 805 ; 30 W. R. 883.

A testatrix by her will, dated in 1875, gave all her real and personal estate to trustees upon trust for sale and conversion, and after payment of debts, to raise thereout 4,500*l.*, and invest the same and hold the investments upon trust for R. for life ; and declared, after his death, the

trustees should stand possessed of three several sums of 1,000*l.*, part of the 4,500*l.*, in favour of certain persons therein named; as to the remaining 1,500*l.*, in trust for and to pay the same to B. (a married woman) for her sole and separate use, and in the event of her death in the lifetime of the testatrix to divide the same amongst her children, and declared that the interest which any female might take under her will, should be for her sole and separate use, and without power to anticipate the same, and for which her receipt alone should be a sufficient discharge. The testatrix died in 1881; R. died in 1882:—Held, that B. was entitled to have the capital sum of 1,500*l.* paid to her, and to give a good discharge for the same. *Bown, In re, O'Halloran* v. *King*, 53 L. J., Ch. 881; 27 Ch. D. 411; 50 L. T. 796; 33 W. R. 58—C. A.

A testator devised and bequeathed his residuary real and personal estate to trustees upon trust for conversion, and upon further trust as to both the capital and income, in trust for his children living at his wife's decease, who should either before or after that time attain twenty-one years or marry, in equal shares. The testator declared that all moneys (whether capital, or income) to which any female should become entitled under his will should "be paid into her own hands for her separate use free from marital control," when and as the same should become actually due and payable, "and not by way of anticipation," and her receipts alone should, notwithstanding coverture, be sufficient discharges for the same:—Held, that the restraint on anticipation was not operative to prevent payment to such females, whether under coverture or not. *Bown, In re* (27 Ch. D. 412), followed. *Holmes, In re, Hallows* v. *Holmes*, 67 L. T. 335—C. A.

A testator having a general power of appointment over a settled fund, appointed that a sum of 1,500*l.* should be raised and paid to his daughter, who was a married woman, absolutely, for her separate use, without power of anticipation; and appointed that one-fourth of the residue of the fund should be held upon trust for the same daughter absolutely for her separate use without power of anticipation:—Held, that the daughter was not entitled to payment of the capital of one-fourth of the residue. *Grey's Settlements, In re, Acason* v. *Greenwood*, 56 L. J., Ch. 511; 34 Ch. D. 712; 56 L. T. 350; 35 W. R. 560—C. A.

—— **Fund subject to Particular Estate.**]—Where a fund subject to a particular estate is given absolutely to a married woman with a restraint on anticipation, the restraint will not in the absence of any other ground be confined to the continuance of that particular estate. *Bown, In re* (27 Ch. D. 411), distinguished. *Tippett and Newbould, In re*, 37 Ch. D. 444; 58 L. T. 754; 36 W. R. 597—C. A.

A testator directed surplus income of real and personal estate, after providing an annuity, to be accumulated during the life of his wife; after her death he gave the capital to his children; he directed that the shares of his daughters should be for their separate use, without power of alienation or anticipation during the wife's life:—Held, that his married daughters, during the life of their mother, were entitled to receive only the income of invested income. *Spencer, In re, Thomas* v. *Spencer*, 55 L. J., Ch. 80; 30 Ch. D. 183; 34 W. R. 62.

Payment to Wife under Order reversed—Lien.]—A female infant entitled under a will to a share of residuary personalty contingently on her attaining twenty-one, married before—but came of age after—the commencement of the Married Women's Property Act, 1882. On her marriage a settlement of her property, not sanctioned under the Infants' Settlement Act, was made under which she took the first life estate with a restraint on anticipation. On her coming of age the fund was paid to her under an order of the court. The court of appeal reversed this order and declared her liable to refund, on the ground that the fund was subject to the settlement. She refunded part, but was unable to refund the remainder, which she had spent. After this, the executors of the will paid to the trustees of the settlement an arrear of income which they had in hand:—Held, that so much of this income as accrued between the married woman's attaining twenty-one, and the order declaring her liability to refund, must be retained in part satisfaction of her liability to refund. *Pike* v. *Fitzgibbon* (17 Ch. D. 454) distinguished. *Dixon, In re, Dixon* v. *Smith*, 56 L. J., Ch. 773; 35 Ch. D. 4; 57 L. T. 94; 35 W. R. 742—C. A.

Unauthorised Investment.]—Trust funds, to which a married woman was absolutely entitled, but subject to a restraint on anticipation, were invested upon mortgages of leasehold property, one of which, not being authorised by the trusts of the settlement, the trustees proposed to call in. The court being satisfied that it would be for the benefit of the married woman, made an order, on her application, permitting the investment to continue unchanged. *Wright's Trusts, In re*, 15 L. R., Ir. 331.

f. Removing Restraint under Conveyancing and Law of Property Act, 1881, s. 39.

Principles on which Court Acts.]—The power which the Conveyancing and Law of Property Act, 1881, s. 39, gives to the court of dispensing with a restraint on anticipation is a discretionary power, to be exercised with great caution, and only where a strong case is made for it, and is not necessarily to be exercised because it will be for the benefit of the married woman. *Little, In re, Harrison* v. *Harrison*, 58 L. J., Ch. 233; 40 Ch. D. 418; 60 L. T. 246; 37 W. R. 289—C. A.

The power given by s. 39 of the Conveyancing Act, 1881, ought not to be used indiscriminately. *Jordan, In re, Kino* v. *Picard*, 55 L. J., Ch. 330; 54 L. T. 127; 34 W. R. 270.

Benefit to Wife.]—Section 39 of the Conveyancing Act, 1881, confers no general power of removing the restraint on anticipation, but only enables the court to make binding some particular disposition of her property by a married woman, notwithstanding a restraint on anticipation, if the court is of opinion that such disposition is beneficial to her. *Warren's Settlement, In re*, 52 L. J., Ch. 928; 49 L. T. 696—C. A.

The court, in determining whether an order should be made under s. 39 of the Conveyancing and Law of Property Act, 1881, binding the interest of a married woman in property notwithstanding that she is restrained from anticipation, must consider whether it is for her benefit, and that is not confined to pecuniary

benefit. *Pollard's Settlement, In re*, 65 L. J., Ch. 796; [1896] 2 Ch. 552; 75 L. T. 116; 45 W. R. 18—C. A.

Possibility of Issue.]—Application by husband and wife and trustees of a settlement for the removal of the restraint on anticipation, for the purpose of rendering the capital of the trust fund—which stood limited upon the death of the survivor of husband and wife in trust for the children of the marriage—available for the benefit of the husband and wife, who were fifty-three and fifty years old respectively, there being no issue of the marriage, refused, chiefly on the ground that the court ought not to assume that there would be no children, although the parties had been married for twenty-eight years, and had never had any children, and there was medical evidence that it was almost, if not entirely, impossible that there could be any issue. *Ib.*

—— **Scheme for Paying Wife's Debts.**]—Upon the application of a married woman, the court made an order under s. 39 of the Conveyancing and Law of Property Act, 1881, binding her life interest under her marriage settlement, notwithstanding restraint on anticipation, by approving a scheme for discharging her debts and liabilities, the court being of opinion that the scheme was for the benefit of the married woman, within the meaning of the section. *Wilson-Stewart, In re, Keown-Boyd* v. *Gilmour*, 75 L. T. 381—C. A.

—— **Compromise of Annuity for Lump Sum.**]—By indenture M. covenanted to pay to trustees an annuity of 400*l.* in trust for H., a spinster, until her death or marriage, and in case she married with M.'s consent, then to pay the like annuity to the trustees for H. for life for her separate use without power of anticipation. H. married with M.'s consent. M. having died, his executor and residuary legatee brought an action against H. and her husband claiming that the deed did not bind M.'s estate. Terms of compromise having been arranged under which H. was to receive a lump sum in discharge of the deed of covenant, the court was asked to sanction the arrangement on behalf of H. under s. 39 of the Conveyancing and Law of Property Act. The court, considering the terms of compromise to be for H.'s benefit, sanctioned the arrangement, but directed that H. should attend to give her consent by separate examination before the judge in the ordinary way. *Musgrave* v. *Sandeman*, 48 L. T. 215.

Release of Power of Appointment.] — A fund was settled on a married woman for life for her separate use with a restraint on anticipation, remainder to her children and issue as she should appoint, and in default of appointment to the children equally, with cross limitations in the event of any dying under twenty-one without issue. She being in straitened circumstances, arranged with her eldest son that his fifth share in a part of the trust funds should be applied in a specified way for her benefit. With a view to this she released her power of appointment over the trust funds, and then applied to the court to have the fifth share of the son in the agreed part of the funds, together with her life interest, sold, and the proceeds applied as above:—Held, that the court would not in the exercise of its discretion dispense with the restraint on anticipation in order to give effect to a release executed by the donee of the power for her own benefit. *Cunynghame* v. *Thurlow* (1 Russ. & My. 436) approved. *Little, In re, Harrison* v. *Harrison*, supra.

Keeping up Policy on Husband's Life.]—Where a married woman was entitled to the first life interest, with restraint on anticipation, remainder to her husband for life, in property settled by herself on marriage, the court, on her application, removed the restraint to the extent of allowing the income to be applied towards keeping up policies on the husband's life, to which she was entitled, and towards keeping down the interest on certain mortgages in which she had by misapprehension joined with her husband, and by which she purported to charge her life interest, the mortgagees being put upon terms to reduce their rate of interest to 5 per cent., and not to enforce payment against either party during the life of the wife without the leave of the court. *Milner's Settlement, In re, Milner* v. *Milner*, 61 L. J., Ch. 84; [1891] 3 Ch. 547; 65 L. T. 310; 40 W. R. 76.

Securing Loan on Settled Estate.] — An estate having been purchased in court by trustees of a marriage settlement, and the trustees requiring to raise a loan by way of mortgage on the estate for the completion of the purchase, the proposed lender required that an order should be obtained dispensing with the restraint on anticipation, contained in the said marriage settlement. The court being satisfied that the removal of such restraint on anticipation would be for the benefit of the married woman, granted an order dispensing with the same. *Tennant's Estate, In re*, 52 L. R., Ir. 522.

Release of Annuity charged on Partnership Business and Profits.]—When a married woman was entitled to a life annuity, with restraint on anticipation, charged upon one-third share of the business and profits of a partnership, and it was proposed that the partnership should be converted into a company with limited liability, the court sanctioned the removal of the restraint on anticipation, for the purpose of enabling the married woman to release her annuity, on being satisfied that the offer in lieu thereof of an absolute allotment of perpetual preference shares in the company, producing an income equal to the annuity, to be settled in trust for her during her life, with restraint on anticipation, and with power of appointment after her decease, was to her advantage and that of her husband and children. *Millar, In re*, 25 L. R., Ir. 107.

Life Interest of Wife — Right of Wife to Indemnity—Conveyancing Act, 1881.] — Where the life interest of a married woman without power of anticipation has been made available by means of the sanction of the court under s. 39 of the Conveyancing Act, 1881, to enable her to raise money to pay her husband's debts, she cannot afterwards claim to be indemnified by him in respect of the sums so raised, when no reservation of any such remedy has been made by the court giving its sanction to the application. *Paget* v. *Paget*, 67 L. J. Ch. 1; [1898] 1 Ch. 47; 77 L. T. 490. On appeal, 67 L. J., Ch. 266; [1898] 1 Ch. 470.

Statement of conditions under which the

court will allow the removal of a restraint upon anticipation. *Ib.*

Raising Money for Son.] — Restraint on anticipation of personalty settled by a married woman on herself for life, with remainder to her husband for life, was removed, so as to allow a sum of 500*l.*, which she and her husband had appointed to their son, the only child of the marriage, free from the husband's life interest, but subject to the wife's life interest, to be raised by the trustees of the settlement and expended in buying cattle and farm implements for the purpose of starting the son as a farmer, and relieving the husband and wife of the expense of maintaining him. *Sawyer's Trusts, In re*, [1896] 1 Ir. R. 40.

Specific Performance — Divorce — Husband Dead.]—The court has no power under s. 39 of the Conveyancing Act, 1881, to order specific performance of an agreement entered into by a married woman, notwithstanding that she is restrained from anticipation, in a case where, at the time when the application for specific performance is made, she has been divorced and her husband is dead. *Thomson* v. *Thomson and Rodochinka*, 65 L. J., P. 80; [1896] P. 263; 74 L. T. 801; 45 W. R. 134—C. A.

Advantageous Sale of Life Interest.]—A fund, secured by mortgage, was vested in trustees in trust for the separate use of a married woman during the joint lives of herself and her husband, without power of anticipation, and after the decease of either, to the survivor for life; and, after the death of the survivor, for their three children in equal shares. The judge being satisfied that it would be for the advantage of the married woman, made an order, on summons in chambers, for accepting an advantageous offer for the sale of her life interest in the fund, under the Conveyancing and Law of Property Act, 1881, s. 39. *Flood's Trusts, In re*, 11 L. R. Ir. 355.

Rectification of Instruments—Charging Costs.] —In an action for the rectification of certain instruments on the ground of mistake, the plaintiff had undertaken to pay the costs of all parties. The plaintiff had a life interest in some property passing under a settlement, but with a restraint on anticipation. Upon the application of the defendant, and with the consent of the plaintiff, the court made an order under s. 39 of the Conveyancing Act, 1881, binding such life interest of the plaintiff and charging thereon the costs of all parties. *Sedgwick* v. *Thomas*, 48 L. T. 100.

To satisfy Wife's Creditors.]—A wife living with her husband was entitled to an income of 1,700*l.* for her separate use without power of anticipation. Her husband was without any means and had been adjudged bankrupt. The wife had given acceptances to many of her husband's creditors, and was harassed with actions, and a county court order for attachment in event of non-payment had been made against her. She was also suffering in health from the anxiety produced by pecuniary embarrassment:—Held, that the case was one in which the court would, in the exercise of its discretion under s. 39 of the Conveyancing Act, 1881, make an order relieving part of the wife's income from the restraint on anticipation, in order that a sum might be raised to satisfy creditors. *C.'s Settlement, In re*, 56 L. J., Ch. 556; 56 L. T. 299.

A married woman was entitled to the income of a fund in court for her life, for her separate use without power of anticipation, with remainder in trust for her children, and in default of issue, in trust for such persons as she should, whether covert or sole, by will appoint, and in default of appointment, to herself absolutely. She having had no children, and being past the age of childbearing, and having contracted a number of debts, for payment of which the creditors were pressing her and causing her great annoyance, she with her husband applied to the court to exercise its power under s. 39 of the Conveyancing Act, 1881, to remove the restraint on anticipation, and to order part of the fund to be paid out to her to enable her to pay her debts:—Held, that, whether she did or did not exercise her power of appointment, the fund would at her death be subject to the payment of her debts, and that under the circumstances the restraint on anticipation ought to be removed, and a portion of the fund paid out to the applicant. *Harvey's Estate, In re* (13 Ch. D. 216), followed. *Hodges* v. *Hodges*, 51 L. J., Ch. 549; 20 Ch. D. 749; 46 L. T. 366; 30 W. R. 483.

Payment off of Mortgage.]—By a voluntary deed lands were settled on A., the settlor for life; remainder to B., a married woman, for life, with a clause against anticipation; remainder to C. (B.'s husband) for life; remainder as B. should appoint; A., B., and C. joined in a mortgage with a power of sale, to secure advances by a bank to them. The bank sold under their power for the full value. It appearing that there were no other means of paying off the mortgage, that the lands were in danger of eviction for non-payment of headrent, and that they were sold for full value, the court, on the application of B. and C., made on order for dispensing with the restraint on anticipation. *Seagrave's Trust, In re*, 17 L. R. Ir. 373.

Binding Life Interest—Forfeiture.]—A married woman was, under the will of a testator, entitled to the income of a share of his residuary estate for her life for her separate use without power of anticipation. The will contained a proviso that the income to which any person should become entitled for life under the will should be forfeited in the event of such person charging, alienating, or assigning such income or any part thereof by any act of theirs, or by bankruptcy, or other act or operation of law. And there was a gift over of the income in the event of forfeiture. She applied to the court, under s. 39 of the Conveyancing Act, 1881, that, notwithstanding the restraint on anticipation, she might be at liberty to bind her life interest under the will for the purpose of raising a loan:—Held, that the application must be refused, as it might involve a forfeiture of her life interest. *Jordan, In re, Kino* v. *Picard*, 55 L. J., Ch. 330; 54 L. T. 127; 34 W. R. 270.

Tenants in Common—House Property.]—Two married women were tenants in common in equal shares of property for their separate use without power of anticipation. The property consisted for the most part of houses of which desirable leases could not be granted because of the restraint on anticipation. A summons was accordingly taken out for an order under the Conveyancing Act, 1881, s. 39, enabling the married women to bind their interests in the

property, and for a partition, and its resettlement in moieties upon the married women for their lives for their separate use without power of anticipation, with remainders for their husbands for their lives, and ultimate remainders for the issue of the marriages:—Held, that under the circumstances an order binding the interests of the married women would be for their benefit within s. 39. *Currey, In re, Gibson* v. *Way*, 56 L. J., Ch. 389; 56 L. T. 80; 35 W. R. 326.

—— **Application to Bind.**]—An application to the court to bind a married woman's interest in property as to which she is restrained from anticipation must be made by summons in chambers and not by petition. *Lillwall's Settlement Trusts, In re*, 30 W. R. 243.

—— **Title of Petition under Settled Estates Act.**]—Where, on a petition under the Settled Estates Act, 1877, the court, under s. 39 of the Conveyancing and Law of Property Act, 1881, makes an order binding the interest of a married woman who is restrained from anticipation, the petition need not be entitled under the latter act. *Landfield's Settled Land, In re*, 46 L. T. 227; 30 W. R. 377.

—— **Strong Grounds necessary.**]—In applications to bind a married woman's interest in property, on which there is a restraint on anticipation, very strong grounds must be presented in order that the application may be successful. *Tamplin* v. *Miller*, 30 W. R. 422.

—— **Upon what Evidence.**]—The order was made upon the evidence of the married woman's consent afforded by an affidavit made by her in support of the application, and a letter written by her to her solicitors, strongly urging them to obtain the money for her. *Ib.*

But, quære, whether such an order ought, in general, to be made without ascertaining the consent of the married woman by a separate examination in the ordinary way. *Ib.*

Application—Service on Trustees.]—On an application by a married woman, under s. 39 of the Conveyancing Act, 1881, for liberty to bind her life interest by way of mortgage, notwithstanding that she is restrained from anticipation, it is not necessary to serve the trustees of the settlement. *Little, In re*, 56 L. J., Ch. 872; 36 Ch. D. 701; 57 L. T. 583—C. A.

Costs, Payment out of fund subject to restraint.]—*See* col. 1307.

4. Wife's Debts and Liabilities.

a. Ante-nuptial.

By 45 & 46 Vict. c. 75, s. 13, *a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this act shall operate to increase or diminish the liability of any woman married before the commencement of this act for any such debt, contract or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this act, and to which she would not have been entitled for her separate use under the acts hereby repealed or otherwise, if this act had not passed.*

For what Debts, &c., Liable.]—When a married woman contracts a debt which she can only satisfy out of her separate estate, her separate estate will, in equity, be made liable for the debt. *Picard* v. *Hine*, L. R. 5 Ch. 274; 18 W. R. 178.

See the judgments in *London Chartered Bank of Australia* v. *Lempriere*, 9 Moore, P. C. (N.S.) 426; 42 L. J., P. C. 49; L. R. 4 P. C. 572; 29 L. T. 186; 21 W. R. 513.

Debts contracted before Marriage.]—Property which is settled by a woman upon marriage to her separate use is liable, after her husband's bankruptcy, for debts contracted by her before her marriage. *Chubb* v. *Stretch*, 39 L. J., Ch. 329; L. R. 9 Eq. 555; 22 L. T. 86; 18 W. R. 483.

A married woman was sued without her husband for debts contracted before her marriage. By her ante-nuptial settlement it was agreed that all property coming to her or to her husband in her right during the coverture should be vested in two trustees, except jewels, which were to be for her separate use. The creditors obtained judgment, and issued execution against her separate estate. The sheriff seized jewels which belonged to her before her marriage, and an interpleader action was commenced between her husband and the execution creditor. The jury found that the jewels belonged to the husband:—Held, on an application for a new trial, that the jewels belonged to the wife for her separate use, and that the execution creditor was entitled to seize them. *Williams* v. *Mercier* or *Mercier* v. *Williams*, 51 L. J., Q. B. 594; 9 Q. B. D. 337; 47 L. T. 140; 30 W. R. 720—C. A.

By a settlement executed on the second marriage of the Countess of K., to which her husband was a party, her property, consisting of her jointure settled on her first marriage, a life interest in a money charge, and certain furniture, was assigned to trustees in trust for her separate use, without power of anticipation, but if he should survive her, then after her decease, as to all such part of the moneys as should not have been spent or disposed of by her in her lifetime, as she should by will appoint, and, in default of appointment, in trust for the persons who would have been entitled as her next of kin under the Statute of Distributions, if she had died without being under coverture. The Countess of K., after her second marriage, retained that title, having contracted debts before and after marriage. She died intestate, entitled to apportioned parts of the jointure and interest on the charge, and some personal estate not included in the settlement. Her husband, who survived her, became her administrator. Her daughter by her first marriage was her next of kin:—Held, first, that the trusts in favour of the next of kin, as to the part of the

separate estate which she should not spend or dispose of, was valid against the husband. Secondly, that the debts contracted before the second marriage should be paid pari passu out of the apportioned parts of the separate estate and the general personal estate. Thirdly, that the debts contracted after the marriage should be paid out of the separate estate. *Turner* v. *Caulfield*, 7 L. R., Ir. 347.

The Married Women's Property Act, 1870, does not free the husband from liability to be sued as the wife's administrator for debts contracted before the marriage. *Ib.*

A debt contracted by a wife before marriage survives against her upon the death of her husband. *Woodman* v. *Chapman*, 1 Camp. 189; 10 R. R. 666.

Judgment against Wife alone.]—A married woman is liable at common law for a debt contracted before her marriage. The Married Women's Property Act, 1882, leaves that liability untouched, and judgment can therefore be obtained against her personally. *Robinson* v. *Lynes*, 63 L. J., Q. B. 759; [1894] 2 Q. B. 577; 10 R. 448; 71 L. T. 249; 43 W. R. 62—D.

Judgment against the Wife—Action against Husband.]—A judgment having been recovered by the plaintiff in an action brought against a married woman under the Married Women's Property Act, 1882, s. 13, for a debt incurred by her before marriage, but such judgment remaining unsatisfied because she had no separate estate, an action for the debt was afterwards brought by the plaintiff against the husband, who had acquired property from his wife to an amount exceeding the debt:—Held, that the judgment recovered against the wife was no defence to the action against the husband. *Beck* v. *Pierce*, 58 L. J., Q. B. 516; 23 Q. B. D. 316; 61 L. T. 448; 38 W. R. 29; 54 J. P. 198—C. A.

—— **Statute of Limitations.**]—A husband cannot be made liable under the provisions of the Married Women's Property Act, 1882, ss. 14, 15, for an ante-nuptial debt of the wife which accrued due against the wife more than six years before the commencement of the action. *Ib.*

Promise to Pay—Estoppel.]—A feme sole possessed of farms and farming stock was indebted for goods supplied to her before her marriage, when a settlement was executed, disposing of the farms upon certain trusts (the stock being mentioned in the recitals only). After the marriage the husband promised the creditor to see him paid, and the creditor, at the husband's request, gave time for payment, and continued to supply goods upon credit to the husband and wife. The husband afterwards repudiated his liability for the ante-nuptial debt. In an action against the husband and wife for the whole debt, including goods supplied before and after the marriage:—Held, that even assuming that the husband had not acquired, or become entitled to property in right of his wife, he was liable for the goods supplied before as well as after the marriage. *Quinn* v. *Moloney*, 28 L. R., Ir. 12.

Restraint on Anticipation — Marriage after 1882.]—A clause restraining alienation in a settlement made upon a feme sole by another person, of property settled to her separate use, will not, on the clause becoming operative, by her marrying after the passing of the Married Women's Property Act, 1882, protect such property from the claims of her ante-nuptial creditors. *Kirk* v. *Murphy*, 30 L. R., Ir. 508.

—— **Married Women's Property Act, 1870.**]—Income settled to the separate use of a married woman is liable, under the Married Women's Property Act, 1870, for her debts contracted before marriage, although it is subject to restraint on anticipation. *London and Provincial Bank* v. *Bogle*, 47 L. J., Ch. 301; 7 Ch. D. 773; 37 L. T. 780; 26 W. R. 573.

Section 12 of the Married Women's Property Act, 1870, which makes any property belonging to a married woman for her separate use liable to satisfy her debts contracted before marriage, extends to property settled to the separate use of a married woman without power of anticipation.—A husband and wife were sued in respect of debts of the wife contracted before their marriage, which took place after the coming into operation of the Married Women's Property Act, 1870, and before the coming into operation of the Married Women's Property Act, 1882, and judgment was recovered against them. The wife was possessed of property which upon her marriage was settled to her separate use without power of anticipation:—Held, that the wife's property was liable to satisfy the judgment. *Sanger* v. *Sanger* (L. R. 11 Eq. 470) approved. *Axford* v. *Reid*, 58 L. J., Q. B. 230; 22 Q. B. D. 548; 60 L. T. 726; 37 W. R. 291; 53 J. P. 611—C. A.

—— **Debt contracted during former Marriage.**]—By s. 13 of the Married Women's Property Act, 1882, a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for "all debts contracted by her before her marriage." By s. 19, nothing in this act shall affect any settlement made respecting the property of any married woman, or render inoperative any restriction against anticipation; but no restriction made in any settlement of a woman's own property to be made or entered into by herself shall have any validity against "debts contracted by her before marriage." Judgment for a sum of money was recovered against a married woman, who subsequently obtained a dissolution of her marriage, and married again; and by a settlement made by her on the second marriage property belonging to her was settled to her separate use without power of anticipation:—Held, that the judgment debt was a "debt contracted before her marriage" within the meaning of s. 13, so that the defendant continued to be liable for it after her second marriage; and also that it was a "debt contracted before marriage" within the meaning of s. 19, so that the restriction upon anticipation contained in the settlement had no validity against it. *Jay* v. *Robinson*, 59 L. J., Q. B. 367; 25 Q. B. D. 467; 63 L. T. 174; 38 W. R. 550—C. A.

—— **Devised Real Estate—Liability of Devisee.**]—The liability, under the acts 11 Geo. 4 & 1 Will. 4, c. 47, of a devisee of land, who alienates the land, to the unpaid debts of the testator, is such that, on the alienation, the debts become his own debts to the extent of the value of the land alienated. Consequently, when a woman to whom land had been devised settled it on her marriage, after the passing of the Married Women's Property Act, 1870,

the first trust being for herself absolutely until the marriage, and, after its solemnisation, on trust for herself for her life, without power of anticipation, with remainder on trusts for the issue of the marriage:—Held, that the testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the deficiency, to the extent of the value of the devised land; her liability to satisfy the debts of the testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage," within the meaning of s. 12 of the Married Women's Property Act, 1870. *Sanger* v. *Sanger* (L. R. 11 Eq. 470) and *London and Provincial Bank* v. *Bogle* (7 Ch. D. 773) followed. *Hedgely, In re, Small* v. *Hedgely*, 56 L. J., Ch. 360; 34 Ch. D. 379; 56 L. T. 19; 35 W. R. 472.

Court will not restrain Alienation pending Action.]—Therefore, in an action to obtain payment of the debt of a married woman out of her separate property, an application before the hearing for an injunction to restrain the married woman from alienating her separate property was refused. *Wayford* v. *Heyl*, 44 L. J., Ch. 567; L. R. 20 Eq. 321; 33 L. T. 155; 23 W. R. 848.

In an action by a creditor to enforce against the separate estate of a married woman a general engagement entered into with her on the credit of that estate, the court will not, before the creditor has established his right by obtaining a judgment, restrain the married woman from dealing with her separate estate. *Robinson* v. *Pickering*, 50 L. J., Ch. 527; 16 Ch. D. 660; 44 L. T. 165; 29 W. R. 385—C. A.

b. Post-nuptial.

i. *Cases before the Married Women's Property Act*, 1882.

General Engagements of Married Women.]—A married woman cannot bind herself by contract, but equity holds that she may, by contract, bind her separate estate. Her separate estate will be liable to pay any debt of hers which she has secured by writing. Equity has also held, that it is sufficient if it is shown that the married woman verbally promised that her debt should be paid out of her separate estate. *Shattock* v. *Shattock*, 35 Beav. 489; 35 L. J., Ch. 509; L. R. 2 Eq. 182; 12 Jur. (N.S.) 405; 14 W. R. 600.

The principle of courts of equity is, that, as regards her separate estate, a married woman is a feme sole, and can act as such; but this is only so far as is consistent with the other principle—viz., that a married woman cannot enter into a contract. *Ib.*

When a married woman, who is entitled to separate estate, has entered into a contract on the faith of that estate, the person with whom she has so contracted has a right to come to the court of chancery in order to reach the separate estate by a kind of equitable execution. *Picard* v. *Hine*, L. R. 5 Ch. 274; 18 W. R. 178.

The general engagements of a married woman are enforced by a court of equity against her separate estate, not as executions of a power of appointment, but on the principle that to whatever extent she has, by the terms of the settlement, the power of dealing with her separate property, she has also the other power incident to property in general, namely, the power of contracting debts to be paid out of it. *Owens* v. *Dickenson*, Cr. & Ph. 48; 4 Jur. 1151. Affirming 3 Beav. 48.

The separate estate of a married woman is bound by her debts, obligations, and engagements, contracted for herself upon the credit of that estate; and whether such obligations were so contracted must be judged of by the circumstances of each particular case. *Matthewman's case, Leeds Banking Co., In re*, 36 L. J., Ch. 90; L. R. 3 Eq. 781; 12 Jur. (N.S.) 982; 15 L. T. 266; 15 W. R. 146. And see *Bolden* v. *Nicolay*, 3 Jur. (N.S.) 884; *Bolton* v. *Williams*, 2 Ves. J. 145; 4 Bro. C. C. 297; *Clerk* v. *Miller*, 2 Atk. 379; and *Hughes, In re, Brandon* v. *Hughes*, 67 L. J., Ch. 279; [1898] 1 Ch. 529.

Taking Shares.] — There is nothing in the nature of a company, in the absence of any special clauses in the deed of settlement, to prevent a married woman being a shareholder in her own right, so as to bind her separate estate. *Ib.*

Writing not necessary.]—The separate estate of a feme covert is liable in equity when she has obtained goods upon credit, though there is no contract in writing, nor reference to her separate estate. *Burke* v. *Tuite*, 10 Ir. Ch. R. 467.

But if the separate estate is an interest in realty, the provisions of the Statute of Frauds prevent such liability being enforced if there is no writing. *Ib.*

Semble, that the separate estate of a feme covert is liable in equity to her general engagements, as well upon an implied undertaking, as by a written obligation. *Murray* v. *Barlee*, 3 Myl. & K. 209; 3 L. J., Ch. 184. *And see* 4 Sim. 82; 9 L. J. (O.S.) Ch. 87.

Concurrence of Trustee not necessary.]—A married woman having separate property may, by her contract, bind that property, even without the concurrence of her trustees, nor is it necessary that she should, in such contract, expressly refer to it. *Dowling* v. *Maguire*, Ll. & G. t. Plunk. 1 and 2.

Wife must have Separate Property at Date of Contract.]—The contracts of a married woman can only be enforced against property which formed part of her separate estate at the date of the contract. *Gaffee, In re* (1 Mac. & G. 541), *Molyneux's Estate, In re* (L. R. 6 Eq. 411), and *Sturgis* v. *Corp* (13 Ves. 190) discussed. *King* v. *Lucas*, 53 L. J., Ch. 64; 23 Ch. D. 712; 49 L. T. 216; 31 W. R. 904—C. A. *Smith* v. *Lucas*, 18 Ch. D. 531; 45 L. T. 460; 30 W. R. 451.

Held, by Malins, V.-C., that the general engagements of a married woman entitled to separate estate will be enforced by a court of equity against such separate estate as she has at the time when judgment is given, including (if her husband be then dead) estate limited to her separate use, without power of anticipation:—But held, on appeal, that they can be enforced only against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation. *Pike* v. *Fitzgibbon*, 50 L. J., Ch. 394; 17 Ch. D. 454; 44 L. T. 562; 29 W. R. 551—C. A.

Credit Given to Separate Property.]—Something more than the obligation which the law would create in the case of a single woman is necessary to affect the separate estate of a married woman; and in order to bind the separate estate by a general engagement, it should appear that an engagement was made with reference to and upon the faith or credit of that estate. *Johnson* v. *Gallagher*, 3 De G., F. & J. 494; 30 L. J., Ch. 298; 7 Jur. (N.S.) 273; 4 L. T. 72; 9 W. R. 506.

A married woman living apart from her husband, and having separate estate, carried on trade; after the death of her husband, tradesmen who had supplied her with goods in her trade filed a bill against her and her trustees for an account of her separate estate, and payment out of it of their demands for the price of the goods. Pending the suit she mortgaged the property which had been her separate estate, for valuable consideration, to an extent exceeding its value:—Held, that the dealings with the tradesmen were not such as to give them any remedy against the property which had been the separate estate. *Ib.*

A wife was left by her husband at an hotel at Baden Baden, at which they had been staying together. The landlord caused her to be detained for payment of the unsettled hotel bills. In order to get away she gave a memorandum, stating "the debt of Madame B. was 5,000 florins":—Held, there had been no credit given to her separate estate, and that, under the circumstances of the arrest, the words "the debt of Madame B." did not bind her separate estate. *Bromley, In re, Bromley* v. *Norton*, 27 L. T. 478; 21 W. R. 155. And see *Littlefield* v. *Shee*, 2 B. & Ad. 811; 1 L. J., K. B. 12.

Receiver of Rents—Elegit.]—Where by marriage settlement, freehold lands of the wife were conveyed to trustees upon trust to pay the rents and profits, after payment of the head rent and renewal fines, to the wife, during her life, to her separate use, and a judgment was afterwards obtained against the husband and wife, the court refused to appoint a receiver over such separate estate upon the petition of the judgment creditors under the 5 & 6 Will. 4, c. 55, and 3 & 4 Vict. c. 105; holding, that the separate estate of a feme covert is cognisable only in a court of equity; that her right of disposition over it is not within the meaning of a "disposing power" in s. 19 of 3 & 4 Vict. c. 105; and that that section does not render extendible under an elegit any species of trust estate which was not extendible under the Statute of Frauds. *Digby* v. *Irvine*, 6 Ir. Eq. R. 149.

Payment of Dividends to Sequestrator of Wife's Estate.]—The court will, upon petition, order dividends accrued due upon a fund in court, settled to the separate use of a wife for life, without power of anticipation, to be paid to the sequestrator of her estate. *Claydon* v. *Finch*, 28 L. T. 101.

Creditor has no Charge on Separate Estate.]—The circumstance that the separate estate of a married woman is liable for general engagements does not give her creditors any charge upon the separate property. *National Provincial Bank of England* v. *Thomas*, 24 W. R. 1013.

Marriage during Pending Proceedings.]—Where a woman married when proceedings were pending between her and others, which resulted after her marriage in a statutory debt being created:—Held, that her separate property was chargeable with the payment of such debt. *London Corporation* v. *Brooke*, 1 Cab. & E. 169.

Statute of Limitations.]—Moneys advanced by a stranger in providing necessaries for the support of a married woman, living separate from her husband, are debts binding her separate estate; and, being debts payable out of funds held in trust for her separate use, are not barred by the Statute of Limitations. *Barber, In re, Hodgson* v. *Williamson*, 15 Ch. D. 87; 42 L. T. 676; 28 W. R. 944. *See* infra, col. 1117.

Compromise.]—A married woman having property to her separate use, without power of anticipation, had power to bind the corpus of the estate by a compromise entered into by her. *Wilton* v. *Hill*, 25 L. J., Ch. 156; 4 W. R. 66.

Appointment under General Power makes Property Assets.] — The property of a married woman settled as she should appoint by deed or will, and in default of appointment to her for life for her separate use, with remainder, if she survive her husband, to her executors, administrators, and assigns, without restraint on anticipation, is in equity separate estate for the purpose of being bound by her general engagements. *Mayd* v. *Field*, 45 L. J., Ch. 699; 3 Ch. D. 587; 34 L. T. 614; 24 W. R. 660.

The property of a married woman, settled by an ante-nuptial settlement for her separate use for life, with remainder as she should by deed or will appoint, with remainder in failure of appointment to her executors or administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire corpus in her for all purposes. *London Chartered Bank of Australia* v. *Lemprière*, 9 Moore, P. C. (N.S.) 426; L. R. 4 P. C. 572; 29 L. T. 186; 21 W. R. 513.

Property was settled on a married woman for her separate use for life, with remainder for such persons as she should by her will appoint, with remainder, in default of appointment, for her children or her next of kin, and the married woman made a testamentary appointment in favour of her daughter:—Held, that the appointed property was liable to the payment of the appointor's debts as if it were her separate estate. *Harvey's Estate, In re, Gilbert* v. *Harben*, 49 L. J., Ch. 3; 13 Ch. D. 216; 28 W. R. 73.

London Chartered Bank of Australia v. *Lemprière* (L. R. 4 P. C. 572) followed. *Vaughan* v. *Vanderstegen* (2 Drew. 165) not followed on this point. *Ib.*

—— **Testamentary Power of Appointment.**]—In cases not within the Married Women's Property Act, 1882, the exercise by the will of a married woman of a general power of appointment, whether the power be exerciseable by deed or will, or by will only, does not make the property appointed liable to engagements entered into with her on the credit of her separate estate. *Roper, In re, Roper* v. *Doncaster*, 58 L. J., Ch. 215; 39 Ch. D. 482; 59 L. T. 203; 36 W. R. 750. And see *Beecher* v. *Major*, 6 N. R. 351.

Under s. 1, sub-ss. 3 and 4, and s. 4 of the

Married Women's Property Act, 1882, when read together, property appointed by a married woman by will under a general testamentary power, becomes on her death liable for her "debts and other liabilities," even though she may have had no separate estate at the time she contracted them. *Ann, In re, Wilson* v. *Ann*, 63 L. J., Ch. 334; [1894] 1 Ch. 549; 70 L. T. 273.

Restraint on Anticipation.]—The Married Women's Property Act, 1870, s. 12, extends to property settled to the separate use of a married woman without power of anticipation. *Sanger* v. *Sanger*, 40 L. J., Ch. 372; L. R. 11 Eq. 470; 24 L. T. 649; 19 W. R. 792.

After the passing of that act, and on the same day on which a marriage took place, but subsequently thereto, judgment was entered up against the wife for a debt incurred previously to the marriage. The judgment creditors subsequently obtained a charging order on her interest in a fund in court, to the income of which she was entitled, for her separate use, without power of anticipation:—Held, that the charging order constituted a valid incumbrance on the fund. *Ib.*

—— **Income Settled to Separate Use.**]—Income settled to the separate use of a married woman is liable under the Married Women's Property Act, 1870, for her debts contracted before the marriage, although it is subject to restraint on anticipation. *London and Provincial Bank* v. *Bogle*, 47 L. J., Ch. 301; 7 Ch. D. 773; 37 L. T. 780; 26 W. R. 573.

In an action in the queen's bench division against a husband and wife jointly for a debt contracted by the wife before marriage, costs of defence were recovered by the husband under the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), s. 3, and were paid to him by the plaintiff. In a subsequent action (commenced by the plaintiff in the chancery division for the purpose of enforcing the judgment obtained by him in the first action against the wife) the same costs were ordered to be repaid to the plaintiff out of the wife's separate estate. *Ib.*

Joint and Several Promissory Note.]—A woman, married since the passing of the Married Women's Property Act, 1870, joined her husband in signing a joint and several promissory note for money lent to him. The husband became bankrupt:—Held, that her separate estate was liable for the amount due on the note, and that it was not necessary to make any trustees for the wife parties to the action. *Davies* v. *Jenkins*, 6 Ch. D. 728; 26 W. R. 260.

Real and personal estate was given by will to A. and B. to permit X. to receive the income during his life, remainder to the use of an infant. On the death of X., leaving his widow and the infant otherwise unprovided for, the court made an order for the payment of the whole income of the property for her maintenance, to the widow by A. and B. Shortly afterwards the circumstances of the widow improved, but A. and B., till the death of B. in 1851, and after that event A. alone, still paid the gross income (without ever paying succession duty) to the widow during the minority of the child. The child attained twenty-one in 1873, married, and sought to charge A. and the estate of B. with, first, excess of payments for maintenance, having regard to the widow's altered circumstances; second, dilapidations; third, amount paid for succession duty, with interest:—Held, first, that the order was a protection during the joint lives of A. and B., but that the trust so created did not survive, and that an inquiry must therefore be directed whether A. properly paid the whole income from 1861. *Brown* v. *Smith*, 46 L. J., Ch. 866.

Held, secondly, that they were under no liability for dilapidations; third, that they were liable for succession duty, but not for the interest. *Ib.*

The widow, in 1863, married J. W., who died in 1872. On the 7th May, 1874, she married R. W. The infant sought to charge J. W.'s estate, her separate estate, if any, and R. W. in the same way:—Held, first, that J. W.'s liability in respect as well of his wife's receipt of income from 1861 to 1863, as of her accountability for succession duty, terminated with the coverture. *Ib.*

Held, secondly, that R. W. was similarly protected by s. 12 of the Married Women's Property Act, 1870. *Ib.*

Held, thirdly, that J. W.'s estate was liable for the receipts of income from 1863 to 1872. *Ib.*

Receipt of Assets by Husband need not be Alleged.]—In an action against a husband and wife married since the Married Women's Property Act, 1874, for the recovery of a debt of the wife contracted before the marriage, it is not necessary that the statement of claim should allege that the husband has received assets of the wife: it is sufficient that it should simply allege that the husband is liable for the debt, leaving it to the husband to exercise his option of pleading non-liability under the provisions of the act. A demurrer by the husband to the plaintiff's statement of claim in such an action, on the ground that the plaintiff had failed to allege that the husband had received assets, was therefore overruled. The effect of the Married Women's Property Acts, 1870 (s. 12) and 1874, considered. *Matthews* v. *Whittle*, 49 L. J., Ch. 359; 13 Ch. D. 811; 43 L. T. 114; 28 W. R. 822.

Payment of Accumulated Dividends to Sequestrator—Restraint on Anticipation.]—The court will, upon petition, order dividends accrued due upon a fund in court, settled to the separate use of a wife for life, without power of anticipation, to be paid to the sequestrator of her estate. *Claydon* v. *Finch*, 42 L. J., Ch. 416; L. R. 15 Eq. 266; 28 L. T. 101.

Bankruptcy.]—A married woman cannot be a debtor, and therefore cannot be made bankrupt, even though she has separate estate and has contracted engagements after her marriage. *Jones, Ex parte, Grissell, In re*, 48 L. J., Bk. 109; 12 Ch. D. 484; 40 L. T. 790; 28 W. R. 287; 44 J. P. 55. *But see now* Married Women's Property Act, 1882, col. 1115, in case of a married woman trading separately.

Annuity—Grant of.]—An annuity granted by a feme covert, having a power to dispose of her separate estate, to A., a young lady upon her marriage, for whom she promised to provide, is a specific lien on the grantor's estates. *Power* v. *Bailey*, 1 Ball & B. 49.

—— **Wife not Joining in Operative Part of Deed.**]—Where a wife was a party to and executed a deed, charging her separate property with payment of an annuity, but did not join in the operative part or the covenants :—Held, that there was no charge on the separate estate. *Tullett* v. *Armstrong*, 4 Beav. 319 ; 5 Jur. 601.

—— **Restraint on Anticipation.**]—A testator devised certain real estates to trustees, upon trust for A. for her life, for her separate use, without power of anticipation. A. was a single woman at the date of the will, and at the death of the testator, and there was no gift over in case of her attempting to alien. She afterwards married, and she and her husband granted an annuity, and charged it on the property devised to her in the manner before mentioned :—Held, that the gift to her separate use, and also the restraint upon alienation, were valid and effectual, and that the annuitant had no claim on the property so devised. *S. C.*, 1 Beav. 1 ; 8 L. J., Ch. 19 ; 2 Jur. 912. Affirmed, 4 Myl. & C. 377 ; 9 L. J., Ch. 41. And see *Scarborough* v. *Borman*, 1 Beav. 34 ; 8 L. J., Ch. 22 ; 2 Jur. 915. Affirmed, 4 Myl. & C. 377, 407 ; 9 L. J., Ch. 48 ; 4 Jur. 38.

—— **Avoidance of—Wife "doing Equity."**]—Where wife sues (which she ought to do) to avoid an annuity charged by her on her separate estate, on account of defect of memorial. the maxim, "he that will have equity," &c., does not apply to compel her to repay the consideration money, nor can it be recovered against her. *Aguilar* v. *Aguilar*, 5 Madd. 414. And see *Jones* v. *Harris*, 9 Ves. 486 ; 7 R. R. 282.

Bond by Feme Covert.]—Bond of a feme covert, jointly with her husband, shall bind her separate property. *Hulme* v. *Tenant*, 1 Bro. C. C. 16 ; Dick. 560 ; *Standford* v. *Marshall*, 2 Atk. 69. See also *Anon.*, 18 Ves. 258 ; 11 R. R. 194.

—— **As Surety.**]—Bond by feme covert as surety, enforced against her separate estate under a settlement to her separate use, with power of appointment by will, &c., and in case she should die in life of husband, and without making any will, as to the whole or any part, then as to the whole or such part, as to which no gift or disposition should be made, to the persons who would be entitled by statute if she had died intestate and unmarried. *Heatley* v. *Thomas*, 15 Ves. 596 ; 10 R. R. 122.

Rent — Agreement to Pay.] — A married woman, having separate property, and who was living apart from her husband, made an agreement to take the lease of a dwelling-house :—Held, that to the extent of her separate property she was liable to pay the rent. *Gaston* v. *Frankum*, 2 De G. & Sm. 561 ; 13 Jur. 739. And see *Master* v. *Fuller*, 1 Ves. J. 513 ; 4 Bro. C. C. 19.

Wife Surety for Husband's Mortgage Debt.]—A married woman, entitled for her separate use, mortgaged her renewable leasehold estate as surety for her husband. The husband covenanted with the mortgagee to pay the money, and also gave him a judgment. The husband renewed the lease, and paid the fine. The lease was granted to the husband and wife, their executors, administrators, and assigns. The wife survived. The executor of the husband paid off the mortgage debt, and took an assignment of the mortgage. There were other creditors, and the estate was insolvent. In a creditor's suit against the executor of the husband, the wife made a claim to have her estate re-assigned to her, discharged of the mortgage debt and the renewal fine :—Held, that the husband's estate was solely liable for the mortgage debt ; that the creditors of the husband had no right to marshal the assets, or to compel the mortgagee to resort to the wife's leaseholds ; that the fine was not an advancement by the husband for the benefit of the wife ; that the executor was an incumbrancer on the wife's leaseholds for the amount of the fine ; and, subject to the payment of the fine, the wife's claim must be allowed. *Eyton* v. *Broughton*, 1 Eq. R. 164.

Wife Depositing Bond as Collateral Security.]—A bond was vested in a trustee in trust, as to income, for a married woman for her life for her separate use, with remainder ; as to the corpus, in trust for her issue ; and in default of issue, in trust for such persons as the married woman alone, notwithstanding her coverture, should by deed or instrument in writing, to be by her sealed and delivered in the presence of, and to be attested by, two credible witnesses, appoint. The husband being indebted to his bankers on the balance of an account current, the married woman deposited the bond with the bankers, with a letter signed by her to the effect that in consideration of the bankers paying or having already paid the cheques of the husband or otherwise advancing him sums of money, she thereby guaranteed the repayment thereof ; and that she deposited as a collateral security the bond, which she undertook to assign to the bankers on request :—Held, that the consideration was sufficient, and that the separate life-interest of the wife was effectually charged ; but that, the letter not having been executed and attested as required by the power, the court would not under the circumstances give effect to it as an appointment. *Tuckwell* v. *Gardiner*, 5 De G. & Sm. 58 ; 21 L. J., Ch. 777 ; 16 Jur. 588.

Trustee Induced to take Shares—Indemnity against Contribution.]—A married woman, having property settled to her separate use, with a restraint against anticipation, and having separate property not subject to such restraint, induced one of her trustees to apply for, and accept in his own name, certain shares in a banking company, upon the undertaking that she would pay for them out of the savings of her separate income. The bank shortly afterwards failed, and the trustee was made a contributory, and paid calls in the winding up :—Held, that he was entitled to indemnity out of such part of the separate estate of his cestui que trust as was not subject to the restraint against anticipation. *Butler* v. *Cumpston*, 38 L. J., Ch. 35 ; L. R. 7 Eq. 16 ; 17 W. R. 24.

Held, also, that a fund representing savings out of the separate income which she had from time to time, partly before and partly after the transaction, invested in the names of her trustees, but without their knowledge and without any express declaration of trust, was available for the indemnity. *Ib.* And see *Leeds Banking Co., In re*, L. R. 3 Eq. 781.

Parochial Rates—Married Woman Rated as

Owner—Non-payment—Agreement—Imprisonment.]—A married woman rated as owner of hereditaments under s. 4 of the Poor Rate Assessment Act, 1869, is liable to be imprisoned on non-payment of parochial rates, in default of sufficient goods being found whereon to levy distress. The notice given by an owner under s. 4 does not constitute an agreement between such owner and the overseers. *Allen (Elizabeth), In re*, 63 L. J., M. C. 267; [1894] 2 Q. B. 924; 10 R. 514; 43 W. R. 141; 59 J. P. 229.

ii. *Cases since the Married Women's Property Act*, 1882.

Married Women's Property Act, 1882, s. 1 (2).]—*A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.*

Married Women's Property Act, 1893, s. 1.]—*Every contract hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; (c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.*

Married Women's Property Act, 1882, s. 1, sub-s. 4, not Retrospective.]—Sub-section 4 of s. 1 of the Married Women's Property Act, 1882, which enacts that a married woman's contract with respect to her separate property shall bind not only the separate property to which she is entitled at the date of the contract, but all which she shall subsequently acquire, is not retrospective, and does not apply to a married woman's engagements made before the act. *Roper. In re, Roper* v. *Doncaster*, 58 L. J., Ch. 215; 39 Ch. D. 482; 59 L. T. 203; 36 W. R. 750.

Sub-section 4 of s. 1 of the Married Women's Property Act, 1882, is not retrospective, and, therefore, in an action on a contract made by a married woman before the passing of that act, judgment cannot be ordered in such terms as to be available against separate property to which the defendant became entitled after the date of the contract. *Turnbull* v. *Forman*, 54 L. J., Q. B. 489; 15 Q. B. D. 234; 53 L. T. 128; 33 W. R. 768; 49 J. P. 708—C. A. And see *Davies* v. *Stanford*, 61 L. T. 234; and *Conolan* v. *Leyland*, 27 Ch. D. 632.

Contract—Existence of Separate Estate at Time of Contract—Onus of Proof.]—Under the Married Women's Property Act, 1882, a married woman cannot make a contract in respect of and to bind her separate estate unless she has separate property at the time of making the contract. Therefore, in an action upon a contract made by a married woman, it lies upon the plaintiff to show that she had separate property at the time when she made the contract. *Palliser* v. *Gurney*, infra (19 Q. B. D. 519), approved. *Stogdon* v. *Lee*. 60 L. J., Q. B. 669; [1891] 1 Q. B. 661; 64 L. T. 494; 39 W. R. 467; 55 J. P. 533—C. A.

—— **Onus of Proof.**]—Section 2, sub-s. 2 of the Married Women's Property Act, 1882, does not make a married woman capable of rendering herself liable in respect of her separate property on any contract unless she has some separate property at the time the contract is made. In an action against a married woman to recover the price of goods sold and delivered to her:—Held, that the onus was on the plaintiff to show that the defendant had separate property at the time she made the contract. *Palliser* v. *Gurney*, 56 L. J., Q. B. 546; 19 Q. B. D. 519; 35 W. R. 760; 51 J. P. 520. And see *Shakespear, In re, Deakin* v. *Lakin*, 55 L. J., Ch. 44; 30 Ch. D. 169; 53 L. T. 145; 33 W. R. 744.

—— **Evidence of Separate Property.**]—In an action by certain jewellers against a married woman for jewellery supplied, the jury found that she had purchased the goods "on her own credit for her own use as her separate estate." According to the evidence, the only separate estate existing at the time of the contract was certain other jewellery previously supplied by the plaintiffs and a wardrobe of dresses, furs, and jackets, and there was no evidence of any separate property being subsequently acquired other than these:—Held, upon motion for judgment, that the plaintiffs were entitled to judgment, on the ground that such separate property was property in respect of which the married woman might reasonably be deemed to have contracted credit within the meaning of the Married Women's Property Act, 1882, and that the words "unless the contrary be shown" in sub-s. 3 of s. 1 of that act, only admit of evidence of the fact of there being no such separate property in respect of which a married woman could reasonably be deemed to have contracted and not of any intention or absence of intention, of the married woman so to contract, at the time of making the contract or getting credit. *Leak* v. *Driffield* (24 Q. B. D. 98) distinguished. *Bonner* v. *Lyon*, 38 W. R. 541.

Question of Reasonable Inference—Clothing bought with Separate Income.]—An action of contract against a married woman, under s. 1, sub-s. 2 of the Married Women's Property Act, 1882, is answered, if it appears that, at the time of entering into the contract, the married woman had not any separate property which she could reasonably be supposed to have intended to bind. A married woman was entitled to the income of certain stock for her separate use without power of anticipation. At the time of entering into the contract sued upon she had spent all the income then accrued in clothing for herself and her children:—Held, that it was unreasonable to suppose that she intended to bind the clothing by her contract. *Leak* v. *Driffield*, 59 L. J., Q.

B. 89; 24 Q. B. D. 98; 61 L. T. 771; 38 W. R. 93.

—— **Jewellery and Clothing.**]—In an action against a married woman upon a balance of account for goods supplied, it was proved that she was entitled to an income of 300*l.* a year, subject to a restraint on anticipation; this income her trustee received and paid it over to her, and she paid bills with it and kept some portion for her own immediate use. It was also proved that she lived in a house rent free which she had let on two occasions and received the sums paid for rent. She also had some jewellery and wearing apparel of value:—Held, that there was ample evidence to show that the defendant had sufficient separate estate at the times she bought the goods, and, therefore, that she was liable for the sum claimed. *Everett* v. *Paxton*, 65 L. T. 383; 56 J. P. 230.

—— **Free separate Property £3 or £4.**]—Where a married woman entered into a covenant in a mortgage deed for the payment of 400*l.*, and the only free separate estate that she had at the date of the covenant was about 3*l.* or 4*l.*:—Held, that there was no presumption of law that the contract was entered into with respect to, and to bind such small separate estate, and that the contract was not binding. *Braunstein* v. *Lewis*, 65 L. T. 449; 55 J. P. 775—C. A.

—— **Divorce Proceedings—Costs of Solicitor.**]—A married woman, having either no separate property, or only separate property subject to a restraint on anticipation, who institutes divorce proceedings after the passing of the Married Women's Property Act, 1882, cannot be deemed under the act to have entered into a contract, with respect to her separate property, for payment of the costs of her solicitor incurred in the divorce proceedings. *Harrison* v. *Harrison*, 58 L. J., P. 28; 13 P. D. 180; 60 L. T. 39; 36 W. R. 748—C. A.

—— **Action by Executors against Legatee for Indemnity.**]—A married woman became entitled to the residue of a testator's estate for her separate use. A part of the residue consisted of certain shares not fully paid up. The certificates for the shares were handed to her by the executors, but no transfer was executed. A call was afterwards made on the shares, which the married woman refused to pay. The executors commenced an action against the married woman for an indemnity:—Held, that they were entitled thereto; that the words "or otherwise" in s. 1, sub-s. 2 of the Married Women's Property Act, 1882, gave the executors the right to sue her in respect of her separate estate. The object and effect of s. 1 of the Married Women's Property Act, 1882, is to enable a married woman to be sued on any cause of action on which a man can be sued, subject to the fact that her power to contract is limited, and the remedy against her is confined to her separate estate. *Kershaw, In re, Whittaker* v. *Kershaw*, 60 L. J., Ch. 9; 45 Ch. D. 320; 63 L. T. 203; 39 W. R. 23—C. A.

Post-nuptial Settlement of Wife's Property made after Debt contracted—Validity of.]—A woman at the time of her marriage in December, 1882, being then an infant, was entitled to a sum of money absolutely for her separate use, and to certain freeholds. After her marriage, and while still an infant, she contracted a debt for which judgment was recovered against her separate estate. After this debt was contracted, and before the woman attained her majority, a post-nuptial settlement of all the property was made in 1884 under the Infants' Settlement Act, to the wife for her life for her sole and separate use with a restraint on anticipation, and after her death to her husband and children. This settlement was approved by the chancery division of the high court. The judgment creditor applied to have a receiver appointed of the property, upon the ground that such settlement was void as against creditors under the last clause of s. 19 of the Married Women's Property Act, 1882:—Held, that the settlement, though made after the debt was contracted, was valid as against creditors by virtue of the first part of s. 19 of the act, and that the judgment creditor was not entitled to have a receiver appointed. *Hemingway* v. *Braithwaite*, 61 L. T. 224.

Post-nuptial Settlement before 1882—Contract during Coverture.]—By a post-nuptial settlement, made before the Married Women's Property Act, 1882, property devised by will to a married woman for her separate use without restraint against anticipation was limited to her for life for her separate use without power of anticipation, remainder to the husband for life, remainder to the children. The wife after the act and during coverture made a promissory note in favour of the plaintiffs, and after the death of the husband the plaintiffs obtained judgment upon the note against the widow and an order for the appointment of a receiver of the rents and profits of the property in settlement:—Held, that upon the true construction of the act, ss. 1, 5, and 19, the property in settlement was not liable to satisfy the judgment, and that the order appointing the receiver must be discharged. *Beckett* v. *Tasker*, 19 Q. B. D. 7; 56 L. T. 636; 36 W. R. 158.

Undertaking as to Damages.]—Where an injunction is wrongly granted, an undertaking as to damages given to the plaintiff is equally enforceable whether the mistake was in point of law or in point of fact. In such a case a husband-defendant is not prohibited from enforcing an undertaking given by a wife-plaintiff by reason of the provision in the Married Women's Property Act, 1882, s. 12, debarring him from suing his wife in tort. A married woman who has given an undertaking as to damages since the Married Women's Property Act, 1882, will be dealt with on the same footing as that on which a married woman's next friend who had given such an undertaking would have been dealt with before the act. *Hunt* v. *Hunt*, 54 L. J., Ch. 289.

A married woman living and carrying on business apart from her husband brought her action for specific performance of an alleged agreement to grant a lease, and moved for an interlocutory injunction to restrain the defendant from dealing with the property. The defendant alleged that the plaintiff had not sufficient separate property to satisfy her present liabilities, and that her undertaking in damages would be illusory, and asked for the undertaking of some responsible person:—Held, that since a married woman was for the purpose of suing in the same position as a feme sole, no distinction could be made between her and a male plaintiff; and that, therefore, her sole undertaking for damages

was sufficient. *Pike* v. *Care*, 62 L. J., Ch. 937 ; 68 L. T. 650.

Action brought before, Order of Reference by Consent after Act.]—Section 1, sub-ss. 3 and 4 of the Married Women's Property Act, 1882, have not a retrospective operation so as to include contracts entered into by a married woman before the date of the commencement of the act. But an order made after the commencement of the act by consent in an action by a creditor against a married woman in respect of her contract before the act, by which order all questions under the contract were referred to an arbitrator, and the parties bound themselves to abide by, obey, perform, and keep the award, is an agreement by the married woman after the commencement of the act, within s. 1, sub-s. 3 ; and therefore, by s. 1, sub-s. 4, any separate estate which she had at or after the date of such agreement is liable to pay the amount found by the award to be due from her under the contract. *Conolan* v. *Leyland*, 54 L. J., Ch. 123 ; 27 Ch. D. 632 ; 51 L. T. 895.

Debt Contracted during Marriage — Death of Husband — Restraint on Anticipation.] — A judgment, in respect of a contractual liability incurred by a woman during coverture, obtained against her after the death of her husband as against her separate property not subject to any restriction against anticipation, cannot, though she is discovert, be enforced against property which during coverture was her separate estate without power of anticipation. *Pelton* v. *Harrison*, 60 L. J., Q. B. 742 ; [1891] 2 Q. B. 422 ; 65 L. T. 514 ; 39 W. R. 689—C. A.

Form of Judgment—Restraint on Anticipation.]—The proper form of judgment against a married woman under, s. 1 sub-s. 2, of the Married Women's Property Act, 1882, settled by the court. *Scott* v. *Morley*, 57 L. J., Q. B. 43 ; 20 Q. B. D. 120 ; 57 L. T. 919 ; 36 W. R. 67 ; 4 Morrell, 286 ; 52 J. P. 230—C. A.

An order, with costs, made against a married woman, suing or sued under the Married Women's Property Act, 1882, in respect of her separate property, must contain a restriction in the words of s. 1, sub-s. 2, that the order is "with costs payable out of her separate property and not otherwise," and a proviso limiting execution to her separate property not subject to any restriction against anticipation. *Scott* v. *Morley* (20 Q. B. D. 120) followed. *Galmoye* v. *Cowan*, 58 L. J., Ch. 769. *And see* col. 1288.

Form of judgment against a woman married after the accrual of a debt, it being alleged that all her property was put in settlement on her marriage. *Findlater's Brewery Co.* v. *Lynch*, 24 L. R. Ir. 249.

Order for Costs against Married Woman—Restraint on Anticipation — Income accrued between commencement of Suit and date of Order.] —A married woman, entitled under a will to separate property without power of anticipation, having been ordered to pay the costs of proceedings taken by her in her own name under the Married Women's Property Act, 1882 :—Held, that all income accrued due to the date of the order might be attached in execution. *Glanvil, In re* (31 Ch. D. 532), distinguished. *Cox* v. *Bennett*, 60 L. J., Ch. 651 ; [1891] 1 Ch. 617 ; 64 L. T. 380 ; 39 W. R. 401—C. A.

The will fixed no days for payment of the income to the married woman, but by an order in an administration suit direction was given for quarterly payments :—Held, that the restraint on anticipation did not apply to a balance of income in the hands of the trustees at the date of the order for costs, though by reason of the direction in the administration suit it was not immediately payable to the married woman. *Ib.*

Settlement made before 1882—Restraint on Anticipation.] — Section 19 of the Married Women's Property Act, 1882, so far as it affects the validity of a settlement or an agreement for a settlement as against the creditors of a married woman, is not retrospective. Therefore execution cannot issue against property settled before the commencement of the act to the separate use of a married woman without power of anticipation. *Smith* v. *Whitlock*, 55 L. J., Q. B. 286 ; 34 W. R. 414.

Equitable Execution—Marriage Settlement—Life Interests of Husband and Wife in use of Furniture—Judgment Creditor of Husband and Wife.]—Under a marriage settlement certain furniture and effects were vested in trustees upon trust to permit the wife to use the same during her life for her sole and separate use, and after her death to permit her husband to use the same during his life, and the settlement contained a power, under certain conditions, to sell the furniture and invest the proceeds, and that the trustees should stand possessed of the annual income therefrom in trust for such persons as the husband and wife should during their joint lives jointly appoint, or as the survivor should appoint, and in default of such appointment for the wife for her life for her sole and separate use, and so that she should not have power to anticipate the same, with other trusts over in favour of the children. Upon an application by a judgment creditor of the husband and wife for the appointment of a receiver of the several interests of the husband and wife under the settlement :—Held, that, having regard to the terms of the settlement, the court had no power to appoint a receiver of the interests of the husband and wife under the settlement. *Whitaker* v. *Cohen*, 69 L. T. 451. *And see* EXECUTION.

Garnishee Proceedings.]—A judgment for a debt against a married woman enforceable only against property to her separate use which she is not restrained from anticipating, is a "judgment" within the meaning of Ord. XLV., r. 1, which entitles the judgment creditor to institute garnishee proceedings, and to attach a debt owing or accruing to such married woman. *Holtby* v. *Hodgson*, 61 L. T. 297. Affirmed, 24 Q. B. D. 103 ; 38 W. R. 68—C. A.

Appointment by Married Woman.]—Under s. 1, sub-s. 3, 4, and s. 4 of the Married Women's Property Act, 1882, when read together, property appointed by a married woman by will under a general testamentary power becomes on her death liable for her "debts and liabilities" even though she may have had no separate estate at the time she contracted them. *Ann, In re, Wilson* v. *Ann*, 63 L. J., Ch. 334 ; [1894] 1 Ch. 549 ; 70 L. T. 273. And see *De Burgh Lawson, In re*, 41 Ch. D. 568.

Debts of Deceased Wife—Administration not

taken out—"Legal Personal Representative"—Leasehold Property.]—A husband who jure mariti succeeds to leasehold property which belonged to his deceased wife as separate property, without taking out administration, is her "legal personal representative" within the meaning of s. 23 of the Married Women's Property Act, 1882, so as to be liable to the extent of such separate property for his wife's debts. *Surman* v. *Wharton*, 60 L. J., Q. B. 233; [1891] 1 Q. B. 491; 64 L. T. 866; 39 W. R. 416.

Bankruptcy—Separate Trading—Discontinuance of Business.]—A married woman may be made bankrupt in respect of a debt incurred by her whilst carrying on a trade separately from her husband, notwithstanding that at the date when the act of bankruptcy on which the petition is founded was committed she had ceased to trade. *McGeorge, Ex parte, Stevens, In re* (51 L. J., Ch. 909; 20 Ch. D. 697), distinguished. *Dagnall, In re, Soan, Ex parte*, 65 L. J., Q. B. 666; [1896] 2 Q. B. 407; 75 L. T. 142; 45 W. R. 79. *See* infra, col. 1115.

c. Bills of Exchange and Promissory Notes.

Married Woman living Abroad.]—A married woman living abroad, alone, under circumstances which led to the belief that she was a feme sole, indorsed a bill of exchange, and drew a cheque on her London bankers for the purpose of enabling her agent to raise money. The bill and cheque were cashed by a banker at Paris, but were dishonoured:—Held, that her separate estate was liable to make good the amount, irrespectively of any equities between her and her agent. *M'Henry* v. *Davies*, 39 L. J., Ch. 866; L. R. 10 Eq. 88; 22 L. T. 643; 18 W. R. 855.

Quære, whether the Statute of Limitations can be pleaded in bar of a bill filed to enforce payment out of the separate estate of a married woman, on a bill of exchange given by her in her separate capacity. *Coppin* v. *Gray*, 1 Y. & Coll. C. C. 205; 11 L. J., Ch. 105; 6 Jur. 512.

—— **Executory Settlement.**]—A married woman was, under articles for a settlement, seised and possessed of property to be settled upon her for her life for her separate use without any restraint on anticipation. By a subsequent deed (but which was inoperative) the lady and her husband purported to settle the property, with a restraint on anticipation. She carried on the business of an hotel keeper, and in so doing gave the plaintiff (a wine merchant) a bill of exchange accepted by her, to secure a debt. She was possessed of some shares, not included in the articles. The plaintiff dealt with her after her marriage on the same terms as he had done before it, and credited her as a feme sole. Her husband became bankrupt, and the bill was dishonoured:—Held, that so far as the articles were executory, the court would restrain the lady from anticipation. *Symonds* v. *Wilkes*, 10 L. T. 153.

Held, also, that the only relief to which the plaintiff was in equity entitled was an inquiry whether any and what separate property of the lady existed that was applicable to the payment of his debt, having regard to the shares, and declaring that if any of them were undisposed of he might be paid thereout. *Ib.*

—— **Forgery by Husband — Purchaser for Value.**] — A bill, payable to the order of a married woman, was remitted to her in respect of her separate estate. Her husband got possession of it without her knowledge, forged her name on the back, then indorsed his own name, and gave the bill to P. to get it discounted, stating that she had indorsed it. P. got it discounted, and in order to do so, was obliged himself to indorse it. He then paid the proceeds to the husband. The acceptor, in consequence of a notice from the wife, refused to pay the holder, who thereupon had recourse to P., who paid the holder. A suit having been instituted in equity by the wife, to establish her title to the bill, and to restrain P. from suing the acceptor:—Held, that P. was to be treated as a purchaser of the bill for value. *Dawson* v. *Prince*, 2 De G. & J. 41; 27 L. J., Ch. 169; 4 Jur. (N.S.) 497; 6 W. R. 171.

Held, also, that assuming P. to have notice that the bill was drawn in respect of the wife's separate estate, yet, as there was nothing to excite suspicion of the forgery, he was justified in relying on the husband's statement that the bill had been indorsed by her, and was not bound to inquire further as to the genuineness of her signature, and that there was, therefore, no equity to restrain him from the assertion of the legal title which he had acquired by the husband's indorsement. *Ib.*

Quære, whether the circumstance of a bill of exchange being drawn in favour of a married woman amounts to notice, actual or constructive, that it is drawn in respect of her separate estate. *Ib.*

Promissory Note several and jointly with Husband.]—A woman who was married subsequently to the passing of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), signed with her husband a joint and several promissory note to secure money advanced to him. The husband having become bankrupt:—Held, that the wife's separate estate was liable on the note. *Davies* v. *Jenkins*, 6 Ch. D. 728; 26 W. R. 260.

Held, also, that her trustees were not necessary parties to the action. *Ib.*

A married woman having property settled on her for her separate use, without power of anticipation or alienation, made, during her coverture, together with her mother and husband, a joint and several promissory note. Before it became due her husband died, after which she in no way acknowledged or ratified the contract. On action brought against her on the note when discovert:—Held, that the note being when made nudum pactum both at law and in equity, did not become binding on her after her husband's death; and her separate property could not be reached in the action. *Roberts* v. *Watkins*, 46 L. J., Q. B. 552; 36 L. T. 799.

—— **Manager of Estate.**]—A sum of 1,000*l.* settled in trust for S. for life, and after her decease in trust for her daughter, F. (a married woman) for life, for her separate use, without power of anticipation, was invested on mortgage of lands, the property of F.'s husband. Arrears of interest became due, and S. assigned the arrears at that time owing, and the future interest to become due in her own lifetime, to a trustee in trust for F., for life, for her separate use, to be paid to her on her own sole receipt, without power of anticipation, and as to so much of the said moneys as should remain due, owing or unpaid at the

time of her decease, upon trust for such persons as she should appoint. F.'s husband afterwards executed a mortgage of lands to the same trustee to secure the arrears, which in the mortgage deed were recited to have been paid to F., and re-lent by her to her husband. The trustee did not execute either deed, nor did he act in the trust. The second deed contained no clause in restraint of anticipation. Some time after the execution of the deeds, F.'s husband conveyed his lands and other property in trust for his creditors, and one of the trustees joined with him in making a joint and several promissory note to secure an advance made to him. F. was subsequently appointed by the surviving trustee of the creditor's deed (who had joined in making the promissory note) manager of the trust property, and having entered into receipt of the rents and profits of the lands and property comprised in the trust deed, she joined with her husband in making and renewing from time to time joint and several renewals of the note. F.'s husband was adjudicated a bankrupt. The payees, in the ultimate renewals, deposed that she dealt with them on the credit of her separate estate, but this was disputed by her, and she alleged that she joined in renewing the notes with the intention that they should be paid out of the rents of the trust property over which she was manager :—Held, upon the evidence, that F.'s separate estate was chargeable with the amount of the notes. *Devitt* v. *Faussett*, 7 L. R. Ir. 511. Affirmed on appeal, with a variation, 9 L. R. Ir. 84—C. A.

Property subject to Testamentary Power of Appointment.]—Property was settled on a feme covert for her separate use for life, with a power to appoint it by deed or will. She executed the power by will :—Held, that the appointed property was not liable to pay a promissory note signed by her. *Shattock* v. *Shattock*, 35 Beav. 489 ; 35 L. J., Ch. 509 ; L. R. 2 Eq. 182 ; 12 Jur. (N.S.) 405 ; 14 L. T. 452 ; 14 W. R. 600.

A woman entitled to a sum of stock, settled it, on her marriage, for her separate use for life, with power to her to appoint it by will only, but no trust was declared in default of appointment. After her marriage she signed a promissory note, and then, by will, appointed the stock to her husband. Semble, that the holder of the note is not defeated thereby. *Nail* v. *Punter*, 5 Sim. 562.

See also *Owen* v. *Homan*, 13 Beav. 196 ; 19 L. J., Ch. 549 ; 14 Jur. 821 ; *Vandergucht* v. *De Blaquiere*, 5 Myl. & C. 229 ; 3 Jur. 1116 ; *Bullpin* v. *Clarke*, 17 Ves. 365 ; *Devitt* v. *Faussett*, supra. *And see* col. 1099.

d. Fraud by Wife.

Making Appointed Estate Liable as General Assets.]—A married woman had a life estate in personalty to her separate use, with a general power of appointment by will, and, in default of appointment, over. She had also real estate similarly settled, except that in default of appointment the ultimate limitation was to her and her heirs, so that her husband should not be benefited by the curtesy. She borrowed money, fraudulently representing herself to be single, and purported to execute a mortgage of some of the settled real estate, with the ordinary covenant to pay. Afterwards, she by will appointed her freehold and personal estate chiefly to her children, and then died :—Held, that by the fraud, the married woman made the appointed estate liable as general assets, as if she had been a feme sole in respect of it ; and that the mortgagee had a right not only to a charge on the mortgaged real estate to which she was entitled in remainder, but, if it was not sufficient, he was, by reason of the fraud, to rank as a creditor on her general assets, and to take the appointed personal fund, if there was not enough without it. *Vaughan* v. *Vanderstegen*, 2 Drew. 363 ; 23 L. J., Ch. 793 ; 2 W. R. 599.

Making good Representation as to Chargeability of Reversionary Interest.]—A wife living separate from her husband, represented to G. that she had the power of charging the reversionary interest in a fund to which she was entitled on the death of her husband, the fact being that she was restrained from anticipation during coverture. On the strength of such false allegation she induced G. to destroy certain bills of exchange he had as securities for money lent to her on her executing an agreement to charge her reversionary interest with the debt, and at the same time entreating G. to make no inquiries as to the truth of her statements, as it would lead to her husband's discovering her liabilities and prevent a reunion :—Held, on the assumption that G. was really ignorant of the trusts of the settlement, that she had been so far guilty of fraud as to make the false allegation binding on her reversionary estate. *Green* v. *Lyon*, 21 W. R. 695. And see *Greatley* v. *Noble*, 3 Madd. 79.

Suppressing Notice of Settlement.]—Husband and wife, in treating for a loan on the security of her real estate, informed the mortgagee's solicitor of the existence of a settlement executed on their marriage, whereby, on her attaining her majority, the property was to be conveyed to trustees upon the usual trusts, although no such conveyance was ever executed. The solicitor told them that he should not mention it to the mortgagee, lest he should refuse to make the advance. The mortgage deed was executed without further mention of the settlement, and it was acknowledged by the wife at the time of its execution ; but by reason of the sudden death of the solicitor, the certificate of its acknowledgment was not filed. The omission was not discovered until after the mortgagee had become aware of the settlement, upon which a new acknowledgment was made by the wife, and a certificate thereof was at once filed :—Held, that the fraud committed was one for which a married woman was as liable as a feme sole, and that the mortgagee's equity was as valid against her as against her husband, and that the mortgagee had priority over the settlement. *Sharpe* v. *Foy*, L. R. 4 Ch. 35 ; 19 L. T. 541 ; 17 W. R. 65.

Husband not to pay Costs of.]—Where a feme covert has been guilty of fraud, solely without the husband, no precedent of his paying costs. *Cotton* v. *Luttrell*, 1 Atk. 453.

e. Funeral Expenses.

Chargeability to Separate Property.]—The vice-chancellor doubted whether husband had right to throw expense of wife's funeral on her separate estate. *Gregory* v. *Lockyer*, 6 Madd. 90 ; 22 R. R. 246.

A married woman, by her will, in exercise of a power of appointment over trust moneys, made several bequests, and "after payment of her just debts, funeral and testamentary expenses, and the expenses attending the execution of her will, appointed" the residue of the trust moneys among her nieces:—Held, that the charge of funeral expenses was not contingent upon her surviving her husband, and that her husband surviving was entitled to repayment out of trust moneys of money paid by him in respect of such expenses. *Willeter* v. *Dobie*, 2 Kay & J. 647; 4 W. R. 669.

f. Maintenance of Child or Husband.

Liable to Parish for Maintenance of Husband —45 & 46 Vict. c. 75, s. 20.]—*Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by s.* 33 *of the Poor Law Amendment Act*, 1868, *they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.*

Liable to Parish for Maintenance of Children —45 & 46 Vict. c. 75, s. 21.]—*A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren, as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.*

Chargeability to Separate Property.]—Where father is not of ability, court will allow maintenance for children, though mother has competent separate estate. *Haley* v. *Bannister*, 4 Madd. 275; 20 R. R. 299.

The court cannot, on account of the misconduct of the wife, provide for the children out of her separate property. *Hodgens* v. *Hodgens*, 4 Cl. & F. 323; 11 Bli. (N.S.) 62; Ll. & G. t. Plunk. 533.

W. having become lunatic, was taken to an asylum in London. His wife, who at the time of her marriage was entitled to separate property, removed to London, in order to be near her husband, and borrowed money on his credit to meet the expenses of such removal of herself and husband, and to provide herself with necessaries. He died, and a bill was filed for the administration of his estate. The persons who had made the advances to the wife carried in their claim for the amount against the husband's estate:—Held, that the claim must be allowed. *Davidson* v. *Wood*, 32 L. J., Ch. 400; 9 Jur. (N.S.) 589; 8 L. T. 476; 11 W. R. 791.

Semble, that a woman possessed of separate estate is entitled to maintenance by her husband although he be a lunatic, and is not bound to pledge her separate estate in order to provide herself with necessaries. *Ib.*

g. Rates.

Parochial—Rated as Owner—Non-payment—Agreement—Imprisonment.]—A married woman rated as owner of hereditaments under s. 4 of the Poor Rate Assessment Act, 1869, is liable to be imprisoned on non-payment of parochial rates, in default of sufficient goods being found whereon to levy distress. The notice given by an owner under s. 4 does not constitute an agreement between such owner and the overseers. *Allen* (*Elizabeth*), *In re*, 63 L. J., M. C. 267; [1894] 2 Q. B. 924; 10 R. 514; 43 W. R. 141.

h. Torts and Breaches of Trust by Wife.

Immunity.]—The separate estate of a married woman is not liable for general torts committed by her, nor for breaches of trust, unless the breaches of trust consist in appropriation of trust funds comprised in the same settlement as that creating her separate estate. *Wayford* v. *Heyl*, 44 L. J., Ch. 567; L. R. 20 Eq. 321; 33 L. T. 155; 23 W. R. 848.

Breach of Trust—Breach of Contract—Tort.]—In 1876 the defendant, a married woman, agreed to grant a lease of a piece of land to V., when he should have built a messuage thereupon, V. to have an option of purchasing the freehold. In 1877 V. assigned the agreement to the plaintiffs by way of mortgage. In 1878 the defendant conveyed the land to V.:—Held, assuming that the defendant had notice of the assignment of 1877, that she had not committed a tort, but a breach of trust or implied contract which was not such an engagement as would have bound her separate estate before the Married Women's Property Act, 1882. *Davies* v. *Stanford*, 61 L. T. 234.

Breach of Trust at Solicitation of Wife.]—Where the trustee of a fund settled on a husband until insolvency, and then to the separate use of his wife, at the urgent solicitation of the wife committed a breach of trust by lending part to the husband, and he became insolvent, whereupon the wife claimed the whole fund:—Held, that the trustee was responsible to her, as during the husband's estate she could not bind the remainder to her separate use. It is no answer to such a claim that the husband's insolvency was concerted, if that was done merely to evade his debts; but semble, it would be a defence if the insolvency was concerted for the purpose of calling the wife's estate into existence. *Mara* v. *Manning*, 8 Ir. Eq. R. 218; 2 Jo. & Lat. 311.

Parol Engagement will Bind.]—Semble, that a married woman may make her separate estate liable by parol engagement as well as by express contract, but there must be some engagement or contract. *Wright* v. *Chard*, 4 Drew. 673; 29 L. J., Ch. 82; 5 Jur. (N.S.) 1334; 1 L. T. 138. Affirmed 29 L. J., Ch. 415; 2 L. T. 104; 8 W. R. 334.

Settlement of Necklace—Fraudulent Sale by

Settlor.]—A woman, on her marriage, settled a necklace upon trust for herself for life, with remainder to her eldest son. She also settled other property to her separate use for life, as to part of such property with, and as to other part without, restraint upon anticipation. She afterwards, in fraud of the settlement, sold the necklace, and appropriated the money to her own use:—Held, that the property settled to her separate use, with restraint upon anticipation, was not chargeable with the value of the necklace, but that the property settled without such restraint was so chargeable. *Clive* v. *Carew*, 1 J. & H. 199; 28 L. J., Ch. 685; 5 Jur. (N.S.) 487; 7 W. R. 433.

Liability of Husband.]—The Married Women's Property Act, 1882, does not abolish the liability of a husband for his wife's wrongful acts, and the plaintiff may sue the husband and wife jointly or the wife alone for wrongs committed by her after the marriage. *Seroka* v. *Kattenburg*, 55 L. J., Q. B. 375; 17 Q. B. D. 177; 54 L. T. 649; 34 W. R. 543.

And see *Bahin* v. *Hughes*, 55 L. J., Ch. 472; 31 Ch. D. 390; 54 L. T. 188; 34 W. R. 311.

i. Trading separately from Husband.

Married Women's Property Act, 1882, s. 5.]—*Every married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a feme sole.*

Liability to Bankruptcy.]—A married woman, possessed of separate estate, but not carrying on a trade separately from her husband, is not subjected to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under s. 4 of the Bankruptcy Act, 1883. *Coulson, Ex parte, Gardiner, In re*, 57 L. J., Q. B. 149; 20 Q. B. D. 249; 58 L. T. 119; 36 W. R. 142; 5 Morrell, 1.

"Carrying on Trade separately from her Husband"—Joint Business.] — A married woman cannot be made a bankrupt in respect of a business carried on by her if such business is even partially under the control of her husband. It is not sufficient that her interest in the business is her separate property. *Helsby, In re, Helsby, Ex parte*, 63 L. J., Q. B. 261; 10 R. 49; 69 L. T. 864; 1 Manson, 12.

Bankruptcy Notice — Separate Estate.] — A bankruptcy notice cannot be issued against a married woman under s. 4, sub-s. 1 (g) of the Bankruptcy Act, 1883, in respect of a judgment against her separate estate. *Lynes, In re, Lester, Ex parte*, 62 L. J., Q. B. 372; [1893] 2 Q. B. 113; 4 R. 416; 68 L. T. 739; 41 W. R. 488; 10 Morrell, 124; 58 J. P. 5—C. A.

—— **Judgment against Husband and Wife—Limited to Wife's Separate Estate—Death of Husband—Service of Notice on Widow.**]—A bankruptcy notice under s. 4, sub-s. 1 (g) of the Bankruptcy Act, 1883, cannot be issued against a widow against whom a creditor has in her husband's lifetime recovered a judgment in the form settled by the court of appeal in *Scott* v. *Morley* (20 Q. B. D. 120). *Hewett, In re, Levine, Ex parte*, 64 L. J., Q. B. 185; [1895] 1 Q. B. 328; 15 R. 162; 72 L. T. 60; 43 W. R. 237.

Discontinuance of Business.] — A married woman may be made bankrupt in respect of a debt incurred by her whilst carrying on a trade separately from her husband, notwithstanding that at the date when the act of bankruptcy on which the petition is founded was committed she had ceased to trade. She must be deemed to be still "carrying on a trade" within the meaning of s. 1, sub-s. 5, of the Married Women's Property Act, 1882, so long as any debts incurred by her while so trading remain unpaid. *McGeorge, Ex parte, Sterens, In re* (51 L. J., Ch. 909; 20 Ch. D. 697), distinguished. *Dagnall, In re, Soan, Ex parte*, 65 L. J., Q. B. 666; [1896] 2 Q. B. 407; 75 L. T. 142; 45 W. R. 79; 3 Manson, 218.

Separate Property—General Power of Appointment.]—By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 5, "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole":—Held, that the expression "separate property" includes only that which would, if the woman was unmarried, be her "property," and does not therefore include a general power of appointment by deed or will of which she is the donee, but which she has not exercised, and a married woman who has traded separately from her husband, and who has been adjudicated a bankrupt, cannot be compelled to execute a deed exercising such a power in favour of the trustee in the bankruptcy. *Gilchrist, Ex parte*, or *Armstrong, Ex parte, Armstrong, In re*, 55 L. J., Q. B. 578; 17 Q. B. D. 521; 55 L. T. 538; 34 W. R. 709; 3 Morrell, 193; 51 J. P. 292—C. A.

Loan to Husband for Trade—Settlement—Right of Proof.]—H. was married to his wife in 1864, and she subsequently became entitled to certain moneys under the wills of her father and grandfather. These moneys she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon the bankruptcy of H. a proof was tendered upon the settlement and rejected:—Held, that the settlement was not invalidated by s. 3 of the Married Women's Property Act, 1882, since that section was not retrospective, and could not affect previously existing rights. *Home, Ex parte, Home, In re*, 54 L. T. 301. See also *May, In re, Crawford* v. *May*, 60 L. J., Ch. 34; 45 Ch. D. 499; 68 L. T. 375; 38 W. R. 765.

j. Statute of Limitations—Analogy.

Simple Contract Debt.]—Feme covert, having a separate estate, borrows money, and gives a bond; the separate estate liable, and though six years pass, the demand not barred by the Statute of Limitations. *Norton* v. *Turvill*, 2 P. W. 144.

In 1875 a married woman borrowed money from her husband upon a parol agreement to repay him the amount with interest out of her separate estate. She died in 1884, without having paid anything in respect either of interest or principal, and without having given

any acknowledgment in writing of her liability to repay the debt. After her death her husband claimed repayment:—Held, that the debt was barred by analogy to the Statute of Limitations. *Norton* v. *Turvill* (2 P. Wms. 144) explained. *Hastings (Lady), In re. Hallett* v. *Hastings*, 56 L. J., Ch. 631; 35 Ch. D. 94; 57 L. T. 126; 35 W. R. 584; 52 J. P. 100—C. A. But see next case.

The liability of the separate estate of a married woman, for what would be a simple contract debt in the case of a person sui juris, is not barred by the lapse of six years from the accruer of the cause of action. *Vaughan* v. *Walker*, 8 Ir. Ch. R. 458.

—— **Moneys advanced for Necessaries—Trust.**]—Moneys advanced by a stranger in providing necessaries for the support of a married woman, living separate from her husband, are debts binding her separate estate; and, being debts payable out of funds held in trust for her separate use, are not barred by the Statute of Limitations. *Barber, In re, Hodgson* v. *Williamson*, 15 Ch. D. 87; 42 L. T. 676; 28 W. R. 944.

—— **Note given to Husband's Bankers—Consideration.**]—A married woman, who had property settled upon her to her separate use, in 1837 made a joint promissory note with her husband for 950*l.*, and delivered it to his bankers as a security for his overdrawn account; from time to time the note was renewed until the death of the husband in 1855, the last renewal bearing date 1848. At the time of his death the debt due by the husband to the bankers was 2,340*l.* 16*s.* 4*d.*, which was reduced by the realisation of other securities they held to 917*l.* 11*s.*, for which sum, on the 28th of August, 1856, she, after her coverture had determined, made and delivered her promissory note:—Held, that there was a good consideration, for the last-mentioned note, as the note made in 1848, although made during coverture, was binding on her separate estate in equity, and that it was immaterial whether it was barred by the Statute of Limitations or not. *Latouche* v. *Latouche*, 3 H. & C. 576; 34 L. J., Ex. 85; 11 Jur. (N.S.) 271; 13 L. T. 773; 13 W. R. 563.

k. Costs.

See col. 1302.

B. WIFE'S PROPERTY OTHER THAN SEPARATE ESTATE.

1. Generally.

Unity Doctrine.—From the time of the intermarriage the law looks upon the husband and wife as but one person, and therefore allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family, and for this reason the law gives the husband an absolute power of disposing of her personal property, no act of hers being of any force to affect or transfer that which by the intermarriage she has resigned to him—Bacon, Abr. B. & F. (c).

Disposition—Property in Autre Droit.]—A wife may make a will, disposing of property, which she only has in autre droit, as executrix, without her husband's consent. *Seammell* v. *Wilkinson*, 2 East, 552.

Share under Intestacy—Death of Wife.]—If, during marriage, the wife acquires a right to a distributive share in an intestate's estate, and dies without asserting her claim, leaving the husband surviving, who dies without asserting his claim, it is necessary for the next of kin of the husband, in order to enforce the right of the wife, and to reduce it into possession for their benefit, to take out letters of administration both to the wife and the husband, and to pay stamp duty for each grant. *Att.-Gen.* v. *Partington*, 3 H. & C. 193; 33 L. J., Ex. 281; 10 Jur. (N.S.) 825; 10 L. T. 751; 13 W. R. 54—Ex. Ch.

Title Deeds—Trustee in Bankruptcy of Husband of Tenant for Life.]—Where a wife is legal tenant for life of lands, not for her separate use, the trustee in bankruptcy of her husband has no absolute right to the possession of the title-deeds during the coverture, but the court has a discretion in the matter. *Rogers, Ex parte, Pyatt, In re*, 53 L. J., Ch. 936; 26 Ch. D. 31; 51 L. T. 177; 32 W. R. 737—C. A.

2. Equity to a Settlement.

a. General Principles.

Nature of the Equity.]—The wife's equity to a settlement does not depend on any right of property in her, but rests on the control which courts of equity exercise over property falling under their dominion. *Osborn* v. *Morgan*, 9 Hare, 432; 21 L. J., Ch. 318; 16 Jur. 52.

The right to a settlement is an obligation which the court fastens not upon the property, but upon the right to receive it. *Ib.*

Origin of the wife's equity to a settlement. *Ib.*

Court of Equity may impose Terms.]—Where husband has mere equitable right to property of wife, court may impose terms on his receiving it. *Becket* v. *Becket*, Dick. 343.

—— **Otherwise where Title of Husband a Legal One.**]—Where the husband has a legal title to his wife's personal estate, equity will not interpose in prejudice of such right, yet where he cannot get at it without the assistance of this court, it will put terms upon him. *Milner* v. *Colmer*, 2 P. Wms. 639.

If husband can lay hold of wife's estate, without aid of equity, he is not compelled to settle it; otherwise where he cannot. *Att.-Gen.* v. *Whorwood*, 1 Ves. 538; *Murray* v. *Elibank (Lady)*, 10 Ves. 84.

Trustee may Pay over to Husband before Bill filed.]—Previously to bill filed, trustee for wife may pay her personal property, or the rents, &c., of real estate to her husband, but not after. *Ib.*

Court in Loco Parentis.]—As a father would not have married his daughters without a provision, neither will a court of equity, which stands in loco parentis, do it. *Jewson* v. *Maulson*, 2 Atk. 417.

Misconduct of Husband.]—The wife's equity to a settlement out of her own choses in action

is in no respect founded on or influenced by the misconduct of the husband, and is the simple result of the rule, that he who seeks equity must do equity. *Warren* v. *Newton*, 7 Ir. Eq. R. 211.

Equitable Life Interest.]—Where an absolute equitable interest is given to the wife, the court will not permit husband to possess it without making provision for the wife, or without her express consent. *Elliot* v. *Cordell*, 5 Madd. 156; 21 R. R. 287.

But where equitable interest is for life only, husband may enjoy it without consent of wife, or making any provision for her. *Ib.*

But it is otherwise if he neglect to provide for her; therefore, in bankruptcy or otherwise, assignee is liable to make allowance. *Ib.*

Smallness of Sum no Objection.]—A married woman has an equity for a settlement, however small the sum. *Kincaid's Trusts, In re*, 1 Drew. 326; 22 L. J., Ch. 395; 17 Jur. 106; 1 W. R. 120.

Creditors of Wife.]—The creditors of a woman remaining unpaid after her marriage in respect of debts incurred before the marriage have a right to be satisfied out of her property, in priority to any equity to a settlement out of it which she may possess. *Barnard* v. *Ford*, *Carrick* v. *Ford*, 38 L. J., Ch. 671; L. R. 4 Ch. 247; 20 L. T. 289; 17 W. R. 478.

Domicil—Change by Residence—Reverter to Domicil of Origin.]—In 1855 a domiciled Manxman came to England and married an Englishwoman, and resided in England for twenty years. At the date of the marriage the wife was entitled to a vested reversionary interest in a legacy which fell into possession in 1885. In 1875 the husband and wife returned to the Isle of Man, where the husband carried on business till 1878, when he became insolvent, and executed a deed of assignment of all his property, including his wife's interest in the legacy, for the benefit of his creditors. In 1880 the parties returned to England, where they resided till 1882, when the husband went to Mexico to seek employment. The doctrine of a wife's equity to a settlement is unknown to Manx law:—Held, that the Manx domicil of the husband, which had been lost by the twenty years' residence in England, reverted on his return to the Isle of Man, that nothing happened afterwards to re-establish the English domicil, and that as the domicil was therefore Manx, the wife's equity to a settlement could not be asserted. *Marsland, In re*, 55 L. J., Ch. 581; 54 L. T. 635; 34 W. R. 540.

Husband of Unsound Mind.]—The wife of a person of unsound mind was entitled to a fund in court. An order was made in enforcement of her equity to a settlement, directing accumulations and future income to be paid to her separate use, with liberty to apply in chambers for the disposal of capital in a similar manner. *Dixon's Trusts, In re*, 48 L. J., Ch. 592.

Fraud of Wife.]—A married woman may by fraud deprive herself not only of her equity to a settlement out of moneys to which her husband may become entitled in her right, but semble of any right to a reversionary interest falling due after his death. *Lush, In re*, 38 L. J., Ch. 650; L. R. 4 Ch. 591; 21 L. T. 376; 17 W. R. 974.

b. What Property the Equity Attaches to.

Property must come in Marital Right.]—A wife's equity to a settlement attaches only to property which comes to her husband's hands in his marital right. *Knight* v. *Knight*, 43 L. J., Ch. 611; L. R. 18 Eq. 487; 22 W. R. 792.

Income of Realty and Personalty.]—The right of the wife extends to her income, whether it arises from real or personal estate, if that interest be an equitable one. *Warren* v. *Newton*, 7 Ir. Eq. R. 211.

Life Interest for Benefit of Husband and Wife jointly.]—A married woman has no equity to a settlement out of property given for the benefit of herself and her husband during their joint lives and the life of the survivor of them. *Bryan, In re, Godfrey* v. *Bryan*, 49 L. J., Ch. 504; 14 Ch. D. 516; 28 W. R. 761. S. P., *Ward* v. *Ward*, 49 L. J., Ch. 409; 14 Ch. D. 506; 42 L. T. 523; 28 W. R. 943.

Life Interest.]—The wife's equity to a settlement attaches to her life interest. *Wilkinson* v. *Charlesworth*, 10 Beav. 324; 16 L. J., Ch. 387; 11 Jur. 644.

Life Interest and Corpus.]—The same principles are applicable with regard to a wife's equity to a settlement whether she is entitled absolutely to the corpus or whether she takes a life interest only, and the court will, in its discretion, direct the whole of the dividends on a fund in which the wife has a life interest only, to be paid to her in exclusion of the assignee in insolvency of her husband. *Taunton* v. *Morris*, 47 L. J., Ch. 721; 3 Ch. D. 453; 38 L. T. 552; 26 W. R. 674. Affirmed, 48 L. J., Ch. 408; 11 Ch. D. 779; 27 W. R. 718—C. A.

Wife's Portion.]—When a husband comes in a court of equity for his wife's portion, the court will oblige him to make a settlement upon her, or secure her a maintenance in case she survives him. *Oxenden* v. *Oxenden*, 2 Vern. 494.

Estate Tail—Outstanding Jointure Term.]—The estate of a feme covert, tenant in tail in possession, subject to a jointure term, is equitable during the continuance of the term, for the purpose of entitling her to a settlement on a bill filed by her; and the court directed a settlement, although the bill did not expressly pray to that effect. *Wortham* v. *Pemberton*, 1 De G. & Sm. 644. *S. C.* nom. *Newenham* v. *Pemberton*, 17 L. J., Ch. 99; 11 Jur. 1071.

Fee Simple Estates.]—Semble, a married woman is not entitled to a settlement out of her fee simple estates. *Gleaves* v. *Paine*, 1 De G. J. & S. 87; 32 L. J., Ch. 182; 7 L. T. 811; 11 W. R. 273.

Leaseholds, Sale of—Desertion.]—A husband entitled to leaseholds in right of his wife deserted her and their children, and for eight years contributed nothing towards her or their support, except the rents of the leaseholds. During the desertion the leaseholds were sold by the wife for 250*l.* to a purchaser, who expended

the greater part of the proceeds upon the maintenance of the wife and children. In an action by the husband against the wife and the purchaser to set aside the sale and recover the leaseholds or the proceeds :—Held, that, under her equity to a settlement, the wife was entitled to have the entire proceeds of the sale secured to herself, and such proceeds having practically been expended for her benefit, the action must be dismissed with costs. *Boxall* v. *Boxall*, 53 L. J., Ch. 838 ; 27 Ch. D. 220 ; 51 L. T. 771 ; 32 W. R. 896.

Railway Stock.]—Railway stock, the property of a wife before marriage, is not a chose in action, and she cannot claim a settlement out of it, though the certificates were deposited with a third person to secure a debt of her own. *Warden* v. *Jones*, 26 L. J., Ch. 427 ; 3 Jur. (N.S.) 456 ; 5 W. R. 446.

Fund in Court not presently Distributable.]—In an administration action, after judgment but before further consideration, a married woman, who was absolutely entitled to a share of a fund in court representing the residuary estate of the testator, presented a petition to enforce her equity to a settlement :—Held, that she was entitled to an immediate order, although the fund would not be actually distributable until further consideration, and the amount of her share in it had not yet been ascertained. *Robinson's Settled Estate, In re, Robinson* v. *Robinson*, 48 L. J., Ch. 507 ; 12 Ch. D. 188 ; 27 W. R. 781.

Debt of Husband to Testator—Wife's share in Residue—Deduction of Debt from Wife's share.]—A testator bequeathed to his married daughter after the death of his wife, a share of the residue of his real and personal estate. The daughter's husband owed the testator 725*l.*, a sum equal to or in excess of her share of residue. There were six children of the marriage. The daughter had about 70*l.* a year derived from an uncle, for her life, and remainder to her children, and her husband had no private means, and made only some 60*l.* a year by his business. The testator left six children him surviving. He died in 1877 :—Held, the case not coming within the Married Women's Property Act, 1882, that although the executors had a right to set off the debt due from the husband against the share given to the wife, yet as the claim of the husband, if there had been no debt, would have been subject to the wife's equity to a settlement, which would therefore have been prior to the husband's claim, the wife's equity was also prior to the executor's right of retainer. *Knight* v. *Knight* (L. R. 18 Eq. 487) distinguished. *Briant, In re, Poulter* v. *Shackel*, 57 L. J., Ch. 953 ; 39 Ch. D. 471 ; 59 L. T. 215 ; 36 W. R. 825.

Bond Debt to Wife.]—Where there is a bond debt to the wife dum sola, and the husband receives it at law, the court will not grant an injunction, for the action was proper. *Jewson* v. *Moulson*, 2 Atk. 417.

Joint Property.]—A married woman has no equity to a settlement out of property given for the benefit of herself and her husband during their lives and life of the survivor of them. *Byran, In re, Godfrey* v. *Bryan*, 49 L. J., Ch. 504 ; 14 Ch. D. 516 ; 28 W. R. 761.

By an ante-nuptial settlement the wife's father covenanted with the trustees to pay to them during his life an annuity of 60*l.*, to be held by them upon trust to pay the same "unto and to the use of the husband and wife during their joint lives," and after the death of the husband to the use of the wife absolutely, with trusts for the husband if he survived her, and for the children :—Held, that as the husband and wife took the annuity as tenants by entireties, the whole of it during their joint lives was liable to the husband's debts, and that the wife had no equity to a settlement out of it. *Ward* v. *Ward*, 49 L. J., Ch. 409 ; 14 Ch. D. 506 ; 42 L. T. 523 ; 28 W. R. 943. And see *Atcheson* v. *Atcheson*, 11 Beav. 485 ; 18 L. J., Ch. 230 ; 13 Jur. 665.

Legacies.]—In what case court will oblige husband to settle legacy left to wife, for which he sues, on wife. *Harrison* v. *Buckle*, 1 Stra. 239.

Where a wife's legacy was her only portion, the court allowed her husband the interest of it for her maintenance ; but where the husband had received great part, and refused to make a settlement, the court stopped the residue and the interest also, that it might accumulate for the wife's benefit. *Bond* v. *Simmons*, 3 Atk. 20.

Husband and wife sue for a legacy given to the wife ; the court will not compel the payment of it, unless the husband makes some settlement on the wife. *Brown* v. *Elton*, 3 P. W. 202.

Settlement directed of a legacy to a married woman, claimed by her husband. *Blount* v. *Bestland*, 5 Ves. 515. S. P., *Green* v. *Scott*, 1 Ves. J. 282.

If money be devised to an infant daughter who marries, the court may refuse helping the husband to the money, unless he makes a suitable settlement ; though if the portion be small and the husband a freeman of London, the custom of London is a suitable provision. *Adams* v. *Peirce*, 3 P. W. 12.

c. Previous Settlement. Effect.

All Moneys taken into Account.]—In considering the question of a wife's equity to a settlement, the court takes into account not only all moneys of the wife previously received by the husband, but conversely all moneys which have been settled upon the wife. *Erskine's Trust, In re*, 1 Kay & J. 302 ; 24 L. J., Ch. 327 ; 1 Jur. (N.S.) 156 ; 3 W. R 262.

Additional Settlement.]—The fact of a settlement having been made of part of an intended wife's personalty on her marriage, upon trusts for her and the children of the marriage, does not bar her equity to an additional settlement out of other personal property belonging to her prior to her marriage, and left unsettled upon the occasion of the marriage, as against her husband's assignee, if he is obliged to resort to chancery it order to reach it. *Spirett* v. *Willows*, 3 De G. J. & S. 293 ; 34 L. J., Ch. 365 ; 11 Jur. (N.S.) 614 ; 11 L. T. 614 ; 13 W. R. 329. And see *Elibank (Lady)* v. *Montolieu*, 5 Ves. 737 ; 5 R. R. 151 ; *Barrow* v. *Barrow*, 18 Beav. 529, and *S. C.* on appeal 24 L. J., Ch. 267 ; 3 Eq. R. 149 ; 3 W. R. 122—L.JJ.

Sufficiency of Existing Provision.] — The principle of a wife's equity to a settlement out of property, coming to her husband in her right, does not apply where she has already a sufficient

provision secured to her, independently of her husband. *Giacometti* v. *Prodgers*, L. R. 8 Ch. 338; 28 L. T. 432; 21 W. R. 375. And see *Lannoy* v. *Athol* (*Duke*), 2 Atk. 448; *Green* v. *Ekins*, 2 Atk. 477.

Property of the wife, amounting to 17,000*l.* consols, being already settled, the court refused to settle a further sum of 2,000*l.* belonging to her, and directed it to be paid to the husband. *Spicer* v. *Spicer*, 24 Beav. 365. And see *Spirett* v. *Willows*, supra.

A provision by marriage settlement will not be held a purchase of all the property of wife, unless that purpose is clearly imported or expressed. *Druce* v. *Denison*, 6 Ves. 385. And see *Salwey* v. *Salwey*, Amb. 693; *Sykes* v. *Meynal*, Dick. 368; and *Bois* v. *Hereford* (*Viscount*), 2 Vern. 502.

Where a wife has an adequate settlement to her separate use, she is not entitled on his insolvency, desertion, or otherwise, to a further provision out of a life interest belonging to her, which he takes jure mariti. *Aguilar* v. *Aguilar*, 5 Madd. 414.

Though a settlement be made on a wife before marriage, if a great accession of fortune happen to the wife afterwards, the court will direct a further settlement out of it, when it once obtains jurisdiction. *Tomkyns* v. *Ladbroke*, 2 Ves. 591. And see *March* v. *Head*, 3 Atk. 720; *Lannoy* v. *Lannoy*, Sel. Ch. Cas. 48; *Stockpole* v. *Beaumont*, 3 Ves. 98.

d. Separation. Effect.

Wife Living Apart but not in Adultery.]—Where the wife was living separate, but not in adultery:—Held, that she was entitled to a settlement out of funds coming to the husband in her right. *Eedes* v. *Eedes*, 11 Sim. 469; 10 L. J., Ch. 199.

Separation without sufficient Cause—Apportionment.]—Where a separation took place without sufficient cause, the court ordered that three-fourths of a fund in court should be settled upon the wife and her isssue, and the residue be paid to the husband. *Coster* v. *Coster*, 9 Sim. 597; 8 L. J., Ch. 230.

Both Separate and Living in Adultery.]—Husband and wife made an assignment of the wife's interest in a reversionary fund, which afterwards fell into possession. It was mutually imputed, and not denied, that they were both living separate, and in adultery:—Held, that the wife was entitled to a settlement out of the fund. *Greedy* v. *Lavender*, 13 Beav. 62; 19 L. J., Ch. 494; 14 Jur. 608.

Desertion by Husband—Proceeds of Wife's Leaseholds.]—A husband entitled to leaseholds in right of his wife deserted her and their children, and for eight years contributed nothing towards her or their support, except the rents of the leaseholds. During the desertion the leaseholds were sold by the wife for 250*l.* to a purchaser, who expended the greater part of the proceeds upon the maintenance of the wife and children. In an action by the husband against the wife and the purchaser to set aside the sale and recover the leaseholds or the proceeds:—Held, that, under her equity to a settlement, the wife was entitled to have the entire proceeds of the sale secured to herself, and such proceeds having practically been expended for her benefit, the action must be dismissed with costs. *Boxall* v. *Boxall*, 53 L. J., Ch. 838; 27 Ch. D. 220; 32 W. R. 896.

e. As against Trustee in Bankruptcy or General Assignees of Husband.

General and particular Assignee—Distinction.]—There is a distinction between husband's general assignment of his wife's property on bankruptcy and of an assignment to a particular assignee for value. *Tidd* v. *Lister*, 3 De G. M. & G. 857; 23 L. J., Ch. 249; 18 Jur. 543; 2 W. R. 184.

General Assignees take Subject to the Equity.]—A feme covert, being entitled to the interest of funds for life, her husband makes a general assignment of his estate for the benefit of creditors, the assignees shall not take the dividends without making a provision for the wife. *Pryor* v. *Hill*, 4 Bro. C. C. 139.

The wife is equally entitled to a settlement, although the children of the marriage may be provided for aliunde. *Ib.*

The provision of wife shall in general be secured to her in equity, notwithstanding the bankruptcy of her husband. *Mitchell*, *Ex parte*, 1 Atk. 120. *Holland* v. *Calliford*, 2 Vern. 662. *Middlecome* v. *Marlow*, 2 Atk. 519. *Winchester*, *Ex parte*, 9 Mod. 471. *Mitford*, *Ex parte*, 1 Bro. C. C. 398.

The assignee of an insolvent debtor, whose wife was entitled for life to real property, being obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being vested in mortgagees:—Held, bound to make a provision for the wife. *Sturgis* v. *Champneys*, 5 Myl. & Cr. 97. See *Clark* v. *Cook*, 3 De G. & S. 333; and *Hanson* v. *Keating*, 4 Hare, 1; 14 L. J., Ch. 13; *Barnes* v. *Robinson*, 32 L. J., Ch. 143; 7 L. T. 617; 11 W. R. 276.

f. As against particular Assignees of Husband.

Distinction between Life Interest and Corpus.]—A wife has no equity to a settlement out of her life interest, as against the husband's assignee for value. *Duffy*, *In re*, 28 Beav. 386.

Although the purchaser for value from the husband of his wife's chose in action, to the corpus of which she is entitled, is in no better position than the husband himself, yet the husband's assignment for value of his wife's equitable life interest will prevail against her if he afterwards deserts her and leaves her destitute; if he deserts his wife, a court of equity will not help him to get at the fund without securing to the wife a portion of the income; but this consideration is inapplicable to the assignee of the husband. *Tidd* v. *Lister*, 3 De G. M. & G. 857; 23 L. J., Ch. 249; 18 Jur. 543; 2 W. R. 184.

Distinction between the cases in which a wife takes an absolute interest in her property, and those in which she takes a life interest only, and between cases of an assignment by the husband of the wife's property to his general assignee on his bankruptcy or insolvency, and of an assignment to a particular assignee for value. *S. C.*, 10 Hare, 140.

Husband entitled while Maintaining Wife.]—Husband is not compelled to make allowance to wife before he enjoys her equitable interest for life, unless he neglects to provide for her, but if, before the latter event, husband assigns it for

valuable consideration, purchaser is not obliged to provide for wife. *Elliott* v. *Cordell*, 5 Madd. 156; 21 R. R. 287.

Chattels Real of Wife.]—Where a person entitled, jure mariti, to chattels real mortgages them, the wife has not any equity to a settlement thereout, as against the mortgagee seeking a foreclosure and sale. *Hatchell* v. *Eggleso*, 1 Ir. Ch. R. 215.

Real Estate of Wife.]—A married woman has no equity to a settlement as against an assignee for value of her husband's interest, in her right, in her real estate. *Durham* v. *Crackles*, 32 L. J., Ch. 111; 8 Jur. (N.S.) 1174; 11 W. R. 138. And see *Stanton* v. *Hall*, 2 Russ. & M. 175; 9 L. J. (O.S.) Ch. 111.

Legacy.]—A reversionary interest of a wife in a legacy of 1,000*l.* was, upon becoming payable, settled upon herself and children, though it had been mortgaged by her husband for value. *Duncombe* v. *Greenacre*, 30 L. J., Ch. 882; 7 Jur. (N.S.) 650—L.JJ. Affirming 28 Beav. 472; 30 L. J., Ch. 413; 6 Jur. (N.S.) 987; 9 W. R. 429.

Wife Lending her Money for Use in Husband's Business.]—A trader lived with his deceased wife's sister as her husband. In 1858 she received a legacy of 3,000*l.*, which she handed over to him upon an agreement that the money should be advanced to and used by him in his business, but that as to 2,000*l.* he should be a trustee for her, and a settlement should be executed to carry out that agreement. The money was accordingly used by him in his business, but no settlement was ever executed. The trader having gone into liquidation in 1876:—Held, that inasmuch as by its primary destination under the agreement the fund was to be and was used in the business, no trust could be imposed upon it to the disadvantage of the creditors, and the wife could not prove in the liquidation for any part of it. *Beale, In re, Corbidge, Ex parte*, 46 L. J., Bk. 17; 4 Ch. D. 246; 35 L. T. 768; 25 W. R. 324.

Mortgage by Husband and Wife.]—Before her marriage a lady was in 1839 entitled to a reversionary interest under her father's settlement, and to 1,904*l.* consols. The 1,904*l.* was sold out and paid to the intended husband previously to the marriage; and he by a marriage settlement covenanted to pay 12,000*l.* to the trustees for the benefit of himself for life until bankruptcy, and then for his wife, with the usual limitations in favour of the issue of the marriage. The lady's father also covenanted to pay 4,000*l.* six months after his death, to be held by the trustees for the benefit of the wife for life, the husband for life, and the issue in the usual way. The lady's reversionary interest was not included. The husband became bankrupt, and 1,250*l.* only out of the 12,000*l.* was secured by the trustees of the settlement. In 1871 the husband and one of his sons assigned to a mortgagee all their right in the wife's reversionary interest as a security for 450*l.*, and this assignment contained joint and several covenants by the husband and wife for payment of this sum. The wife's reversionary interest having fallen in, the money was paid into court on a petition by the wife asking for a settlement of the whole sum upon herself and her children to the exclusion of her husband and the mortgagee:—Held, that neither the husband nor his trustee in bankruptcy were entitled to any part of the money in court; and the usual order for settling the whole fund of the petitioner and her children was made, but without prejudice to the mortgagee's security. *Townsend's Trusts, In re*, 41 L. T. 19.

Wife Joining in Charge.]—A wife having an absolute interest in leasehold property, never reduced into possession by the husband, joined in a letter enabling her husband to charge it:—Held, that she had no equity to a settlement out of arrears of income as against his particular assignees. *Carr, In re*, 40 L. J., Ch. 353; L. R. 12 Eq. 609; 19 W. R. 675.

Assignee for Value — Misconduct of Wife — Quantum to be Settled.]—A husband and wife concurred in assigning for valuable consideration the wife's reversionary interests in two funds derived under instruments executed before the commencement of Malins's Act, and the deed of assignment was separately acknowledged, all parties being under the impression that the act applied. The funds having fallen into possession, the husband and wife obtained payment of one fund and applied it to their own use. Upon an application by the assignees for payment of the other fund, the wife claimed it by virtue of her equity to a settlement. At this date the wife entirely supported her husband and three children:—Held, the assignees having consented to a settlement of one half, that the wife had by her conduct disentitled herself to any further relief. Under the special circumstances a settlement was made which directed payments annually out of corpus to the wife. *Roberts* v. *Cooper*, 60 L. J., Ch. 377; [1891] 2 Ch. 335; 64 L. T. 584—C. A.

g. Rights of Children.

Death of Wife—Rights of Children.]—A wife filed a bill against the trustee of a fund to which she was entitled, and her husband, to enforce her equity to a settlement. The defendant appeared, but before any further step had been taken in the cause the wife died:—Held, that the fund was not so bound as to entitle her children to enforce their mother's equity to a settlement. *Wallace* v. *Auldjo*, 1 De G. J. & S. 643; 32 L. J., Ch. 748; 8 L. T. 750; 2 N. R. 567; 11 W. R. 972.

Must be Contract or Decree.]—Children have no right to a settlement without a contract or decree for a settlement in lifetime of wife. *Lloyd* v. *Williams*, 1 Madd. 450. And see *De la Garde* v. *Lempriere*, 6 Beav. 344; 12 L. J., Ch. 471. *Winch* v. *Brutton*, 14 Sim. 379; 8 Jur. 1086.

The right of children to a provision out of the property of their mother, under decree directing a settlement by husband on her and her children, exists, notwithstanding death of mother before the report. *Murray* v. *Elibank* (*Lady*) 10 Ves. 84. See also *S. C.*, 14 Ves. 496; 13 Ves. 1. And see *Lloyd* v. *Mason*, 5 Hare, 149.

Children's Position that of Volunteers.]—The position of children in respect of their mother's equity to a settlement is substantially that of volunteers, so long as such settlement is only executory, i.e., they cannot enforce its execution or object to its rescission, although she on her part cannot enforce it without benefiting them. An executory settlement may be executed either by the execution of a formal instrument, or by a

judicial decision declaring trusts of the property to take effect at once. *Pemberton* v. *Marriott*, 47 L. T. 332.

An obligation to make a settlement on the wife and the issue, includes an obligation to make a settlement on the issue after the death of the wife. *Prebble* v. *Boghurst*, 1 Swan. 319 ; 1 Wils. 161.

Waiver by Wife.]—The wife by appearing in court, may waive her right to a settlement, in which case no provision is made for the children. *Walker*, *In re*, Ll. & G. t. Sugd. 324. See *Waiver*, infra, col. 1128.

Even where there is no contempt or misconduct, the children can only be entitled under and after their mother ; they have no independent right, and where there is a contempt, the husband is excluded, as against the wife, altogether and generally as against the children also. *Id.* 327.

The court cannot, on account of the misconduct of the wife, provide for the children out of her separate property. *Id.* 328.

If the wife insist upon her equity, as against the assignees in bankruptcy of her husband, it attaches for the benefit of her children and she cannot afterwards release it in favour of her husband. *Barker* v. *Lee*, 6 Madd. 330. And see *Fenner* v. *Taylor*, 2 Russ. & M. 190.

Fortune of Children Irrelevant.]—When a married woman has established her equity to a settlement, the usual provision for her children follows as a matter of course, wholly irrespective of any other fortune they may have, and her children by a former marriage are within the equity. *Comington* v. *Gilliat*, 46 L. J., Ch. 61 ; 35 L. T. 736 ; 25 W. R. 69.

h. Terms and Limitations.

Extent of Interference with Marital Right.]—Courts of equity only so far interfere with the husband's marital right as is necessary for the purpose of providing for the wife and her children. Therefore, where a fund to which a husband becomes entitled in right of his wife is being settled by order of the court, the ultimate remainder will, as a rule, be to the husband absolutely, without reference to the question of survivorship. *Croxton* v. *May*, 39 L. J., Ch. 155 ; L. R. 9 Eq. 404 ; 22 L. T. 59 ; 18 W. R. 373.

Ultimate Limitation to Husband.]—When a wife is entitled to an equity to a settlement the fund will be limited, after her death, and in default of children of the wife, to the husband, whether he does or does not survive the wife. *Walsh* v. *Wason*, 42 L. J., Ch. 676 ; L. R. 8 Ch. 482 ; 28 L. T. 457 ; 21 W. R. 554. And see *Noakes' Will*, *In re*, 28 W. R. 762. *Suggitt*, *In re*, 37 L. J., Ch. 426 ; L. R. 3 Ch. 215 ; 16 W. R. 551. *Spirett* v. *Willows*, L. R. 4 Ch. 407 ; and *Carter* v. *Taggart*, 1 De G. M. & G. 286 ; 21 L. J., Ch. 216 ; 16 Jur. 300.

Power of Appointment amongst Children.]—In a settlement of a wife's property made in pursuance of her equity an exclusive power of appointment by deed or will among her children ought to be given to her in priority to the limitations in favour of the children. And the like power was inserted in a case where the husband had by post-nuptial deed covenanted to settle the property on trusts not including such a power. *Oliver* v. *Oliver*, 48 L. J., Ch. 630 ; 10 Ch. D. 765 ; 27 W. R. 657.

Misconduct of Husband.]—Gross misconduct of a husband (adultery and desertion) will not of itself disentitle him to any share in the subsequently acquired property of his wife. *Aubrey* v. *Brown*, 25 L. J., Ch. 446 ; 2 Jur. (N.S.) 879 ; 4 W. R. 425.

Deduction of Costs.]—Where a married woman insisted upon her equity to a settlement, and the court gave her a moiety of the fund, her costs were deducted before the division. *Archer* v. *Gardiner*, C. P. Cooper, 340.

i. Waiver.

By Wife.]—The wife, by appearing in court, may waive her right to a settlement, in which case no provision is made for the children. *Walker*, *In re*, Ll. & G. t. Sugd. 324.

After Order for Settlement.]—Wife may waive equity for settlement out of her own property, even after the order, at any time before its completion. *Murray* v. *Elibank* (*Lady*), 10 Ves. 88.

Joining with Husband in Assignment.]—A married lady being entitled to a share of the proceeds of real estates directed to be sold, joined with her husband in assigning, and levying a fine of her share, to a mortgagee :—Held, that she was barred of her equity to a settlement. *May* v. *Roper*, 4 Sim. 360.

Infant Wife.]—A fund in court belonging to an infant married woman will not be paid out to her husband, as she cannot waive her equity to a settlement. *D'Angibau*, *In re*, (15 Ch. D. 228) noticed. *Shipway* v. *Ball*, 50 L. J., Ch. 263 ; 16 Ch. D. 376 ; 44 L. T. 49 ; 29 W. R. 302.

Election—Assignment of Presumptive Share of Assets by Married Woman.]—In 1866 A., a married woman, being one of the presumptive next-of-kin of a lunatic, in consideration of sums advanced to her husband, and of a covenant by C. to pay her, on the death of the lunatic, two sums of 400*l.* and 500*l.*, with interest on the former sum in the meantime, for her separate use, joined her husband in assigning her presumptive share of the lunatic's assets to C. The interest on the 400*l.* was paid until 1881, when the lunatic died ; but the assignee of C. refused to pay the further interest. A. was declared one of the next-of-kin in a suit to administer the lunatic's assets, and applied to the court for payment of the balance of interest due on the 400*l.*, and a portion of the principal. In 1883 A., being then administratrix of the lunatic, acknowledged the deed of 1866 before commissioners. A part of the lunatic's assets had been lent on mortgage of real estate :—Held (1) that the deed of 1866 was void against A., and could not be confirmed by any act of hers, and that she had not elected to take under it, or waived her equity to a settlement. (2) That neither the fact of part of the assets being lent on mortgage, nor A.'s being administratrix when it was made, gave the acknowledgment any legal validity. *Druitt* v. *Willens*, 23 L. R. Ir. 436.

j. Amount Settled.

Matter of Discretion.]—The amount to be settled on a married woman under her equity to a settlement is discretionary with the court,

and depends on the particular circumstances of each case. *Scott* v. *Spashett*, 3 Macn. & G. 599; 21 L. J., Ch. 349; 16 Jur. 157.

In making a settlement of property belonging to a wife, the court looks not only to the portions of her fortune which the husband may have already received, but to all the circumstances of the case, and particularly to the husband's conduct. *Barrow* v. *Barrow*, 5 De G. M. & G. 782; 24 L. J., Ch. 267; 3 Eq. R. 149; 3 W. R. 122; *Aubrey* v. *Brown*, 25 L. J., Ch. 446; 2 Jur. (N.S.) 879; 4 W. R. 425.

The court will not settle the whole of a wife's fund upon her and her children unless the husband is insolvent, or has been guilty of gross misconduct, such as adultery, cruelty, or desertion. In determining the proportion of the fund to be settled, the court is bound by no fixed rule, but will exercise a judicial discretion according to the circumstances of the case. *Suggitt, In re*, 37 L. J., Ch. 426; L. R. 3 Ch. 215; 16 W. R. 551.

A married woman has the same equity to a settlement, as against her husband or his general assignee, out of property in which she has only a life interest, as out of property in which she has an absolute interest; and the court will make no distinction between the two cases as regards the amount to be settled. In every case the court will exercise its judicial discretion as to the amount to be settled, having regard to all the circumstances. *Taunton* v. *Morris*, 48 L. J., Ch. 408; 11 Ch. D. 779; 27 W. R. 718—C. A. Affirming 47 L. J., Ch. 721; 3 Ch. D. 453; 38 L. T. (N.S.) 552; 26 W. R. 674.

Necessities of Wife not the Limit.]—The rule of the court of equity, which entitles a married woman to a settlement out of her equitable interest, is not limited by the necessities of herself and children. *Carter* v. *Taggart*, 5 De G. & Sm. 49; 21 L. J., Ch. 216; 16 Jur. 160. And see *S. C.* on appeal, 1 De G. M. & G. 286; 21 L. J., Ch. 216; 16 Jur. 300.

One-half Rule.]—As to the amount to be settled, there is no rule limiting it to half the fund; but each case must be governed by its own special circumstances. When the husband was insolvent and had received 3,000*l.* out of 12,000*l.* to which his wife (who was living apart from him) had become entitled at various times, the whole of a fund of 3,094*l.* 19*s.* 2*d.* was settled on her and her children, as against his mortgagees. *Conington* v. *Gilliat*, 46 L. J., Ch. 61; 35 L. T. 736; 25 W. R. 69.

Where a fund in court belonging to a married woman is small, the course is to settle one-half of it on the wife where a husband is not wholly incapable of maintaining his wife, but is in a fair way of supporting her; but where he is incapable of doing so, to settle the whole fund. *Grove's Trust, In re*, 3 Giff. 575; 9 Jur. (N.S.) 38; 6 L. T. 376. *Bagshaw* v. *Winter*, 5 De G. & Sm. 466; 16 Jur. 561.

—— **When departed from.**]—In giving effect to a wife's equity to a settlement of a fund in court, the rule of settling half on the wife is departed from, either where the fund is very small and the husband is not in a position to maintain his wife, or where the husband has received a much larger amount in right of his wife, without appropriation for her maintenance. *Ward* v. *Yates*, 1 Dr. & Sm. 80; 8 W. R. 428.

Whole Amount Settled—Bankruptcy of Husband.]—Where a married woman was entitled to a fund of 153*l.*, her husband bankrupt, and unable to maintain her:—Held, as between her and her husband's assignees, that the whole should be settled on her. *Kincaid's Trusts, In re*, 1 Drew. 326; 22 L. J., Ch. 395; 17 Jur. 106; 1 W. R. 120. And see *Townsend's Trusts, In re*, 41 L. T. 19; *Cutler, In re*, 14 Beav. 220; 20 L. J., Ch. 504; 15 Jur. 911; *Dunkley* v. *Dunkley*, 3 De G. M. & G. 390; 16 Jur. 767; *Marshall* v. *Fowler*, 16 Beav. 249; 16 Jur. 1128; *Walker* v. *Drury*, 17 Beav. 482; 23 L. J., Ch. 712; 2 W. R. 3; *Wilson, In re*, 1 Jur. (N.S.) 569; *Gent* v. *Harris*, 10 Hare, 383; *Tubb, In re, Tubb* v. *Curtis*, 8 W. R. 270; *Smith* v. *Smith*, 3 Giff. 121; 4 L. T. 353; 9 W. R. 651; *Nicholson* v. *Carline*, 22 W. R. 819; *Bray* v. *Langton*, 2 Eq. R. 385; 2 W. R. 324; *Morgan* v. *Morgan*, 2 Eq. R. 1270; 2 W. R. 667.

—— **Separation.**]—A female infant with a small fortune being persuaded to contract a marriage with a young man without fortune, who, soon after the marriage, separated from her, on a bill by her for a settlement, the court ordered the whole to be settled on her and her children. *Layton* v. *Layton*, 1 Sm. & G. 179. And see *Disney, In re*, 2 Jur. (N.S.) 206; 4 W. R. 425, n.

—— **Misconduct of Husband.**]—A wife was entitled to about 1,500*l.* The husband had disregarded an order of the court for restitution of conjugal rights, and stated that he and his wife should not again live together:—Held, that the conduct of the husband amounted to aggravated misconduct, and that under all the circumstances of the case the whole fund was to be settled on the wife and children. *Reid* v. *Reid*, 55 L. J., Ch. 756; 33 Ch. D. 220; 55 L. T. 153; 34 W. R. 715.

A married woman, whose husband had been insolvent, became entitled to a sum of 200*l.*, and to the income of 400*l.* which was divisible after her death amongst her nine children. The court settled the whole 200*l.* upon her, without giving any portion of it to her husband's assignee in insolvency. *Hooper's Trusts, In re*, 6 W. R. 824.

—— **Wage-earning Husband.**]—When a journeyman carpenter was in the receipt of wages not exceeding 12*s.* a week, and had to support a wife and six children, the court settled the whole of an incoming fund, the property of the wife, but liable to the extent of the husband's interest to the claim of a creditor, upon the wife and children. *Cordwell, In re, White* v. *Cordwell*, 44 L. J., Ch. 746; L. R. 20 Eq. 644.

Two-thirds—Bankruptcy of Husband.]—In an action by a married woman for her equity to a settlement, where the husband was an undischarged bankrupt, but was living with his wife, and contributed something out of his earnings to her support, the court directed two-thirds only of the wife's fund to be settled upon her. *Callow* v. *Callow*, 55 L. T. 154.

By a marriage settlement, 2,000*l.*, part of a mortgage debt of 4,000*l.*, belonging to the wife, was settled upon trusts which entirely excluded the husband, and the remaining 2,000*l.* was left unsettled. The husband having become bankrupt, the court approved of a settlement of three-fourths of the latter sum upon the wife and children, with the ultimate trust in default of children for the husband, without regard to

the question of survivorship. *Spirett* v. *Willows*, 35 L. J., Ch. 755; L. R. 1 Ch. 520; 12 Jur. (N.S.) 538; 14 L. T. 720; 14 W. R. 941. And see *Coster* v. *Coster*, 9 Sim. 597; 8 L. J., Ch. 230; *Vaughan* v. *Buck*, 1 Sim. (N.S.) 284; 20 L. J., Ch. 335; 15 Jur. 348; *Pugh, Ex parte*, 1 Drew. 202; 16 Jur. 652; and *Napier* v. *Napier*, 1 Dr. & War. 407; *Gross* v. *Errington*, 3 W. R. 382.

—— **Bankruptcy of Husband—Form of Settlement.**]—A woman who in 1863 married without a settlement, in 1869 became entitled in remainder under his father's will to a share of his estate. Subsequently her husband became bankrupt, and was discharged in 1871. In 1894 her share vested in possession, its amount over 700*l.* being less than that of her husband's indebtedness to his creditors. She resided with her husband, whose income from business was 300*l.* a year. On an originating summons by the trustee of the will:—Held, that her equity to a settlement attached to her entire share, and that the form of the settlement should follow that ordered in *Briant, In re, Poulter* v. *Shackel* (39 Ch. D. 471). *Howard, In re, Howard* v. *Howard*, 13 R. 233.

One-half.]—By a post-nuptial settlement, a legacy of 600*l.*, belonging to the wife, was settled by husband and wife on the wife for life, for her separate use, with remainder to her children. At the time of the settlement the husband was insolvent:—Held, that the husband was entitled to one moiety of the legacy, and the other moiety was ordered to be paid to the trustees of the settlement. *Wray's Trusts, In re*, 16 Jur. 1126.

Out of 5,000*l.*, the property of a married woman, 2,500*l.* clear of all costs and expenses was directed to be settled upon her as against the assignees of the husband, who was an uncertificated bankrupt in prison and totally unable to provide for the support of his wife and four children. *Lea* v. *Church*, 3 W. R. 603.

Lunacy—Effect of.]—Where wife a lunatic. See *Hewson, In re*, 21 L. J., Ch. 825; and where husband a lunatic, *Baldwin* v. *Baldwin*, 5 De G. & S. 319.

3. Wife's Equity to a Separate Maintenance.

a. Jurisdiction.

No Original.]—No court has any original jurisdiction to give a wife separate maintenance; but it may be given incidentally as on a supplicavit in chancery, or a divorce à mensâ and through propter scevitiam in the ecclesiastical court. *Ball* v. *Montgomery*, 2 Ves. J. 195; 4 Bro. C. C. 339.

In cases of separate maintenance the court must be guided by judicial determinations and not by private judgment. *Tyrrell* v. *Hope*, 2 Atk. 560.

Writ of Supplicavit.]—Order for security under supplicavit, on articles exhibited by wife against husband, under 2 Jac. 1, c. 8. *Heyn's Case*, 2 Ves. & B. 182.

Order for security under a writ of supplicavit, on articles by a wife against her husband. *Dobbyn's Case*, 3 Ves. & B. 183.

On Agreement for Separation.]—There is no doubt of the general jurisdiction of a court of equity to decree the specific performance of articles between husband and wife for a separation and a separate maintenance. But the court exercises its discretion in this case very cautiously, and will not give its assistance until it has seen whether, from the circumstances of the case, there is or is not a probability of the parties being reconciled. A sentence in the ecclesiastical court for the restitution of conjugal rights is a reason for this court refusing to give its assistance in such a case; and, in general, if such an agreement is not fit to be enforced, the court will on a cross bill order it to be delivered up; though there may be cases in which no relief will be given to either party. *Fletcher* v. *Fletcher*, 2 Cox, 99.

b. When Ordered.

Wife and Child.]—Order upon an application of a wife under special circumstances to be allowed maintenance for herself and child out of a fund standing in the name of the accountant-general, to which the husband became entitled in right of his wife during the coverture, the husband opposing the application. *Atherton* v. *Nowell*, 1 Cox, 229.

Husband Forcing Separation on Wife.]—Where husband uses force to compel wife to execute deed of separation, and thereby to take a very small maintenance, court of equity will give relief and direct proper maintenance. *Lambert* v. *Lambert*, 2 Bro. P. C. 18.

By articles before marriage, 6,000*l.*, part of the portion, is agreed to be invested in land and settled to the husband for life, then to his wife for life, remainder as a provision for younger children, remainder to the husband in fee. The husband, having by his cruelty forced his wife to separate from him, the court decreed the interest of the 6,000*l.* to be paid for her separate maintenance till cohabitation. *Oxendon* v. *Oxendon*, 2 Vern. 493; Pre. Ch. 239; Gilb. 1.

A husband, shortly after his marriage, ceased to cohabit with his wife, and never provided her with a home, or contributed to her support, but left her to be supported by her sisters, whilst he received and appropriated to himself her income, and threatened her, by gestures as well as words, with personal violence. In a suit instituted by the wife against her husband and the trustees of an annuity of 50*l.* (which appeared to be all her income), the court directed the annuity to be paid to her for her support till further order. *Gilchrist* v. *Cator*, 1 De G. & Sm. 188; 11 Jur. 448.

Arrears of Annuity.]—A., in a letter to his wife's father, said, as he did not choose to be a witness to her infirmities, he would allow her 400*l.* per annum while she lived with her father. The wife, on a bill for separate maintenance, moved for the arrears (600*l.*) to be paid for her support till the hearing. The court granted 400*l.* in gross, but not as arrears, and said it would be refused in future. The husband, in his answer, swore he was desirous of cohabiting with his wife. Two years after the motion, the wife filed a bill for the arrears, and growing payments for the 400*l.* pursuant to agreement, and the husband contended, that the agreement was only intended to exist during his occasional absence. It appeared that the wife was dis-

ordered in her mind, and that upon the husband's attempt to confine her, she obtained a supplicavit. Lord Chancellor gave judgment: 1. That the 400*l.* was only intended to continue during the husband's occasional absence. 2. As to the liberty to live separate, prayed by the wife, the court could not decree a separation or separate maintenance, unless upon the parties' own agreement. And, 3. The obtaining a supplicavit does not justify the wife's elopement, for it is granted on a supposition that they are to live together:—Decreed, that as the court saw grounds for granting a supplicavit, and the husband's offer to receive his wife was only judicially made by his answer, the arrears of the annuity should be paid, and that the husband should take his wife home and maintain her; if she refused, the maintenance should cease, but if he refused, then the maintenance to continue. *Head* v. *Head*, 3 Atk. 295, 547; 1 Ves. 17.

Desertion by Husband—Pin-Money.]—A husband deserted his wife, and went to America, having first fraudulently assigned all his property. The court decreed her a maintenance out of the estate assigned, though she had the interest of 4,000*l.* as pin-money. In a suit for alimony, separate maintenance or pin-money is not a good plea. *Colmer* v. *Colmer*, Mos. 121.

Ill-treatment the Ground of Maintenance.]—No decree for separate maintenance upon the bill of a wife on the mere fact that she and her husband were separated by consent, he not making any addition to the settlement for her on marriage out of her property. The only instances of it, either out of his property or what was originally hers, are where he turned her out of doors, or by ill-treatment obliged her to leave his house, or had quitted the kingdom leaving her destitute. *Duncan* v. *Duncan*, 19 Ves. 394; Coop. 254.

Interest of Small Legacies.]—The interest of small legacies ordered to be paid to the mother for maintenance, upon her affidavit, that the father was abroad in embarrassed circumstances. *Walker* v. *Shore*, 15 Ves. 122.

When husband and wife are living apart from the misconduct of the wife, the court will not assist her in obtaining a separate maintenance; but the case is different where the separation arises from the misconduct of the husband, as where there is a divorce à mensâ et thoro on the ground of the husband's adultery. *Barrow* v. *Barrow*, 18 Beav. 529; 24 L. J., Ch. 267.

Alleged Misconduct of Wife.]—Bill brought by wife for maintenance on suggestion of cruel usage by the husband. On the part of the defendant as an excuse for his ill-usage, depositions were offered to prove a criminal conversation: unless it is expressly charged by the answer, the court will not suffer the depositions to be read. *Watkyns* v. *Watkyns*, 2 Atk. 96.

Answer charging that the wife had behaved in an indecent manner will entitle the husband to read evidence against her of criminal conversation. *Ib.*

A wife will not be allowed maintenance where there is full proof of her elopement and adultery. *Ib.*

Husband having left the kingdom, interest of trust money directed to be paid to the wife till he thinks proper to return and maintain her as he ought. *Ib.*

—— **Adultery of Wife.**]—Mrs. D. being entitled to 3,000*l.* in reversion expectant on her aunt's death, the aunt consented, at the request of Mr. and Mrs. D., to relinquish her life interest in 2,000*l.*, part of the 3,000*l.*, in consideration of Mr. D. agreeing that remainder of the 3,000*l.*, when payable, should be paid to trustees for his wife's separate use, and that he would immediately settle 2,000*l.* out of his own funds, and also the first-mentioned 2,000*l.*, so as to provide for the maintenance of himself and his wife, and the survivor of them. The agreement was carried into effect by a deed which directed the trustees to pay the interest of the two sums of 2,000*l.* to Mr. and Mrs. D. during their joint lives, and to stand possessed of the principal for the survivor of them. Mr. D. afterwards separated from his wife in consequence of her having committed adultery:—Held, that he was entitled to receive the whole of the interest of the trust fund, and was not bound to maintain his wife out of it, notwithstanding she was destitute of the means of support. *Duncan* v. *Campbell*, 12 Sim. 616; 6 Jur. 667.

Refusal of Wife to Live Abroad.]—The court refused to order a provision for a married woman out of dividends and interest to which she was entitled for life, she refusing to live with her husband, an officer abroad with his regiment, and willing to receive her; if he had deserted her that would be a good ground. *Bullock* v. *Menzies*, 4 Ves. 798.

Insolvency of Husband.]—Money in court belonging to a married woman ordered to be applied for the benefit of herself and children, the husband having taken the benefit of the Insolvent Act. *Brett* v. *Greenwell*, 3 Y. & Coll. 230.

Right of Wife to Maintenance—Possession of Separate Property.]—Semble, a woman possessed of separate estate is entitled to maintenance by her husband, although he be lunatic, and is not bound to pledge her separate estate in order to provide herself with necessaries. *Davidson* v. *Wood*, 32 L. J., Ch. 400; 9 Jur. (N.S.) 589; 8 L. T. 476; 11 W. R. 719—L.JJ.

Interest on Arrears.]—Interest not given upon arrears of maintenance any more than upon arrears of a jointure. *Mellish* v. *Mellish*, 14 Ves. 516.

Interest on the arrear of an annuity, bequeathed to a married woman for her sole and separate use, not given, though the fund was productive, and though there was a large residuum; nor in such annuities apportionable. Secus, semble, if it had been given as a separate maintenance. *Anderson* v. *Dwyer*, 1 Sch. & Lef. 301.

Provision for Wife—Payment by Trustee to Husband.]—Where the court secures a provision for wife out of her equitable interest claimed by the husband, the trustee is at liberty to pay to the husband, and that payment is not called back. *Glaister* v. *Hewer*, 8 Ves. 206.

A woman living apart from her husband and having a separate maintenance, contracts debts, the creditors, by a bill in this court, may follow the separate maintenance whilst it continues; but when that is determined and the husband dead, they cannot by a bill charge the jointure with those debts. *Kenge* v. *Delavall*, 1 Vern. 326

Wife to Keep up Establishment.]—To put an end to litigation between a husband and wife, the husband conveyed property to trustees, upon trust to pay his wife 3,700*l.* a year, or so much as she should "order or require." The wife was, out of that sum, to keep up an establishment for herself and children, upon such a scale as she should think fit; and the husband was to have the benefit of it under certain restrictions. But if she should not require the whole for the purposes aforesaid, the surplus was to be paid to the husband:—Held, that so long as she kept up the establishment she was not liable to account for the surplus in her hands. *Jodrell* v. *Jodrell*, 14 Beav. 397.

Provision during Separation—Death of Husband.]—A husband went abroad, leaving his wife and child unprovided for, whereupon the father of the husband and the father of the wife entered into an agreement to allow the wife 30*l.* each so long as she should continue separate and apart from her husband:—Held, that the allowance was determined by the death of the husband. *Miller* v. *Woodward*, 2 Beav. 271.

c. In Case of Lunacy.

Right to Maintenance—Wife with Separate Property—Lunatic Husband.]—Semble, a woman possessed of separate estate is entitled to maintenance by her husband, although he be lunatic, and is not bound to pledge her separate estate in order to provide herself with necessaries. *Davidson* v. *Wood*, 32 L. J., Ch. 400; 9 Jur. (N.S.) 589; 8 L. T. 476; 11 W. R. 719—L.JJ.

Husband of Unsound Mind.]—Interest ordered to be paid to wife, husband being in a state of imbecility of mind. *Bird* v. *Lefevre*, 4 Bro. C. C. 100.

Where a sum of stock was bequeathed to a married woman, whose husband was of unsound mind, though no commission of lunacy had been issued against him, the court on a bill filed by the husband and wife for payment of the legacy, transferred the fund into court to the joint account of the plaintiffs, and afterwards, in consideration of the poverty of the parties, made an order on the petition of the wife that the dividends would be paid to her for her life. *Steed* v. *Calley*, 2 Myl. & K. 52.

Wife Deranged.]—Part of the capital of a fund in court belonging to a married woman, who was deranged, and had been deserted by her husband, ordered to be applied for her maintenance. *Peters* v. *Grote*, 7 Sim. 238.

A wife who was of unsound mind, being entitled to 500*l.* out of property in the cause, besides an annuity of 100*l.* to her separate use, the court refused to allow the husband more than the 500*l.* for the expense of maintaining her, though the husband showed by affidavits that that sum was insufficient to meet the expenses: but he did not state positively his own inability from other sources. *Nettleshipp* v. *Nettleshipp*, 10 Sim. 236.

Wife's Fund not Paid to Husband Unconditionally.]—A fund in court, belonging to a married woman who was a lunatic, will not be paid to her husband unconditionally. *Symes* v. *Lee, Bone, Ex parte*, 26 L. J., Ch. 665.

The court will, however, make an order for payment of the dividends to the husband; and it will also order a transfer of the stock to him, upon his giving a security, approved by the chief clerk, either upon property or personally, with sureties, to replace the stock when so directed by the court. *Ib.*

And see *T*——, *In re*, 15 Ch. D. 78; and *Edwards* v. *Abrey*, 2 Ph. 37; 15 L. J., Ch. 404; 10 Jur. 650.

Account by Husband subject to Presumed Maintenance.]—The husband maintaining his wife and receiving her separate income is not liable to account for more than one year upon a presumed agreement to subject that fund to maintenance. *Brodie* v. *Barry*, 2 Ves. & B. 36.

4. Real Estate.

a. Generally.

Rights of Husband.]—The freehold and inheritance of the wife is subject to other rules and regulations than the personal property of the wife: for the husband by the marriage does not become absolute proprietor of the inheritance, but as the governor of the family is so far master of it as to receive the profits of it during the wife's life, but has no power to make an absolute sale of it without her consent—Bacon, Abridg. B. & F. C.

If a man marries a woman seised in fee he gains a freehold in right of his wife.—Co. Litt. 351a.

The husband alone is entitled to the rents and profits of the wife's real estate during coverture, and only his receipt is a valid discharge. Therefore, if a tenant, even not having notice of the coverture, pay to the wife after marriage the rents reserved upon a lease made by the wife while sole, he shall pay them again. *Tracey* v. *Dutton*, Palm. 206; *S. C.*, Cro. Jac. 617; *Doe* d. *Leicester* v. *Briggs*, 1 Taunt. 367.

The husband takes an interest in lands belonging to his wife in fee-simple, which he may convey to another for the joint lives of himself and his wife, and such interest passes by the deed of the husband alone. *Robertson* v. *Norris*, 11 Q. B. 917; 17 L. J., Q. B. 201; 12 Jur. 556.

Title Deeds.]—The husband is entitled to the custody of his wife's title deeds during marriage, but he cannot transfer the right to them by assigning the rents. *Pyatt, In re, Rogers, Ex parte*, 26 Ch. D. 31; 51 L. T. 177; 32 W. R. 737.

And see Curtesy, infra, col. 1222.

b. Contracts and Specific Performance.

Agreement by Feme relative to Estate not Binding.]—Feme, though an infant, can in no case be bound by contract relative to her estate, and though made between herself, husband, and her father during her coverture. *Stamper* v. *Barker*, 5 Madd. 157.

A feme covert, one of several devisees in trust for sale, cannot bind herself to convey the estate, and a bill by the purchaser to enforce specific performance of a contract by such trustees was dismissed. *Avery* v. *Griffin*, L. R. 6 Eq. 606.

Husband and wife agreed in writing to sell the wife's equitable estate in fee to A., and subsequently conveyed the same estate by deed duly acknowledged to B., a purchaser for value without actual notice. A, was tenant in posses-

sion, and no inquiry was made as to any claim on his part by B. :—Held, that as an agreement by husband and wife to sell the wife's fee could not be specifically performed in equity, A. took no interest under his agreement, and the conveyance to B. was good. *Wilkinson* v. *Castle*, 37 L. J., Ch. 467; 18 L. T. 100; 16 W. R. 501. Affirmed 39 L. J., Ch. 843; L. R. 5 Ch. 534; 18 W. R. 586.

Held, also, that as A. knew that he was contracting to purchase the wife's estate, he took nothing under the agreement, and could not even compel the husband to convey his interest and receive an abated price. *Ib.*

A wife may, by a deed duly acknowledged, to which her husband is a party, acquire a power to dispose by will of her real estates, whether in possession or in reversion. *Pride* v. *Bubb*, 41 L. J., Ch. 105; L. R. 7 Ch. 64; 25 L. T. 890; 20 W. R. 220.

—— **Voidable Agreement by Female Infant to Settle—Defeating.**]—Though a female infant is not bound by an agreement on marriage to settle her real estate, if she does not, when of age, choose to accede to it, her husband would not be permitted to aid her in defeating, nor is her act, during coverture, effectual. *Milner* v. *Harewood* (*Lord*), 18 Ves. 275.

—— **Improvident Valuation.**]—Though a person may agree to sell at a price to be fixed by an award, and though the award can only be impeached for fraud or gross mistake, yet, upon such an agreement, where some of the persons to be bound were married women, and one of them had not executed, the court refused a specific performance, leaving plaintiff to law. *Emery* v. *Wase*, 5 Ves. 846.

On appeal, his honour's decree was affirmed, on the ground that the evidence did not prove as satisfactorily as it ought (especially in the case of married women) that the valuation was made with due attention and care. *S. C.*, 8 Ves. 505.

Agreement for Partition by Husband.]—The husbands of two co-heiresses by mutual agreement made a partition between themselves and the heir of their respective wives; after death of both husbands, on bill against one of the widows, to confirm the division :—Held, that she was not bound by her husband's agreement; for the agreement of husbands cannot bind the inheritance of the wives. *Ireland* v. *Rittle*, 1 Atk. 542.

—— **For Sale.**]—An agreement by the husband to sell his wife's estate shall not bind her, or be carried into execution without her consent. *Bryan* v. *Woolley*, 1 Bro. P. C. 184.

Specific Performance at Suit of Husband and Wife.]—Husband and wife may maintain a suit for specific performance of an agreement by them with a third party, for the sale to him of lands whereof he is seised in right of the wife. *Fennelly* v. *Anderson*, 1 Ir. Ch. R. 706.

—— **Against Married Woman.**]—The court will not make a peremptory order upon a married woman to execute a conveyance of an estate not settled to her separate use. *Jordan* v. *Jones*, 2 Ph. 170.

—— **Purchaser Cognisant of Coverture.**]—The wife of the plaintiff, by a will made in 1838, left real property to J., a married woman, and a legacy of 1,000*l.* and an annuity of 100*l.* to the plaintiff, and by a will made in 1858 she revoked the former will, and left all her property to the plaintiff. On her death the plaintiff entered into possession of the property, and commenced a suit against the heir-at-law of the wife in the court of probate to establish the second will. By a compromise made in the suit, and signed by J.'s husband for himself and wife, and by J.'s solicitor on her behalf, the plaintiff agreed to give up the property, and all benefit under either will, on the terms of being paid 15,000*l.* out of the estate. The plaintiff gave up the estate, and helped to establish the will of 1838. J. and her husband then refused to pay the 15,000*l.* On a bill filed by the plaintiff against J. and her husband for specific performance of the contract:—Held, that as the plaintiff was aware that J. was a married woman at the time he made the contract, her estate was not bound. *Nicholl* v. *Jones*, 36 L. J., Ch. 554; L. R. 3 Eq. 696; 15 L. T. 383; 15 W. R. 393.

—— **Authority to Sell by Auction—Sale by Private Contract.**]—Baron and feme having joint power to sell an estate of the wife's give authority to an agent to sell by auction; he sells by private contract for more than the price they required; the buyer cannot compel specific performance. Husband delivering his wife's compliments in a letter to the agent, is no proof of her joining in giving authority to agent. *Daniel* v. *Adams*, Ambl. 495.

—— **Power to Appoint—Sale.**]—Husband and wife having joint power to appoint by formal deed over wife's estate, agree in writing to sell it. Specific performance refused, as agreement was not binding on married woman. *Martin* v. *Mitchell*, 2 Jac. & Walk. 425.

Semble, under contract by husband and wife for sale of wife's estate, court would not decree husband to procure her to join. *Id.* 525.

—— **Personal Decree against Wife.**]—The court will not make a personal decree on the wife, where husband and wife jointly agree to convey; but the husband was decreed to convey, and to procure his wife to join or to refund the money received. *Sedgwick* v. *Hargrave*, 2 Ves. 57.

—— **Agreement for Sale by Wife.**]—An estate was devised to a feme covert for her separate use. She entered into a contract for sale and died, having devised the estate to her husband, who sued for a specific performance. The purchaser objected that the feme covert had neither power to enter into a contract nor to devise the estate. The court declined to compel a specific performance in the absence of the heir. *Harris* v. *Mott*, 14 Beav. 169; 15 Jur. 978.

Wife joining in Fine—Revocation.]—Where feme covert joins with husband in fine, she cannot recall it after five years. *Anon.*, Cary, 5.

Wife cannot Change Nature of Property.]—Wife not capable of changing the nature of her estate because under coverture, and unable to contract. *Oldam* v. *Hughes*, 2 Atk. 452.

Where feme covert was entitled to money, which was articled to be laid out in land, before she could alter the property or course of descent, the money must be invested in land, and then

she may levy a fine and give it away, or upon coming into court and consenting to take the money as personal estate, and being examined as to such consent, it binds the money articled to be laid out in land, as much as a fine at law would the land, and she may dispose of it. *Ib.*

Agreement to Grant Lease.]—A married woman, with the concurrence and in the presence of her husband, signed an agreement in writing to grant a lease; at the date of the agreement it was believed by all parties that she was entitled to two-thirds of the property for her separate use, and that the remaining one-third belonged to her brother in India, whose concurrence it was represented that she could procure. It was soon afterwards discovered that the wife was entitled to one-fourth only for her separate use; that to another fourth she was entitled absolutely; that another fourth had belonged to a deceased sister of the wife; and that the remaining fourth belonged to the brother in India. The fourth which belonged to the sister was purchased by the husband soon after the state of the title was discovered. Upon a bill for specific performance against husband and wife:—Held, that there could be no decree against her in personam, and that her agreement did not bind the husband as to the interests in the property which he had at the date of the agreement, or which he afterwards acquired. The court will not compel a vendor to give an indemnity, unless vendor and purchaser have contracted for it. *Aylett* v. *Ashton*, 1 Myl. & C. 105; 5 L. J., Ch. 71.

Feme sole takes consideration for making lease for twenty-one years, and then marries. Lessee surrenders old lease and takes another, husband dies, wife may oust lessee, and he cannot enforce first lease against her. *Anon.*, Cary, 21.

Where reversioner upon an estate for life made a settlement on herself for life with power for her being sole, to make leases for three lives in possession: and she and her husband in the lifetime of the tenant for life made a lease for twenty-one years, habend, from the date: it was held, not pursuant to her power: for by making the marriage she put herself under the control of her husband. *Antrim (Marquis)* v. *Bucks (Duke)*, 1 Ch. Ca. 17; Salk. 276; 2 Freem. 168.

Difference between a naked power and a power which flows from an interest. *Ib.*

Trustee for Sale—Conveyance to Purchaser—Concurrence of Husband.]—Real estate vested in a married woman (married since the commencement of the Married Women's Property Act, 1882) jointly with other persons upon trust for sale cannot be effectually conveyed to a purchaser without the concurrence of her husband and a separate acknowledgment by her. *Harkness and Allsopp's Contract, In re*, 65 L. J., Ch. 726; [1896] 2 Ch. 358; 74 L. T. 652; 44 W. R. 683.

Ignorance of Purchaser as to Vendor's Title.]—A. contracted with B. for the purchase in fee of property in ignorance that B. was only entitled to an estate pur autre vie, and that C. (B.'s wife) was entitled to the remainder in fee on the determination of the particular life. D., with full knowledge of A.'s contract, took a conveyance from B. & C. of the property, acknowledged by C. so as to pass her interest:—Held, that A. was entitled, by way of specific performance, to a conveyance from D. of B.'s interest, with compensation in respect of C.'s interest, which B. was unable to bind or convey without her consent. *Barnes* v. *Wood*, 38 L. J., Ch. 683; L. R. 8 Eq. 424; 21 L. T. 227; 17 W. R. 1080.

Widow Refusing to Convey Life Estate—Specific Performance.]—A husband agreed to sell property which was settled as he and his wife should jointly appoint, and in default of appointment to the use of trustees during the life of the wife for her separate use, with remainder to the husband in fee. The purchase-money was invested in consols and paid to the trustees of the settlement. On the death of the husband before completion the wife refused to convey her life interest:—Held, that the purchaser was entitled, by way of specific performance, to a conveyance of the property subject to the widow's life interest, with compensation in respect of such interest out of the husband's personal estate, and that he was entitled to a lien of the consols in the hands of the trustees for such compensation. *Barker* v. *Coæ*, 25 W. R. 138.

Married Woman instituting Suit—Founding Jurisdiction.]—A married woman having instituted a suit and obtained a decree for specific performance of a contract entered into by her husband for the settlement of her estate cannot afterwards repudiate the contract; for by instituting the suit she gives the court jurisdiction to bind her interests, and it is no objection that this has not been done by deed, acknowledged under the 3 & 4 Will. 4, c. 74. *Barrow* v. *Barrow*, 4 Kay & J. 409; 27 L. J., Ch. 678; 4 Jur. (N.S.) 1049; 6 W. R. 714.

Attorney to Alienate Lands.]—Husband and wife cannot, either jointly or severally, appoint an attorney to alienate the wife's lands. *Graham* v. *Jackson*, 6 Q. B. 811; 14 L. J., Q. B. 129; 9 Jur. 275.

A power of attorney by husband and wife, severally and respectively appointing an attorney to surrender the wife's customary tenement into the lord's hands is a nullity. *Ib.*

Devise to Convey to Husband after Wife's Death.]—A devise of real estate to trustees for an unmarried woman for life for her separate use, and after her death to convey to her husband, with a gift over in the event of her dying unmarried, vests the remainder in fee in the first person she may marry; and a title accruing under such a devise will be forced on an unwilling purchaser. *Radford* v. *Willis*, 41 L. J., Ch. 19; L. R. 7 Ch. 7; 25 L. T. 720.

Letting Wife's Lands.)—By a marriage settlement real estates were conveyed to trustees, to permit the wife to receive the rents to her sole use independently of her husband. After the marriage, the husband let the premises to tenants, speaking of them as property in which his wife was interested. The wife received the rents during her life:—Held, that it was a question of fact in what character the husband let the premises, whether as agent for the trustees, or as dealing with his wife's property, and that after the death of the wife the tenants were not estopped from denying that the husband had any interest unless it was found that he let in his own name. *Howe* v. *Scarrott*, 4 H. & N. 723; 28 L. J., Ex. 325.

—— **Action for Trespass.**]—To a declaration containing counts for trespass to land, conversion of goods, and assault, the defendant pleaded equitable pleas, raising substantially the same defence to each count, viz., that M., the plaintiff's wife, was seised of lands, that she afterwards married the plaintiff, whereby her estate became vested in her and the plaintiff, that afterwards by deed duly acknowledged the plaintiff and M. conveyed to E., his heirs and assigns, to hold during the life of M., to the use of M. and her assigns, to the intent that she and they should receive the rents and profits for her separate use, independently of her husband; that afterwards M. demised to the defendant, and that the acts complained of in the declaration were respectively the defendant's entry upon the lands demised, his taking the crops and his removing the plaintiff from the premises on the plaintiff's disturbing him in his possession:—Held, that these were good pleas, because the lands having been settled to the wife's separate use, and she having demised to the defendant, a court of equity would grant an injunction to prevent the plaintiff from disturbing the defendant in his quiet possession; and that as to the count for assault as well as the counts in trespass and trover, an injunction to restrain proceedings would be granted, such an injunction being necessary for the complete protection of the occupation of the wife's separate estate. *Allen* v. *Walker*, 39 L. J., Ex. 153; L. R. 5 Ex. 187; 22 L. T. 610.

Assignee of Husband and Wife—Survivorship of Wife—Action for Waste.]—Devise to A. and his wife to hold for their joint lives, and to the survivor for his or her life. The husband during the joint lives assigned, and the assignee committed waste:—Held, that the wife (who survived) could not maintain an action for waste, she having only a contingent remainder at the time of the waste done. *Bacon* v. *Smith*, 4 P. & D. 651; 1 Q. B. 345; 10 L. J., Q. B. 119; 5 Jur. 549.

Settlement—Trees Cut down by Order of Husband.]—Lands, together with the woods, were conveyed under a marriage settlement to A. and B., their heirs and assigns, during the life of W., in trust to pay the rents and profits as W. should appoint during her life; and, after her decease, to the use of such child or children of the marriage, and in such shares as W. should appoint; and, for want of appointment, to the use of the children equally, and the heirs of their bodies, with cross-remainders; and, in default of such issue, to the use of the right heirs of W. for ever:—Held, that A. and B. could not maintain trover against a stranger, for certain trees which had been cut down by order of the husband of W., and carried away by the stranger. *Blaker* v. *Anscombe*, 1 N. R. 25.

Husband Tenant by Curtesy — Wife must concur.]—Where a husband is but tenant by the curtesy of his wife's estate, he cannot affect that estate without her joining. *Incledon* v. *Northcote*, 3 Atk. 436. *See* CURTESY, infra, col. 1227.

c. Sale of Wife's Property.

Sale of Wife's Estate.]—A husband and wife agreed in writing to sell the wife's estate in fee to A., and subsequently duly conveyed the estate to B.:—Held, that, as A. knew that he was contracting to purchase the wife's estate, he took nothing under the agreement, and could not even compel the husband to convey his interest and receive an abated price. *Wilkinson* v. *Castle*, 39 L. J., Ch. 843; L. R. 5 Ch. 534; 18 W. R. 586.

And see FINES AND RECOVERIES.

5. WIFE'S CHATTELS.

Husband's Rights in.]—Marriage is an absolute gift to the husband of all chattels personal in possession in her own right, whether the husband survive the wife or no.—Co. Litt. 351b.

Money ordered to be paid to the husband in right of his wife is a vested interest in him. *Heygate* v. *Annesty*, 3 Bro. C. C. 362.

A husband is entitled to the personal property of his wife, which she has acquired by living apart from him in adultery. *Agar* v. *Blethyn*, 2 C. M. & R. 699; 1 Tyr. & G. 160; 5 L. J., Ex. 36.

The property in wearing apparel bought for herself by a wife living with her husband out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and it is liable to be taken in execution for his debts. *Carne* v. *Brice*, 7 M. & W. 183; 8 D. P. C. 884; 10 L. J., Ex. 28.

N., in a marriage settlement, reciting that I., his intended wife, was possessed of goods, and that it had been agreed that, in case she survived him, she should have the goods and such articles as might be bought in lieu thereof for her own use, and, in case she should die before him, that she might dispose of the goods, covenanted with trustees that he would not dispose of the goods without the consent of I.; that he would purchase new articles in lieu of those which might be worn out or disposed of; that if she survived him she should have the goods for her own use, and if he survived her she should dispose of them subject to his life interest. No assignment of the goods was made to the trustees. N. and I. separated after their marriage, and I. demised the goods to F. as a yearly tenant:—Held, first, that the goods were, notwithstanding the settlement, the property of N., and might be seized under a fi. fa. against him; but, secondly that they could not be seized for his debt during the continuance of the demise to F. *Izod* v. *Lamb*, 1 C. & J. 35.

Money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, and invested by her in her own name, belongs to her husband. *Barrack* v. *M'Culloch*, 3 Kay & J. 110.

A husband and wife lived separate from each other. At the death of the wife she was possessed of cash and bank notes arisen from property settled to her separate use:—Held, that the husband was entitled to them in his marital right. *Maloney* v. *Kennedy*, 10 Sim. 254.

—— **Trading by Wife.**]—A married woman carrying on trade without the interference of her husband, who resided in a different part of the kingdom, advanced money to the plaintiff for the purchase of a share in a lottery, upon an agreement with him, that half should be considered a loan to him, and that they should be jointly concerned in the adventure:—Held, that the wife's

money being that of the husband, the produce of the lottery prize belonged to him also; the plaintiff's bill for a moiety of the prize was dismissed. *Lamphir* v. *Creed*, 8 Ves. 599.

And see cols. 1027, 1115.

—— **When Derived from Separate Estate.**]—Money saved by a wife out of the income of her separate estate, and invested, belongs to her. *Barrack* v. *M'Culloch*, 3 Kay & J. 110.

Where such investment had been made by her husband for her, upon its being impeached by his creditors after his death:—Held, that the onus was upon her to prove that the moneys were the savings of her separate estate. *Ib.*

She proved that they were saved out of rents of furnished houses, which were settled to her separate use:—Held, that threw back upon the creditors the onus of proving that the furniture belonged to the husband, and, also what part of the rents was to be attributed to the furniture. *Ib.* *And see* col. 1024.

Paraphernalia, as to.]—*See* col. 1262.

Foreign Spouses acquiring an English Domicil, as to.]—See *De Nicols, In re, De Nicols* v. *Curlier*, 67 L. J., Ch. 274; [1898] 1 Ch. 403.

6. CHATTELS REAL.

Husband may dispose of—During Wife's life.]—Husband may forfeit or dispose of his wife's chattel real during her life; if he does not it survives to her; if he survives it goes absolutely to him. *Moody* v. *Matthews*, 7 Ves. 183.

A wife's term may be disposed of or forfeited by her husband, or taken in execution for his debt; but if not, it survives against his representative. *Wildman* v. *Wildman*, 9 Ves. 177; 7 R. R. 153.

—— **Reversionary Interest.**]—A husband may make a valid assignment of his wife's reversionary interest in leasehold property; but secus, if the interest is of such a nature that it cannot by possibility vest in the wife in possession during the coverture. *Duberley* v. *Day*, 16 Beav. 33.

Agreement for Lease a Reduction into Possession.]—An agreement by a husband for a lease of the chattel real of the wife is in equity a reduction into possession, and binding on the wife surviving. The rent agreed for is, therefore, assets of the husband. *Donegani* v. *Hibson*, Ir. R. 3 Eq. 441. And see *Stead* v. *Cragh*, 9 Mod. 43.

Copyhold Term—Death of Wife.]—If wife, tenant of term in copyhold, dies before expiration, husband continues in without new admission or fine. *Bath (Earl)* v. *Abney*, Dick, 263.

Death of Wife.]—A wife entitled to a term, subject to a life estate therein, predeceased her husband during the subsistence of the life estate:—Held, that it was not necessary for the husband to take out letters of administration to her in order to complete his title to the leaseholds. *Bellamy, In re, Elder* v. *Pearson*, 53 L. J., Ch. 174; 25 Ch. D. 620; 49 L. T. 708; 32 W. R. 358.

On the death of a wife her husband, in the absence of any disposition by her, becomes entitled jure mariti to her equitable interest in chattels real settled to her separate use. *Archer* v. *Lavender*, Ir. R. 9 Eq. 220.

A., being possessed of lands for a term of 999 years, previously to his marriage with B. granted the term to "B. and her heirs, immediately after the death of A., to hold the same to B. and her heirs to and for her and their own proper use for ever"; the marriage took place. A survived B. and died without issue, intestate, and without having taken out administration to B. his wife; the term upon the death of A. goes to his administrator, and not to the administrator of B. *Doe* d. *Roberts* v. *Polgrean*, 1 H. Bl. 535.

Wife Marrying an Alien.]—Wife, being possessed of term for years, and having married an alien, the marriage is not a gift in law of the term. *Theobalds* v. *Duffoy*, 9 Mod. 104.

Lease by Trinity House.]—A lease by the corporation of the Trinity House of a lighthouse, and of the tolls thereof, is a chattel real, and therefore a husband may assign his wife's interest in such a lease. Construction of the twenty-third and twenty-sixth sections of 6 & 7 Will. 4, c. 79, enabling the Trinity House Corporation to purchase lighthouses. *Ellison, Ex parte, Trinity House Corporation Act, In re*, 2 Y. & Coll. 528; 7 L. J., Ex. Eq. 49; 1 Jur. 283.

Merger.]—A trust term is not merged in equity by the marriage of the trustee to a woman entitled to the freehold. *Thorn* v. *Newman*, 3 Swan. 603.

Lessee of Lands Let by Husband and Wife—Arrears of Rent.]—A husband cannot maintain an action against a lessee for arrears of rent, accruing after the death of his wife, on a lease of her land by himself and his wife, under a seal, during coverture, and in which the lessee covenanted with the husband and wife and the heirs of the wife for the payment of rent. *Hill* v. *Saunders*, 2 Bing. 112; 9 Moore, 238; 1 Car. & P. 80. *S. C. (in error)*, 7 D. & R. 17; 4 B. & C. 529; 28 R. R. 375.

If such a lease is made according to the provisions of the 32 Hen. 8, c. 28, it continues during the term, notwithstanding the death of the wife; and although her heir is entitled to the rent he cannot enter or eject. *Ib.*

Reversionary Interest in Leasehold Property.]—A husband may make a valid assignment of his wife's reversionary interest in leasehold property; but secus, if the interest is of such a nature that it cannot by possibility vest in the wife in possession during the coverture. *Duberley* v. *Day*, 16 Beav. 33.

A wife's leaseholds were, on her marriage, limited to her absolutely in the event of her surviving her husband, but without any trust for her separate use:—Held, that he could not, during the coverture, dispose of this contingent reversionary interest. *Ib.*

Secret Settlements.]—A voluntary settlement made after marriage, but without actual fraud, whereby a chattel interest of the wife's was conveyed in trust to the husband and wife for their joint lives and the life of the survivor, remainder to the wife's son by a former marriage, is not avoided under 27 Eliz. c. 4, by a mortgage made by the wife after the death of her husband. *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1035; 20 L. J., C. P. 177; 15 Jur. 512.

A secret settlement by a woman, whilst under treaty of marriage, though liable to be set aside in a court of equity, is not necessarily void in a court of law. *Ib.*

A., pending a treaty of marriage between her and B., without B.'s knowledge made a settlement of certain leaseholds to herself for life, remainder

to C., her son by a former marriage, remainder over to D. :—Held, that this deed was not avoided by the marriage, under 27 Eliz. c. 4, the husband not taking as a purchaser. *Ib.*

On Marrying Administratrix.]—A husband who marries a feme administratrix may surrender or dispose of a term which she has in that right. *Thrustout* d. *Levick* v. *Coppin*, 2 W. Bl. 801; 3 Wils. 277.

7. Choses in Action.

a. Generally.

What are.]—A chose in action is a right to be asserted or property reducible into possession either by action at law or suit in equity. *Langham* v. *Nenny*, 3 Ves. 469; Wms. Exors. 9th ed. 693.

Title of Husband.]—Marriage is only a qualified gift to the husband of his wife's choses in action, viz., upon condition that he reduces them into possession during its continuance—Co. Litt. 351b. *Osborn* v. *Morgan*, 9 Ha. 432; *Fleet* v. *Perring*, 38 L. J., Q. B. 257; L. R., 4 Q. B. 500; 20 L. T. 814.

General Probate of Will of Married Woman.]—A woman married before the Married Women's Property Act, 1882, who was entitled to choses in action, but had no separate property, nor any property of which she could dispose by will, made without the assent of her husband, a will, by which she appointed executors, and gave all her property away from her husband. After her death probate of her will, which, pursuant to the Rules of 1887, was in general form, was granted to one of the executors. The husband brought an action in the chancery division against the executor to recover the choses in action :—Held, by the court below, that the action must be dismissed, for that the plaintiff suing the executor in the chancery division must treat the will as valid, in which case he had no title, and that his remedy was to apply to the probate division to revoke the probate and grant him administration of such estate of his wife as she could not dispose of by will :—But held, by the court of appeal, that the effect of the general probate was only to enable the executor to get in all the assets of the wife, whether she had power to dispose of them by will or not, and that it did not affect the beneficial title to them; that the husband was beneficially entitled to the choses in action, that the executor was a trustee of them for him, and that the husband was entitled to have them transferred to him by the executor, subject to the same deductions as they would have been subject to if the husband had taken out administration under the old practice. *Smart* v. *Tranter*, 59 L. J., Ch. 363; 43 Ch. D. 587; 62 L. T. 356; 38 W. R. 530—C. A.

Funds in Accountant-General's Name.]—The funds of a married woman, standing in the name of the accountant-general to her account, may be pledged by her husband. *Simmus* v. *Dewar*, 3 Russ. 91.

Bond given to Husband and Wife.]—If a bond is given to husband and wife, administratrix, the husband alone may declare on it, as on a bond made to himself. *Ankerstein* v. *Clarke*, 4 Term Rep. 616.

Judgment obtained by Wife before Marriage.]—Marriage does not enure as an assignment to the husband of a judgment recovered by the wife, in Ireland, before the marriage, under 9 Geo. 2, c. 5 (Irish), amended by 25 Geo. 2, c. 14 (Irish), and made perpetual by 12 Geo. 3, c. 19, s. 3. *Fitzgerald* v. *Fitzgerald*, 8 C. B. 592; 19 L. J., C. P. 126; 14 Jur. 485.

b. Reduction into Possession by Husband.

Stock Vesting in Husband as Trustee.]—Stock, the property of a married woman, is not reduced into possession so as to be vested in her husband by a transfer to him merely as trustee. *Wall* v. *Tomlinson*, 16 Ves. 413; 10 R. R. 212. And see *Baker* v. *Hall*, 12 Ves. 497; 8 R. R. 366.

Carrying over to Joint Account.]—The carrying over of a fund in court to the joint account of husband and wife after mortgage of fund by them is not a reduction into possession by husband. *Prole* v. *Soady*, 37 L. J., Ch. 246; L. R. 3 Ch. 220; 16 W. R. 445.

Husband never in Position to Assert his Rights by Action.]—A fund to which a married woman becomes entitled during coverture will not be considered as reduced into possession by the husband, where he has not been at any time in a position to assert his rights by action for the amount as money had and received to his use. *Aitchison* v. *Dixon*, 39 L. J. Ch. 705; L. R. 10 Eq. 589; 23 L. T. 97; 18 W. R. 989.

A., the sole surviving trustee and executor of G.'s will, appointed E. and his own solicitor, D., as his co-trustees. D., as such trustee, having opened an account at a bank in the name of G.'s executor, drew a cheque against it in favour of A.'s wife, who was entitled to a distributive share of G.'s personal estate, and applied it in payment of a railway debenture, taken in the name of D. and E., as trustees for A.'s wife. A. then died, leaving his wife surviving:—Held, that the cheque having been drawn in favour of his wife, and there never having been a moment at which A. could have brought an action for the amount of it, there had been no reduction into possession by him. *Ib.*

A woman entitled to property for her separate use was desirous of raising money for the improvement of her estate, while her husband also wished to raise money to discharge a debt. They accordingly arranged through their solicitor to borrow money upon mortgage of the separate estate, and upon policies upon the lives of each of them respectively. The money was to be advanced by instalments, and when the first instalment was due the husband and wife signed a joint authority for the solicitor to receive it for them. He received the money, and claimed to retain part of it in respect of a separate debt due to him as solicitor of the husband:—Held, that in an action by husband and wife the solicitor could not retain the money, or set off against it a debt due from the husband, as it was received upon the express understanding that it was to be held for the husband and wife jointly, so that there never was any reduction into possession on the part of the husband. *Jones* v. *Cuthbertson*, 42 L. J., Q. B. 221; L. R. 8 Q. B. 504; 28 L. T. 673; 21 W. R. 919—Ex. Ch.

A woman having a sum of money deposited with a merchant, and standing in her name,

married a man whom she afterwards accompanied on a voyage, and both were drowned at the same time. The money was transferred by the merchant into the names of the husband and wife; but the only direction given to the merchant by the husband was to keep this property separate from his other moneys. The husband by his will, after reciting that his wife had previously to her marriage deposited with the merchant this money, which was standing in her name, disposed of the property as his own:—Held, that the husband had done no act to reduce the wife's money into possession, and that it would go to her personal representatives. *Scrutton* v. *Pattillo*, 44 L. J., Ch. 249; L. R. 19 Eq. 369; 32 L. T. 140; 23 W. R. 379.

Promissory Note given to Wife.]—The interest in a promissory note, given to a wife during coverture, the consideration for which was money advanced by her during the coverture, survives to the wife after the death of her husband, unless he reduces it into possession in his lifetime. *Gaters* v. *Madeley*, 6 M. & W. 425; 9 L. J., Ex. 173; 3 Jur. 724.

The plaintiff, who was a widow, was entitled, under the will of her aunt T., to half of 500*l.*, which had been lent by T. to the defendant, and remained in his hands, at interest, during the life of T., and during the life of T.'s sister (the plaintiff's mother), who was entitled to the interest of it for her life. Under the will of the plaintiff's father she and her sister (the defendant's wife) were each entitled to 200*l.*; of this will the defendant was executor. T. died in 1847, the plaintiff's father in 1845, and her mother on the 13th March, 1850, leaving the plaintiff and her sister surviving her. On the 2nd of March, 1850, the defendant gave a bill of exchange to the plaintiff's husband for 242*l.* 10*s.*, the amount to which the plaintiff would be entitled at her mother's death under T.'s will, and in May a receipt in full of all demands was given to the executors of T.'s will by the defendant and his wife, and by the plaintiff and her husband. After the death of the plaintiff's husband, the defendant obtained possession of the bill of exchange. In 1857, in an interview between the plaintiff and defendant, in the presence of her attorney, the defendant, being pressed for payment, made out an account of the sums in which he was indebted to the plaintiff, charging himself with interest on money lent; at the same time he said that he was going to receive money from the sale of some property, and he indorsed on the above account an authority to his solicitor to pay the amount to the plaintiff out of any moneys received for him, "subject to any legal claim he might have against the plaintiff":—Held, that as to the 242*l.*, the plaintiff had an action in her own right, it not having been reduced into possession by her deceased husband; and that as to the 200*l.*, the defendant was personally liable upon an express promise. *Topham* v. *Morecraft*, 8 El. & Bl. 972; 4 Jur. (N.S.) 611; 6 W. R. 294.

A married woman, being administratrix, received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory note of her husband and two other persons payable to her with interest:—Held, that although she could not have maintained any action upon the note during the lifetime of her husband, yet that he having died, and it having been given for a good consideration, it was a chose in action surviving to the wife, and that she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note. *Richards* v. *Richards*, 2 B. & Ad. 447; 9 L. J. (O.S.) K. B. 319.

Causing Wife to Indorse Note.]—In an action by payee against maker of a note, he pleaded, that, when the note was made, the plaintiff was the wife of B., and that he elected to take the note in his marital right, and caused the plaintiff to indorse; and she, by his authority, indorsed the note, and B. delivered it so indorsed to F.; and after the note became due, and before action, B. died, and the note came to the plaintiff's possession by delivery from F.:—Held, that the plea was bad, as it did not clearly show such a reduction of the note into possession by the husband as disentitled the wife to sue upon it after his death. *Scarpellini* v. *Atcheson*, 7 Q. B. 864; 14 L. J., Q. B. 333; 9 Jur. 827.

Shares in joint Names of Husband and Wife.]—A wife became in 1866 entitled, on the death of an intestate, to a share of his estate. Part of her share was paid by the administrator to the husband, and in 1867 shares in a joint-stock company, which had been appropriated by the administrator in respect of the remainder of the wife's share, were, with the assent of the husband and wife, transferred into their joint names. In May, 1874, the husband deserted the wife, and in November, 1874, she obtained from the justices a protection order, by which her property and earnings acquired since the date of the desertion were protected from her husband. In 1876 the company resolved upon a voluntary liquidation, and the liquidator gave notice to the husband and wife that he was prepared to refund 900*l.* in respect of the capital of the shares. The wife thereupon (suing as a feme sole under the protection order) commenced an action against the company and the husband, claiming payment of the 900*l.* to her as a feme sole. The money was paid into court:—Held, that the transfer into the joint names did not amount to a reduction into possession by the husband, and that the wife was entitled to the 900*l.* as a feme sole under the protection order as being property acquired by her after the desertion. *Nicholson* v. *Drury Building Estate Co.*, 47 L. J., Ch. 192; 7 Ch. D. 48; 37 L. T. 459; 26 W. R. 76. See also *Prole* v. *Soady*, 37 L. J., Ch. 246; L. R. 3 Ch. 220; 16 W. R. 445.

Mortgage of Wife's Chattels Real by Husband.]—Husband executed mortgages of his wife's equitable chattels real, and died in his wife's lifetime, without having paid the mortgage money:—Held, upon the construction of the instruments of mortgage, that the transactions were intended solely as a security to the mortgagees for the money lent, and not as a reduction of chattels into the husband's possession; consequently, that the wife, by survivorship, was entitled to the equity of redemption. *Clark* v. *Burgh*, 2 Coll. 221; 14 L. J., Ch. 398; 9 Jur. 679.

Sale by Husband.]—The sale by a husband of his wife's chose in action is a reduction into possession by him. The right to avoid such a sale, e.g. on the ground of fraud, is in the husband, and, though the wife survives him,

passes to his executors, who are the proper persons to sue after the death of both husband and wife, not the wife's representatives. *Widgery* v. *Tepper*, 47 L. J., Ch. 550; 7 Ch. D. 423; 38 L. T. 434; 26 W. R. 546—C. A.

Joint Receipt of Interest on Debt.] — A debt secured to a testator by warrant of attorney was appropriated by his executor, with the concurrence of a legatee and her husband, in satisfaction of the former's legacy, which was of the same amount. The legatee and her husband received interest on the debt:—Held, that this was not a reduction into possession so as to defeat the wife's equity to a settlement. *Norton, Ex parte, Selby, In re*, 8 De G. M. & G. 258; 2 Jur. (N.S.) 479.

Appropriation of Wife's Income does not Affect Future Income.] — When a trust for accumulation is excessive, and a married woman, as one of the next-of-kin, becomes entitled to a share of the income during the excess, this interest, though lasting for her whole life, is not of such a nature as to enable her husband to assign the future payments to become due during his life, but such payments, unless actually received by the husband or his assignee, will belong to the wife by survivorship. *Benn* v. *Griffith*, 18 W. R. 403.

Solicitor Husband Drawing Will.] — B., a solicitor, drew the will of R., his father-in-law, which bequeathed a share of residue, amounting to 45,000*l.*, to B.'s wife, and appointed B. sole executor. The will contained no direction that this sum should be for the separate use of B.'s wife. There was no evidence as to what had passed between B. and R. at the time of the execution of the will:—Held, that, in the absence of evidence, the court could not assume such a dereliction of duty on B.'s part in not informing R. of the effect of the will, as to make B. a trustee for his wife. *Birchall, In re, Wilson* v. *Birchall*, 44 L. T. 243; 29 W. R. 461.

Receipt by Agent of Husband and Wife.]—The receipt by an agent, appointed by husband and wife, of money forming part of the estate of an intestate of which the wife is administratrix, amounts to a reduction into possession by the husband of the wife's distributive share of the money. *Barber, In re, Dardier* v. *Chapman*, 11 Ch. D. 442; 40 L. T. 649; 27 W. R. 813.

Payment of Debt to Wife, contracted before Marriage.]—The act of the wife in receiving during coverture the debt contracted with her dum sola operates as a reduction into possession of the chose in action, and vests the property in the husband. The husband's knowledge of the payment to the wife is only material as evidence of his authority for the payment. *Rogers* v. *Bolton*, 8 L. R. Ir. 69.

Payment into Bank to Husband's Credit.]—A sum of money having been bequeathed to a wife, she and her husband joined in giving a power of attorney to A. to receive the money. A. took out administration as the attorney of the wife, and received the money, which he lodged at a banker's to the credit of her husband. The wife bequeathed the money by her will, which was proved by the husband, and administration, &c., taken out by him. The account having been afterwards settled, and the balance struck, the husband released A. from all claim:—Held, that the giving of the power of attorney to A. did not amount to a reduction into possession by the husband, but that the receipt of the money by A., and the payment of it into the bank to the husband's credit, did. *Roche* v. *Roche*, 7 Ir. Eq. R. 436.

Account at Husband's Bank.]—A legacy, to which a married woman was entitled under a will, was paid by the executors by means of a cheque for 995*l.*, drawn to the order of the husband and wife. The husband and wife indorsed the cheque, and then went together to the husband's bankers, when the wife handed the cheque to the manager, and, in the presence and with the assent of the husband, told the manager to open an account in her own sole name, and to place to the credit of it 800*l.*, part of the 995*l.*, and to credit the residue to the husband's current account. This was done, and the wife afterwards, from time to time, drew cheques on the amount in her sole name. The husband never interfered with the account. The wife drew various cheques, for amounts varying from 20*l.* to 50*l.*, in favour of the husband, for the purpose of those sums being employed by him in his business. Part of the money was, by the wife's directions, invested by the bankers in the purchase of some bonds, they sending her a memorandum which stated that they held the bonds as her property. The husband afterwards asked the wife to sign a memorandum charging her money and securities with the payment of the overdrawn balance of his account with the bankers, but she refused to do so:—Held, that the legacy had never been reduced into possession by the husband. *Parker* v. *Leehmere*, 12 Ch. D. 256; 28 W. R. 48.

Administrator of Husband—Rights of.] — The administrator of a husband who survives his wife, and dies without taking out administration of her effects, cannot recover her choses in action; for that purpose administration must be taken out to the wife. *Betts* v. *Kimpton*, 2 B. & Ad. 273; 9 L. J. (O.S.) K. B. 192.

Double Administration, when Necessary.]—A married woman died intestate, entitled to a chose in action. The husband, who survived her, did not reduce her property into possession during his lifetime, and died intestate, without having administered to her effects:—Held, that a double administration was necessary to enable their only child to possess himself of his mother's property. *Harding, In goods of*, 41 L. J., P. 65; L. R. 2 P. 394; 26 L. T. 668; 20 W. R. 615.

Transfer by Order in Husband's Lunacy.]—A married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock, which was standing in the name of a trustee for her; this stock was, under an order made in the lunacy, transferred into the name of the accountant-general, in the matter of the lunacy, and part of it was afterwards sold out, and applied in payment of costs; the lunatic died, leaving his wife him surviving:—Held, that the stock had been reduced into the possession of the lunatic, and that the wife was not entitled to it by right of survivorship. *Jenkins, In re*, 5 Russ. 183.

Post-nuptial Settlement.]—By a post-nuptial

settlement, reciting that a sum of stock, originally standing in the name of the wife, had been transferred into those of trustees, and that it had been agreed that a promissory note for 500*l.*, given to the wife by her brother, should be cancelled, and that he should give his bond to the trustees for that amount, it was witnessed, agreed, and declared, that the trustees should stand possessed of these funds in trust to pay the interest and dividends to the husband for life, then to the wife for life; and upon the death of the survivor, to transfer the funds to the children of the marriage, and in case there should be no children, then to such persons as the wife should, by deed or will, during and notwithstanding her coverture, appoint; and in default of such appointment, to the husband, his executors, administrators, and assigns. There were no children of the marriage. The wife survived the husband:—Held, that in the event of the death of the wife without making a valid appointment, the fund would belong to the husband's personal representatives, as having been reduced into the husband's possession by the settlement. *Burnham* v. *Bennett*, 2 Coll. 254; 9 Jur. 888. See *S. C.*, 1 De G. & Sm. 513.

Payment to Husband by Trustee of Mortgage.]—A woman being entitled to two sums, one secured by a mortgage in fee to herself, and the other to a trustee for her, married. The mortgagors having been applied to, but being unable to pay the sums, the trustee paid them to the husband. The husband died, leaving the mortgages untransferred:—Held, that he had reduced both sums into possession. *Rees* v. *Keith*, 11 Sim. 388; 10 L. J., Ch. 46; 5 Jur. 20.

Request by Husband to Trustees to Transfer to Wife's Separate Use.]—A married woman being entitled under a will to stock and to cash, forming part of a residue, her husband wrote to one of the executors, requesting that the stock should be transferred into the names of certain trustees for the wife's separate use, and that the cash should be paid to himself. These requests were complied with. The husband employed part of the cash in increasing the amount of stock. He afterwards became bankrupt and died:—Held, that the stock transferred by the executors was not reduced into possession by the husband, and therefore belonged to the wife by survivorship; but that the assignee under the bankruptcy was entitled to the increase made by the husband. *Ryland* v. *Smith*, 1 Myl. & C. 53; 5 L. J., Ch. 186.

Second Husband.]—Where the first husband of a woman entitled to a legacy of 600*l.*, chargeable in default of personalty on the testator's real estate, verbally agreed with the three devisees of the real estate, to sell the legacy to them for 200*l.* apiece, but received the consideration from one only of the devisees, taking interest on the 400*l.* due from the two others:—Held, that to the extent of 400*l.* this was not a reduction of the legacy into possession, and that to a suit instituted by the woman and her second husband, to recover what was due on the legacy, the representatives of the first husband were not necessary parties. *Harwood* v. *Fisher*, 1 Y. & Coll. 110; 4 L. J., Ex. Eq. 10.

D., the father of C., after marriage, drew a cheque in her favour on his bankers for 10,000*l.* Bankers gave her a promissory note for the amount. C.'s husband, L., received 1,000*l.* upon the note, and interest of it up to time of his death:—Held, on L.'s death, that C. was entitled to the note as a chose in action, and that it was not reduced by husband into possession by his receiving the 1,000*l.* and interest. *Nash* v. *Nash*, 2 Madd. 133.

Legacy Payable out of Realty—Acceptance of Land for Money.]—A married woman, entitled to a share in a legacy payable out of real estate, with the consent of her husband agreed, together with other parties beneficially interested, to accept the lands in lieu of the money. The lands were accordingly conveyed by the trustee of the will to a trustee; and by a subsequent deed declaring the trusts a portion of the lands was limited to the husband and wife for their joint lives, and to the survivor for life, with remainder to such of their children as the husband in his lifetime, or the wife if she survived him, should appoint:—Held, that the assignment of the lands to the trustee did not operate as a reduction into possession of the wife's chose in action, and that the lands into which the money was thereby converted were subject to the same uses and trusts as the money. *Bayley, In re*, 16 Ir. Ch. R. 215.

Held also, that the modification of the prior rights and interests of the husband and wife in the lands formed a sufficient consideration, in the deed declaring the trusts, to make it a deed for valuable consideration. *Ib.*

Inoperative Mortgage.]—A fund in court belonging to a married woman residing with her husband at the Cape of Good Hope was, whilst he was temporarily in this country, assigned by him by way of mortgage. Afterwards, the husband and wife were divorced by the proper tribunal at the Cape. The fund was never reduced into possession by the husband during the coverture. On a petition by the wife as feme sole:—Held, that the attempted mortgage was inoperative, and that she was absolutely entitled to the fund. *Heath* v. *Lewis, Johnson, Ex parte*, 10 Jur. (N.S.) 1093; 11 L. T. 333; 13 W. R. 129.

Interest defeasible on Second Marriage—Concealment of Marriage.]—A widow was entitled for life to property, under a will which contained a condition that, should she marry again without consent of the trustees, the property should go over to her children. She did marry again, and until her death concealed her marriage from the trustees:—Held, that her second husband, who knew of the condition in the will, was bound to refund that which the trustees had in ignorance of her marriage paid to her. *Charlton* v. *Coombes*, 6 Jur. (N.S.) 904; 8 L. T. 653; 11 W. R. 1038.

c. Survivorship.

i. *Of Husband.*

Husband cannot Sue till he has Administered.]—A husband cannot sue for a wife's choses in action till he has administered. *Grosvenor* v. *Lane*, 2 Atk. 180.

Husband suing after his wife's death for her chose in action must take out administration to her. *Bourne* v. *Crofton*, 2 Moll. 318.

A man marries an orphan who died under twenty-one, her orphanage part shall not survive to the other children, but shall go to the husband. *Fouke* v. *Lewen*, 1 Vern. 88.

Where there was a fund in court standing to

the separate account of a married woman, whose husband survived her, and died before administering to her estate, the fund was ordered to be paid to the wife's legal personal representative, although such representative had not also obtained administration to the husband's estate. *Gutteridge* v. *Stilwell*, 1 Myl. & K. 486.

And see *Turner* v. *Crane*, 1 Vern. 170 ; 1 Ch. Rep. 242.

Though a husband died before he took out administration to his wife's estate, it shall go to his representatives, for it is vested in him at her death ; but had the wife survived, her choses in action, not reduced into the husband's possession, would have survived to her. *Elliot* v. *Collier*, 3 Atk. 526.

Though ecclesiastical courts are bound by statute to grant administration to the next of kin of the wife, yet that does not bind the right of the husband in equity. *Ib.*

On a marriage, the father of the wife purchased 1,000*l.* consols, and the same were vested in trustees to pay the dividends to the wife for her life ; and then trusts were declared for the children of the marriage, under which the court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest. This daughter married J. M. and died in the lifetime of the mother, leaving J. M. her surviving. J. M. did not take out administration to the effects of his deceased wife, and afterwards died : —Held, that his executors were entitled to the 1,000*l.* consols, and that the representatives of the wife were not entitled. One of J. M.'s executors, who was a defendant, having colluded with the other defendant, the court gave costs against both of them. *Platt* v. *M'Dougall*, Tam. 290 ; 9 L. J. (o.s.) Ch. 150.

And see *Cary* v. *Taylor*, 3 Vern. 302 ; *Burnett* v. *Kinaston*, Pre. Ch. 118 ; 2 Vern. 401 ; 2 Freem. 239.

Residuum—Legacy of Wife not reduced to a Certainty.]—Where the residuum of a testator's estate, bequeathed to a feme covert, is not collected and reduced to a certainty in her lifetime, it is not a vested interest, but remains a chose in action, and shall go to the administrator of the wife. *Amhurst* v. *Selby*, 11 Vin. Abr. 377, pl. 8.

Illegitimacy—Title of Crown.]—By a marriage settlement, a fund, the property of the wife, was settled on her and her husband, and their issue, and in default of issue, on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her :—Held, that the crown was not entitled to the fund, but that it belonged to the husband as administrator to his wife. *Hawkins* v. *Hawkins*, 7 Sim. 173.

Promissory Note to Wife dum sola—Payment during Coverture.]—The amount of a promissory note made to a feme sole was paid to her after marriage, but without the authority of her husband :—Held, that such payment was no answer to an action, brought after her decease by her husband as her administrator upon the note : —Held, also, that if administration had been granted to a stranger, the administrator would have been equally entitled to recover. *Hart* v. *Stephens* (6 Q. B. 937) distinguished. *Rogers* v. *Bolton*, 8 L. R., Ir. 69.

A feme sole, payee of a promissory note payable with interest, married, and her husband survived her :—Held, first, that the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life, for that he did not thereby reduce the chose in action into possession. *Hirt* v. *Stevens*, 6 Q. B. 937 ; 14 L. J., Q. B. 148 ; 9 Jur. 225.

ii. *Of Wife.*

Money in Trustee's Hands.] — Money in trustee's hands for a feme covert, shall go to the feme, if she survives the baron, and not his executors. *Twisden* v. *Wise*, 1 Vern. 161.

Income of Wife's Property.]—The income of wife's property being choses in action, and not possessed or reduced into possession in the lifetime of her husband, belongs to the wife by survivorship, and not to the representatives of the husband or his assignee. *Wilkinson* v. *Charlesworth*, 10 Beav. 324 ; 16 L. J., Ch. 387 ; 11 Jur. 644.

Legacy to Wife.]—If husband dies before legacy left to wife is received, it survives to her. *Brotherow* v. *Hood*, 2 Comb. 725.

Where the husband agreed that a legacy to the wife should be set off against a debt due from him to the estate, and husband and wife gave a joint receipt for the legacy :—Held, on death of husband, that as nothing but a release by him or payment could be a discharge from the wife's claim, she was entitled to be paid it. *Harrison* v. *Andrews*, 13 Sim. 595 ; 13 L. J., Ch. 243.

Power—Survival to Wife.]—Where feme sole conveys stock to trustees, to use of intended husband and self for life, with power to dispose of part, this power survives to wife. *Horner* v. *Bendloes*, 9 Mod. 335.

Equity to a Settlement—Death after Proposal for Settlement.]—Notwithstanding an order for a proposal for settlement under the equity of married woman, by the death of either, while resting in proposal the right by survivorship, as between the husband and wife, is not affected. *Murray* v. *Elibank* (*Lord*), 10 Ves. 91. And see *Macaulay* v. *Phillips*, 4 Ves. 15.

Rent-charge.]—Husband, during coverture, has a legal remedy by distress for arrears of rent-charge devised to wife for life, without first making a provision for her, but he cannot convey it away, for she may be entitled to it wholly by surviving him. *Fitzer* v. *Fitzer*, 2 Atk. 514.

A woman entitled to a rent-charge, marries, and at the husband's death there are arrears due ; they shall go to the wife surviving, notwithstanding she had a settlement, there being no express or implied intention that the husband should be a purchaser of all her fortune. *Salwey* v. *Salwey*, Ambl. 622.

Specific Property of Wife.]—Specific property of wife not reduced into possession on death of husband, survives to wife as joint tenant. *Becket* v. *Becket*, Dick. 343.

Release of Executors and Sale.]—A married woman was entitled, on attaining twenty-one, to stock under her mother's will, and the executors

of the will transferred the stock to the trustees of the married woman's post-nuptial settlement. The husband released the executors, and the trustees of the settlement afterwards sold out, and reinvested the stock, paying the dividends to the husband for his life:—Held, a good reduction of the stock into possession by the husband. *Hamilton* v. *Mills*, 29 Beav. 193; 3 L. T., 766.

Deposit by Husband to Secure Loan.]—M., having in his possession, in right of his wife, title deeds, security for a mortgage debt, which was a chose in action of the wife, the interest upon which had been paid to him, deposited the deeds, by way of equitable mortgage, to secure money borrowed and interest, and the balance of an account current at his banker's. He died insolvent, leaving his wife surviving. Two of his creditors paid off the debts of the equitable mortgage, and claimed to be entitled to the moneys due on the title deeds:—Held, that as neither M. nor the mortgagee by deposit had in his lifetime enforced the wife's security, her right by survivorship had not been barred. *Michelmore* v. *Mudge*, 2 Giff. 183; 29 L. J., Ch. 609; 6 Jur. (N.S.) 770; 8 W. R. 429.

Acknowledgment by Executors to Husband of Wife and Legacy.]—H. died in 1811, having bequeathed a legacy to a woman who afterwards married the plaintiff. In December, 1825, the two executors of H. gave the plaintiff a written acknowledgment whereby they separately and jointly acknowledged that they owed the plaintiff 150*l.* for the legacy and 50*l.* for interest. In 1835, the plaintiff's wife died:—Held, that whether the written memorandum amounted to an admission of assets or not, it gave the plaintiff no right of action, that unless equivalent to an admission of assets it did not create a personal demand against the defendants enforceable in a court of equity, and that it had not the effect of barring or prejudicing the right of the plaintiff's wife in the legacy, or his title in right of his wife as a legatee. *Holland* v. *Clark*, 1 Y. & Coll. C. C. 151.

Fulfilment of Condition by Wife.]—J. M. W., after appointing his wife and a cousin executrix and executor of his will, gave to his wife all such moneys, &c., as he was entitled to by virtue of his intermarriage with her, for her absolute use; but if he should die leaving a child or children by his wife living at his decease, or born in due time afterwards, then he gave to his executor 2,000*l.*, to be taken and received by him out of the moneys so acquired by his marriage, upon trust to invest the same for the benefit of such child or children as in the will mentioned. J. M. W. gave all the rest of his real and personal estate to his son J. W. for his own use; but in case he should die under twenty-one without issue, then he gave the same in trust to sell, and to invest, and to pay one moiety of the interest to his wife while she continued his widow. He died in November, 1854, and his will was proved by his widow alone. J. W. was the only son living at his father's death, and he died shortly afterwards an infant, but another son was born in July 1855. The wife was before her marriage entitled to 11,000*l.* stock, 7,000*l.* of which she in November 1853 settled upon herself for life, with remainders over. The remaining 4,000*l.* was standing in her own name in the bank books at the time of her marriage in August, 1854; but in October, 1854, this sum was transferred into the name of "H. W., formerly C., now the wife of J. M. W." In November, 1854, three days before the death of J. M. W., 500*l.*, part of the 4,000*l.* stock, was sold out and the proceeds paid to him. The produce and some dividends on the stock settled previously to the marriage were invested on mortgage:—Held, that although the 3,500*l.* stock was not reduced into possession by J. M. W. in his lifetime, yet the widow having proved the will, she took the gift therein to her subject to her fulfilling the terms upon which it was made, and therefore the gift of the 2,000*l.* was to be provided for out of the proceeds of the 500*l.* stock and the remaining 3,500*l.* stock. *Webb* v. *Webb*, 2 Jur. (N.S.) 852.

Legacy Presumed Received.] — A testator devised lands to his widow for life, with remainder to a nephew in tail, charged with payment of a legacy to a niece at the widow's death. After his death the niece married, and the father advanced to her husband the amount of the legacy, taking from the husband an assignment of it. The tenant in tail in remainder of the land charged became the residuary legatee and executor of the father, and paid the father's debts and legacies to an amount greater than that of the father's personal estate. Upon the widow afterwards dying:—Held, that the son must be considered to have been beneficially entitled both to the legacy and the land charged with it, and must be presumed to have received the legacy, and that it was thus so reduced into possession that the niece was not entitled to a a settlement out of it. *Allday* v. *Fletcher*, 1 De G. & J., 82; 26 L. J., Ch. 519; 3 Jur. (N.S.) 422; 5 W. R. 584.

Held, also, that the result would be the same whether the assignment to the niece's father was absolute or by way of mortgage only. *Ib.*

Money awarded to Husband in right of Wife.] —A sum of money awarded to the husband, which he is entitled to in right of his wife, will go to his executor and will not survive to his wife. *Oglander* v. *Baston*, 1 Vern. 396,

Note given to Wife.]—A note given to the wife, in the husband's lifetime, for money, is part of the husband's assets. *Hodges* v. *Beverley*, Bunb. 188.

Voluntary Assignment by Husband.]—Voluntary assignment by husband of a fund in court, belonging to the wife, will not bar her right by survivorship. *Johnson* v. *Johnson*, 1 Jac. & Walk. 472. *And see* col. 1185.

Pro tanto Disposition by Husband.]—Intestate left three sisters, his personal estate being agreed to be divided into thirds: two mortgages, one in fee, the other for a term, for 50*l.* each, were allotted to the defendant, one of the sisters. Before any assignment her husband borrowed 200*l.* from the plaintiff on note, and, as a further security, left the two mortgages with him, and gave his note, promising to assign them, and died. On a bill of foreclosure against the mortgagors and the administrator of the husband:—Held, that the husband's promise to secure an assignment of the mortgages amounted in equity to a disposition of them pro tanto, so as to satisfy plaintiff's debt, which being done, they belong

to the wife as her choses in action. *Bates* v. *Dandy*, 2 Atk. 207.

Reversion in Money.]—Where the wife, an infant, was entitled to 1000*l.*, and to the reversion of 2,000*l.* on her father's death, and by her marriage articles she agreed to assign them to trustees upon certain trusts, shortly before she attained twenty-one, the executors of the will without any direction from her or her husband transferred the 1,000*l.* to the trustees, and the husband afterwards died:—Held, that the transfer to the trustees was a reduction into possession of the 1,000*l.*, and that it was bound by the articles; but that the wife was entitled by survivorship to the 2,000*l.*, subject to her father's life interest. *Cunningham* v. *Antrobus*, 16 Sim. 436; 13 Jur. 28.

Promissory Note.]—A feme sole, payee of a promissory note payable with interest, married, and her husband survived her:—Held, first, that the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life, for that he did not thereby reduce the chose in action into possession. *Hart* v. *Stevens*, 6 Q. B. 937; 14 L. J., Q. B. 148; 9 Jur. 225.

—— **Statute of Limitations.**]—Held, secondly, that the payment of such interest in the wife's lifetime to the husband, within six years before action brought, must be considered as made to him in the character of agent to the wife, and was an answer to a plea of the Statute of Limitations. *Ib.*

iii. *Where Articles or Settlement.*

Where part of Consideration for Settlement.]—Where choses in action of wife are part of consideration of settlement, they will not survive to her, unless settlement is inadequate. *Seys* v. *Price*, 9 Mod. 217.

Condition of Settlement not Performed.]—Four thousand pounds portion is secured by articles, wherein is a proviso that if the husband did not within two years settle a jointure he should only have the interest for his life. The wife dies within the two years, and before any settlement made; the husband not entitled to the portion. *Vermuden* v. *Read*, 1 Vern. 68.

Intention — Arrears of Rent-charge.] — A woman entitled to a rent-charge marries, and at the husband's death there are arrears due; they shall go to the wife surviving, notwithstanding she had a settlement, there being no express or implied intention that the husband should be a purchaser of all her fortune. *Salwey* v. *Salwey*, Ambl. 692.

Post-nuptial Settlement—Purchase by Husband.]—Husband, by making settlement after marriage, considered a purchaser of mortgage of wife, though he did not reduce it into possession. *Sykes* v. *Meynal*, Dick. 368.

Wife's Portion—Husband's Debts.]—Whether the wife's portion, consisting of choses in action, shall, upon the husband's death, be liable to his debts, the husband, before his marriage, having made an adequate jointure on his wife. *Lister* v. *Lister*, 2 Vern. 68.

The wife's portion, though out on bond or mortgage, which by law survives to her, shall yet, in equity, be subject to the husband's bond debts, to ease the heir, where a settlement is made on the wife; for that makes the husband a purchaser of her fortune: but if the settlement were only in consideration of part, then the remaining part out on bond shall survive to the wife, unless there were an express agreement that the husband should have it. *Cleland* v. *Cleland*, Pre. Ch. 63.

Where a wife had a chose in action, which was considered as part of her portion, for which the jointure was made, and the jointure was adequate; it was decreed upon the husband's death, it should go to his executor. *Narborne's case*, 2 Freem. 282.

Covenant to Settle Lands in Jointure—Death of Husband.]—Covenant by husband, before marriage, to settle lands in jointure for wife, and other part for the issue of the marriage, her fortune to remain in trustees till such settlement made; the husband dying insolvent, without performing it, the wife's fortune survives for her own benefit, and the issue not entitled to take it from her. *Pyke* v. *Pyke*, 1 Ves. 376.

Legacy from Mother—Lapsed Share of Residue.]—Settlement in consideration of marriage of the wife's present fortune, and subsequent covenants, one of which was that the mother should give to the wife, or any child, equal to what was given to the rest. The mother leaves her a legacy, and, by lapse, part of the residue comes to her; wife survives husband: what he had not reduced into possession goes to her representatives by survivorship, not to his, there being no contract to give him a certain right. *Garforth* v. *Bradley*, 2 Ves. 675.

Infant Wife—Settlement—Silence as to Personal Estate.]—A. marries B., who has an estate in land, and a fortune in money: they being both infants, an act of parliament is obtained for settling a jointure on the wife, in bar of dower, provided that the jointure shall cease, if the wife, when of age, did not settle her land, but nothing said as to the personal estate: part of the fortune is a mortgage for 1,300*l.*, taken in a trustee's name. The wife, when she came of age, settled her own land, and afterwards the husband dies: decreed, the mortgage to the executors of A., and that it should not survive to his wife as a chose in action. *Blois* v. *Hereford* (*Viscount*), 2 Vern. 501.

Claim as Purchaser by Father of Husband.]—A woman, having 12,000*l.* in possession, and 1,200*l.* in the chamber of London on her marriage, the husband's father in consideration of this fortune settles 240*l.* per annum jointure upon her; the husband dies, and the wife administers to him, and the representatives of the husband's father bring a bill for the 1,200*l.* in the chamber of London, the father being, as alleged, a purchaser of it by the settlement. Bill dismissed, the husband having done nothing to alter the property in his lifetime. *Rudyard* v. *Neirin*, Pre. Ch. 209.

Title of Creditors of Husband.]—Where the wife's fortune, though the husband made no settlement on her, shall go to the creditors and representatives of the husband, and not to the

representatives of the wife. *Packer* v. *Wyndham*, Pre. Ch. 412 ; Gilb. 98.

—— **Of Administrator of Husband.**]—Where the wife's portion, charged by will on certain lands, pursuant to a power in settlement, shall go to the administrator of the husband, and not to the administrator of the wife, though the husband and wife are both dead and the portion not raised. *Meredith* v. *Wynn*, Pre. Ch. 312 ; Gilb. 70.

Title of Wife in her own Right over Administratrix.]—A. devises the residuum of her personal estate, about 2,000*l.*, to B., by her maiden name (not knowing her to be married), most of it being South Sea stock : her husband agrees to settle it on two trustees, in trust for husband and wife ; and they transfer it to the trustees accordingly. There is a deed prepared, but not executed, being objected to by the husband, as not in pursuance of the agreement ; and, by letter, he gives directions to prepare another. Before that is done, he dies : his wife administers : she shall have this South Sea stock, &c., in her own right, and not as an administratrix to her husband. *Fort* v. *Fort*, Forrest. 171.

Bond—Husband a Purchaser.]—The husband upon marriage (in consideration of his wife's fortune, computed at 500*l.*) agrees to yearly payments to her separate use ; that she may dispose of 100*l.* by will, in his lifetime ; that, if she survive, he is to leave her 200*l.*, apparel, plate, &c. Part of her fortune was a bond of 200*l.* The husband dies, having made his will, and the plaintiff residuary legatee, but had not recovered the 200*l.* due on the bond ; then the wife dies : this bond shall go the representative of the husband, he being a purchaser of it by the settlement on her. *Adams* v. *Cole*, Forrest. 168.

Subject to Wife's Disposition.]—A testator gave and bequeathed all his personal estate and effects to his daughter, the same to be always considered as vested in her, upon her attaining twenty-one, and to be subject to her disposition thereof ; and the testator further directed that in case his daughter should happen to depart this life without attaining twenty-one, or without disposing by her will of the property bequeathed to her, then the same to be subject to the disposition by will of his wife. The testator's daughter married under twenty-one, and by articles previously to her marriage the husband covenanted to settle all the property left her by the testator upon his wife and himself for life, and then for the benefit of the children of the marriage :—Held, that the daughter took the property not absolutely but for life only, with power to dispose of it by will, and that her husband not having reduced it into possession the articles were not binding upon the wife. *Borton* v. *Borton*, 16 Sim. 552 ; 18 L. J., Ch. 219 ; 13 Jur. 247.

Limitation to Next-of-Kin of Wife.]—The marital right of the husband, as administrator by law, excluded by a limitation to the next-of-kin of the wife. *Anderson* v. *Dawson*, 15 Ves. 537.

Under a limitation in a marriage settlement of the wife's property, in default of her appointment, for her next-of-kin or personal representative, the husband is not entitled. *Bailey* v. *Wright*, 18 Ves. 49 ; 1 Swanst. 39 ; 1 Wils. 15.

d. Assignment by Husband.

Power of Husband to Assign.]—A man may dispose of his wife's personal chattels by will as he pleases, but not of her chattels real or choses in action, unless he has done some act to reduce them into his possession ; for those, upon his death, shall survive to her ; but if he survives, they shall be his own to all intents. *Sharp* v. *Poole*, 4 Co. Rep. 51.

So with respect to debts due to the wife before marriage, and which were not got in during the joint lives of the husband and wife ; and so likewise it will be with regard to her paraphernalia. *Graham* v. *Londonderry* (*Lord*), 3 Atk. 393.

A man possessed of a chose in action in his own right may assign it, though without a consideration. *Carteret* (*Lord*) v. *Paschal*, 3 P. W. 199.

Baron possessed of a chose in action in right of his wife, may assign it for a valuable consideration. Secus, as it seems, if there be no consideration. *Ib.* But see *Honner* v. *Morton*, 3 Russ. 65 ; 27 R. R. 15 ; *Watson* v. *Dennis*, *id.* 90.

—— **For Satisfaction of bonâ fide Creditors.**]—Choses in action are assignable by husband for satisfaction of bonâ fide creditors, though no settlement be made on wife. *Paschal* v. *Thurston*, 2 Bro. P. C. 10.

A. gave to B., his niece, a legacy of 1,000*l.* while she lived sole ; afterwards, on a treaty of marriage with defendant, it was agreed by articles, that 700*l.* of the legacy should be applied towards his debts. After marriage, defendant, without his wife, assigned the remaining 300*l.* to plaintiffs, his creditors, who brought their bill to be paid out of the remaining 300*l.* Decreed an account to be taken, and upon proofs, that plaintiffs were real creditors, and that the assignment was bonâ fide, they were to have satisfaction accordingly, and that the residue of the 300*l.*, if any, to be put out for the benefit of the wife. *Povey* v. *Brown*, Pre. Ch. 325 ; Gilb. 80

—— **Release of Wife's Annuity by Husband.**]—A single woman being entitled to an annuity secured by bond married. Her husband executed a release of the annuity, and died, leaving his wife surviving :—Held, that, as he could release the security, he could release the annuity, so as to bind his wife. *Hore* v. *Becher*, 12 Sim. 465 ; 11 L. J., Ch. 153 ; 6 Jur. 93.

Consideration of Natural Love.] — Wife's chose in action assigned by the husband to unprovided child by former wife, natural love, &c. recited as consideration, not good. *Becket* v. *Becket*, Dick. 340.

Where husband has mere equitable right to property of wife, court may impose terms on his receiving it. *Ib.*

Specific property of wife not reduced into possession on death of husband survives to wife as joint tenancy. *Ib.*

Assignment of Possibility.]—A husband may assign a wife's possibility, if it be for a valuable consideration, but he can release her bond without receiving any part of it. *Bates* v. *Dandy*, 2

Atk. 208. And see *Benn* v. *Griffith*, 18 W. R. 403.

Power of Advancement.]—Where funds were settled upon the husband and wife, and the survivor for life, and afterwards for the children, with power for the trustees with the consent of the wife to advance part of the fund for the benefit of the children in her lifetime; after the death of her husband she married again, and the second husband assigned her life interest, and the trustees afterwards, with the wife's consent, exercised the power of advancement of the children of the first marriage:—Held, that the power was well executed as against the assignee of the husband. *Whitmarsh* v. *Robertson*, 1 Coll. 570; 14 L. J., Ch. 157; 9 Jur. 125.

Bond Conditioned to Pay Wife Annuity.]—A husband having taken a bond conditioned to pay his wife an annuity by the obligor, the latter cannot, without the assent of the husband, agree with the wife to discharge himself from future payments of the annuity for a certain period, in consideration of his discharging certain debts of the husband; but the husband may, notwithstanding, sue for the arrears of the annuity when due. *Brown* v. *Benson*, 3 East, 331.

Salary of Separated Wife.]—Though a wife lives separate from her husband, and supports her children, and earns a salary for her services, yet the party owing it cannot pay her after notice from the husband not to do so; and if the employer pays her such salary, the husband may sue him for its amount. *Glover* v. *Drury Lane Theatre*, 2 Chit. 117.

Dividends of Wifes' Stock.]—Assignment by husband of part of wife's equitable interest, viz. dividends of stock in trust for her, for valuable consideration, enforced upon bill of surety for husband, to be indemnified against past and future payments, the assignment extending only to 100*l.* a year out of 260*l.* The remaining dividends under bill on behalf of wife paid to her, the husband having after the assignment gone abroad without making any provision for her. *Wright* v. *Morley*, 11 Ves. 21; 8 R. R. 69.

Fund of Married Woman in Name of Accountant General.]—The fund of a married woman, standing in the name of the accountant-general to her account, may be pledged by her husband. *Sansum* v. *Dewar*, 3 Russ. 91; 5 L. J. (o.s.) Ch. 46.

Portion of Lunatic Wife—Assignment by Husband to Creditors.]—The portion of a lunatic was ordered to be paid to the master, and the husband was to have it on making a settlement. He made no settlement, but assigned it to his creditors and died without issue; then the wife died. Decreed, the creditors of the husband to have this portion. *Nightingale* v. *Lockman*, Mos. 231; Fitzg. 148.

e. Rights of Trustee in Bankruptcy.

Interest of Husband.]—Creditors in bankrupt cases are entitled to the interest of the husband in the wife's chose in action during his life. *Fitzer* v. *Fitzer*, 2 Atk. 511.

What interests of the wife so vest in the husband as to vest in his assignees upon a bankruptcy. *Saddington* v. *Kinsman*, 1 Bro. C. C. 44.

Assignees of husband, bankrupt, not entitled to legacy vested in wife, but not reduced into possession before husband's death. *Gayner* v. *Wilkinson*, Dick. 491.

Wife's Equity to a Settlement.]—By the marriage settlement of a widow, her property was assigned to two trustees, upon trust to invest and pay the dividends to her for life for her sole and separate use, and after her decease, upon trust to pay the fund to her daughter by her first husband, "for her own use and benefit." The daughter's husband F. H., who was one of the trustees of the settlement, became bankrupt:—Held, that on the death of the tenant for life the assignee of F. H. was entitled to the fund, subject to the wife's equity to a settlement. *Kensington* v. *Dolland*, 2 Myl. & K. 184; 3 L. J., Ch. 209. *See* col. 1118.

Satisfaction of Legacy by Portion.]—One devises to his daughter a portion of 500*l.*, and afterwards in his lifetime gives her 300*l.* for her portion in marriage, and four years after dies without revoking the will; the husband is a bankrupt; the assignees not entitled to the 500*l.* legacy, nor any part thereof. *Bishop* v. *Whitmore*, 1 P. W. 681; Pre. Ch. 541.

Feme Sole Mortgagee Marrying.]—A feme sole mortgagee marries; husband becomes bankrupt and dies; the assignees entitled, in opposition to the wife suing, to the mortgage. Secus, if, by articles before marriage, it was agreed that mortgage should continue wife's. But quære, if assignees had been parties suing. *Bovil* v. *Brander*, 1 P. W. 458.

Husband Taking Benefit of Insolvent Act.]—A sum of 140*l.* belonged to a husband in right of his wife. He had taken the benefit of the Insolvent Act. The court held, that his assignees were entitled to no part of the fund. *Foden* v. *Finney* (4 Russ. 428), is considered not binding. *Cutler, In re*, 14 Beav. 220; 20 L. J., Ch. 504; 15 Jur. 911.

Legacy—No Exclusion of Marital Rights.]—A testatrix gave the interest of her residuary property to her two grand-daughters who were both unmarried at the date of the will, and she directed that the interest should be for and under their sole control, the principal to be equally divided for the use of their surviving issue, and that M. W., their mother, should have no control whatever over it. One of the grand-daughters, E. W., married after the death of the testatrix, and her husband became insolvent:—Held, that the words of the will did not indicate an intention to exclude the marital control, and that the legacy to E. W. passed to her insolvent husband's assignees. Semble, that, if the words had indicated an intention to give the interest of the property to the separate use of the grand-daughters, the legacy would still have passed to the assignee of the insolvent husband; for a gift to the separate use of an unmarried woman will not restrict her right of disposing, in any manner, of the property given, and, consequently, of giving it, if she think fit, by act of marriage, to her husband. *Massey* v. *Parker*, 2 Myl. & K. 174; 4 L. J., Ch. 47.

Deposit of Wife's Certificates—Bankruptcy.]—A bankrupt, whose wife previous to her marriage was entitled to some shares in a gas company, which were still standing in her name, deposited the certificates with a banking company, for the security of advances; but no notice was given to the gas company, until after the act of bankruptcy:—Held, that the banking company were not entitled to those shares, as against the creditors of the bankrupt. *Spencer, Ex parte*, 1 Deac. 468; 3 Mont. & Ayr. 697.

Divorce after Bankruptcy of Husband.]—Divorce obtained by wife after husband's bankruptcy does not entitle her to whole fund bequeathed to her, which came into possession after bankruptcy, though no settlement was made on her at marriage, and her husband at that time received 1,500*l.* stock with her. *Green* v. *Otte*, 1 Sim. & S. 250; 1 L. J. (O.S.) Ch. 87.

Arrears of Annuity—Wife Maintained.]—A married woman being entitled to an annuity, charged on an estate belonging to A., but of which her husband was, as she knew, in receipt of the rents under a power of attorney from A., made no demand upon A. in respect of the annuity for several years. The husband being indebted to A., in respect of his receipts, becomes bankrupt:—Held, that as his wife had lived with her husband, and enjoyed the benefit of his expenditure, she had no claim upon A., or his estate, in respect of arrears of the annuity. *Carter* v. *Anderson*, 3 Sim. 370; 8 L. J. (O.S.) Ch. 91. *See also* 1 L. J. (O.S.) Ch. 132.

Apportionment of Dividends.]—The dividends of stock standing in the accountant-general's name, to which a woman was entitled for life at the time of her marriage, were ordered to be paid to her husband during her life, or until further order. Some time afterwards the husband deserted his wife, and became bankrupt, having previously possessed himself of 2,000*l.* to which she was absolutely entitled:—The court ordered two-thirds of the dividends to be paid to the wife, and the other third to the husband's assignees. *Vaughan* v. *Buck*, 1 Sim. (N.S.) 284; 20 L. J., Ch. 335; 15 Jur. 348.

Note, under Hand of Husband, Part of Settlement.]—A note under the hand of a husband ought to be looked upon as part of the marriage agreement, and consequently as part of the settlement and where the wife would have been relieved if she had brought a bill against the husband, so she would equally against his assignees, who stand in his place. *Tyrrell* v. *Hope*, 2 Atk. 558.

Where, by acts before marriage, husband made himself in the nature of a trustee for the wife, his assignees must be so too. *Id.* 562.

Creditors' Deed—Husband refusing to Complete.]—A lady was, before marriage, entitled to a tontine share. After the marriage, upon which no settlement was made, her husband assigned all his personal estate to trustees for the benefit of his creditors. The trustees sold the share, but the husband refused to complete the transaction by putting the requisite indorsement on it; but, on a bill filed, he was ordered to do so, and to pay the costs of the suit. *Alexander* v. *Cana*, 15 Jur. 51.

Accumulating Legacy.]—By will the father-in-law of the bankrupt gave 4,000*l.* in trust for his daughter for life, to her separate use, then to the bankrupt for life, and then to the issue of the marriage. The will, reciting that the bankrupt was indebted to the testator 6,000*l.* on bond, declared so much of the debt on the bond as remained unpaid in the testator's lifetime should go in redemption and satisfaction of the above bequest of 4,000*l.* Prior to the bankruptcy, and subsequently, by means of dividends from his estate, 1,069*l.*, part of the 6,000*l.* bond debt, was paid off and invested in the funds. On petition of the assignees, claiming to be entitled to the interest of the 1,069*l.*, the wife being dead:—Held, that until the 4,000*l.* should be made up, the 1,069*l.* should accumulate; after which the assignees were declared entitled to the interest for the bankrupt's life. *Young, Ex parte, Prior, In re*, 4 Deac. & C. 645; 2 Mont. & Ayr. 228; 4 L. J., Bk. 60.

Insurance of Wife's Life by Creditors.]—Husband and wife assign to two creditors of husband a contingent interest to which wife would be entitled if she survived a particular person. Creditors insure wife's life; she dies before contingent interest fell in, and creditors receive the insurance money. Husband being bankrupt, the creditors only allowed to prove amount of what was due to them after deducting money received from insurance office, minus the sum paid for insurance and expenses. *Andrews, Ex parte*, 1 Madd. 573; 16 R. R. 263.

Assignment subject to Wife's Right by Survivorship.]—The husband of a woman having a vested interest in possession in a legacy, becomes bankrupt; a bill is filed by his assignees for payment of the legacy; the bankrupt soon after dies, and that fact is pleaded:—Held, that the widow was entitled to the legacy, the assignment of the husband being subject to the wife's right of survivorship. The fact of the bill having been filed before the husband's death, did not affect the question. *Pierce* v. *Thornely*, 2 Sim. 167.

Vested Reversionary Interest in Fund—Bankruptcy of Husband.]—A testator gave a sum of money to trustees on trust to pay the income to his wife for life, and then to divide the capital between his three daughters. One of the daughters, who was married, died; her husband became bankrupt in 1839, and died before the tenant for life. When the tenant for life died, a bill was filed by the assignees of the husband against the defendant, who was the administrator of both husband and wife, claiming to be entitled to a third of the money left by the testator:—Held, that the husband was absolutely entitled, in right of his wife, to the reversionary interest expectant upon the death of the tenant for life, although that interest was not reduced into possession, and that the assignees had the same right to receive the money as the husband would have had. *Drew* v. *Long*, 22 L. J., Ch. 717; 17 Jur. 173; 1 W. R. 318.

f. Joint Interests.

Disposition.]—Where husband and wife acquire a joint right or interest in personalty, husband alone may dispose of it as he pleases. *Paschall* v. *Thurston*, 2 Bro. P. C. 10.

Survivorship.]—A testator bequeathed 10,000*l.* to husband and wife, to be put in their joint names and that of his executor, the husband and wife to enjoy the interest during their joint lives, or the life of the survivor. The fund was paid into court to the credit of the cause, "the husband and wife, their stock acccount":—Held, that the dividends unreceived at the death of the husband belonged to the wife by survivorship. *Laprimaudaye* v. *Teissier*, 12 Beav. 206; 19 L. J., Ch. 16; 13 Jur. 1040.

A wife, with the knowledge and approval of her husband, invested money belonging to the latter in the purchase of government stock, in their joint names. Subsequently, under the authority of a power of attorney given to her by the husband, she sold a portion of the stock, and kept the money in her custody, and it so remained at the husband's death:—Held, that the stock remaining in the joint names of the husband and wife survived to her; but there being no evidence of an intention on the part of the husband to make an absolute gift to the wife, that the proceeds of sale of the stock formed part of the husband's general assets. *Gadbury, In re*, 32 L. J., Ch. 780; 11 W. R. 895.

A woman, joint tenant of a reversionary interest in a legacy of 2,000*l.* stock, married, and after the marriage the husband became bankrupt, and then the wife died, leaving the tenant for life of the fund surviving:—Held, that by the death of the wife, the other joint tenants of the fund became entitled to her interest therein by survivorship; that that was the elder title to that of the husband, which also accrued after the death of the wife; and that, upon the death of the tenant for life, the other joint tenants, and not the assignees of the husband, were entitled to what had been the wife's share of the fund. *Barton's Will, In re*, 10 Hare, 12; 16 Jur. 631.

A testatrix gave a legacy to R. S. A., his wife and children; the husband and wife being entitled to one share equally with the children, the wife, who was living separate from her husband, in a suit instituted by the husband and his assignee, to have the rights of himself, and wife and children, in the legacy, ascertained, claimed a settlement out of the whole share given to her and her husband. The husband, on the other hand, claimed a moiety of the share in his own right, and a moiety in right of his wife, and insisted that she was only entitled to a settlement out of the latter moiety:—Held, that all the court could do was to preserve the wife's right by survivorship; and the whole share was directed to be carried over to the joint account of the husband and wife, the dividends to be paid to the husband during their joint lives, with liberty on the death of either, for the survivor to apply. *Atcheson* v. *Atcheson*, 11 Beav. 485; 18 L. J., Ch. 230; 13 Jur. 666.

Held, also, that if such a legacy were not brought under the consideration of the court, payment to the husband would be a good payment; but in case of no payment, the wife would be entitled by survivorship. *Ib.*

Bond given to a baron and feme during coverture; baron dies; the bond will survive to the wife. *Copin* v. ——, 2 P. W. 406.

If baron and feme have a decree for money in right of the wife, and the husband dies, she shall have the benefit of the decree. *Nanney* v. *Martin*, 1 Ch. Ca. 27; 2 Freem. 72.

g. Merger by Marriage.

Lien on Realty.]—Chose in action of wife, and charged on A.'s estate, is merged on her marriage with A., and will not survive. *Seys* v. *Price*, 9 Mod. 220.

Extinguishment.]—A., on his marriage, gave a bond of 600*l.* with a warrant of attorney to confess judgment thereon, defeasance on payment of 300*l.* to his wife if she survived, afterwards she joined with him in a conveyance by fine of his real estate:—Held, that this extinguished her right or any lien created by this judgment on the real estate. *Goodrick* v. *Shotbolt*, Pre. Ch. 333; Gilb. Eq. R. 18.

h. Reversionary and Contingent.

i. *Disposition of, by Husband.*

General Principle—Assignment by Husband void against Wife.] — Discussion upon the doctrine and authorities applicable to the rights of a married woman over her reversionary interests in personal chattels. *Box* v. *Box*, *Box* v. *Jackson*, Dru. 42; 6 Ir. Eq. R. 174. And see *S. C.*, 2 Con. & L. 605.

It is now established that the husband cannot, even for a valuable consideration, assign the reversionary choses in action of his wife so as to bind her surviving. *Ib.*

Husband cannot reduce wife's reversionary interest into possession. If they join in assigning it as security of debt of husband and she survives, she takes it disencumbered. *Hornsby* v. *Lee*, 2 Madd. 16.

Wife's reversion, which cannot fall into possession during the husband's life as if it is contingent upon his death, not assignable by him. *Dalbiac* v. *Dalbiac*, 16 Ves. 122.

Husband assigns his wife's reversionary chose in action to a particular assignee for value. He survives the person upon whose life the reversion depends, but dies without actually reducing the property into possession: the assignment is void against the surviving wife. *Ashby* v. *Ashby*, 1 Coll. 553; 14 L. J., Ch. 86; 8 Jur. 1159.

—— **Possibility of Wife.**]—A husband cannot in law assign a possibility of the wife, nor a possibility of his own; but a court of equity will support such assignment for a valuable consideration. *Grey* v. *Kentish*, 1 Atk. 280. *Bates* v. *Dandy*, 2 Atk. 207.

Where a particular assignee took with notice of an equity in a wife (and the assignees under a commission of bankruptcy against the husband take subject to the same equity), the court, as it is her property, will decree it to be transferred to her. *Ib.*

A husband may dispose of a wife's possibility in equity, if assigned for a valuable consideration; but it must be an assignment of that particular thing, and not rest only on intention and construction of words in a covenant. *Hawkyns* v. *Obyn*, 2 Atk. 549.

Assignment operates in Equity as Agreement to assign.]—A chose in action, though not assignable at law, yet is so in equity; where the husband may assign it alone, as he may any other part of the wife's personal estate, so may

a contingent interest which the husband has in right of his wife, or a possibility of a term, which, though not good strictly by way of assignment, yet will operate as an agreement where for a valuable consideration. *Chandos (Duke)* v. *Talbot*, 2 P. W. 608. And see *Atkins* v. *Danbury*, Gilb. 88; 1 Ch. Cas. 232; 3 Ch. R. 90; 1 Roll. Abr. 380.

Assignment good against all but Wife.]—Husband can dispose of his wife's property in expectancy against every one, except the wife surviving. *White* v. *St. Barbe*, 1 Ves. & B. 405.

Release by Husband.]—When a feme covert is entitled to a reversionary interest in a chose in action, the release of the husband is as inoperative as his assignment, to bind his wife's right by survivorship. *Rogers* v. *Acaster*, 14 Beav. 445.

Trust of a Term of Years.]—The contingent reversionary interest of the wife in the trust of a term for years may be sold by the husband, and the wife surviving will be bound by such sale, though the husband dies before the contingency is determined, or the reversion falls into possession. *Done* or *Donne* v. *Hart*, 2 Russ. & M. 360; 1 L. J., Ch. 57.

Leaseholds.]—A husband may make a valid assignment of his wife's reversionary interest in leasehold, but secus, if the interest be of such a nature that it cannot by possibility vest in the wife in possession during the coverture. *Duberley* v. *Day*, 16 Beav. 33; 16 Jur. 581.

A wife's leaseholds were, on her marriage, limited to her absolutely in the event of her surviving her husband, but without any trust for her separate use:—Held, that the husband could not, during the coverture, dispose of this contingent reversionary interest of his wife in the term. *Ib.*

Mortgage — Costs — Priority.]—A husband mortgaged his interest in his wife's reversionary personal estate. The wife died in the husband's life, and before the fund fell into possession. Expenses were incurred in taking out administration by persons entitled to the equity of redemption, without any express request by the mortgagee:—Held, that the mortgagee was entitled to priority over such costs. *Saunders* v. *Dunman*, 47 L. J., Ch. 338; 7 Ch. D. 825; 38 L. T. 416; 26 W. R. 397.

Disability of Wife.]—Wife cannot by consent dispose in favour of her husband of her reversionary interest in personalty. *Pickard* v. *Roberts*, 3 Madd. 384.

A married woman who was entitled to a trust fund in reversion having had the life interest assigned to her, the court ordered the fund to be transferred to her husband, she consenting. *Hall* v. *Hugonin*, 14 Sim. 595; 16 L. J., Ch. 14; 10 Jur. 940.

Money vested in trustees, in trust for husband and wife successively for life, remainder to the children, and in default thereof, to such person as the wife should appoint; a deed of the wife, conveying this contingent interest, was established. *Guise* v. *Smell*, 1 Anstr. 277.

Where trustees are interposed, the court will not authorise a woman's parting with her reversionary life interest in a sum of money, upon examination, in analogy to that of a private examination. *Fraser* v. *Baillie*, 1 Bro. C. C. 518.

There is no jurisdiction in equity by consent of married woman upon examination to transfer to her husband personal property, settled in trust for her surviving her husband absolutely. *Richards* v. *Chambers*, 10 Ves. 580.

The court cannot take the consent of the wife to part with her reversionary interest. The consent of the wife taken in a court of equity, to part with her interest in property about to be distributed, is not analogous to a fine at law with respect to real estate. A court of equity will not lend itself as an instrument to enable a husband to acquire a right in his wife's property which he has no means of acquiring at law. *Osborn* v. *Morgan*, 9 Hare, 434; 21 L. J., Ch. 318; 16 Jur. 52.

On marriage, a sum of 9,000*l.* was vested in trustees, upon trust to pay the interest to the husband for life, and after his death, to the wife for life, and after the death of the survivor to pay the principal to such persons as the survivor should direct. The husband having occasion for money, the wife joined him in executing a deed poll, whereby they appointed the money immediately to the husband; but the trustees declining to act without the directions of the court, this bill was filed; and upon personal examination of the wife, the court directed the trustees to pay the money to the husband, and to deliver up the settlement to be cancelled. *Macarmick* v. *Buller*, 1 Cox, 357.

Gift to a lady for life, and, after her death, amongst all her children "which should be living at her death," and if but one, to such only child, such shares to become vested interests at twenty-one. The lady being sixty-three, and desirous of giving up her life interest, she and her children, all of whom had attained twenty-one, presented a petition for payment to the children. One of the children was a feme covert. The court declined making the order. *Brandon* v. *Woodthorpe*, 10 Beav. 463.

A married woman cannot by consent, on examination in court, part with her interest in a fund settled on her marriage for her separate use for life, with remainder to survivor of her and her husband. *Ritchie* v. *Broadbent*, 2 Jac. & Walk. 456.

The court refused to take the consent of a married woman to give up her reversionary interest, in part vested and in part contingent, in a fund in court, in favour of a purchaser from her husband. *Wade* v. *Saunders*, Turn. & R. 306.

A., a married woman who was absolutely entitled to stock in court, being separately examined, desired it to be transferred into the names of trustees, "upon trust for her absolutely, and that the dividends should be held and applied for her separate use, for her life." This was accordingly done:—Held, that during coverture she could dispose of her life interest held for her separate use, but not of her reversionary interest; and the trustee having, at her request, advanced the fund to her husband, whereby it was lost, he was liable to replace it; but her life interest was made answerable for the trustee's indemnity. *Hanchett* v. *Briscoe*, 22 Beav. 496.

A feme covert was entitled to a reversionary interest in a sum in the funds. All the other parties entitled surrendered their interest to her. The fund was in court:—Held, that the

feme covert was still unable to dispose thereof. *Whittle* v. *Henning*, 11 Beav. 22 ; 17 L. J., Ch. 151 ; 12 Jur. 298. Affirmed, 2 Ph. 731 ; 18 L. J., Ch. 51 ; 12 Jur. 1079.

Fund in court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son, by deed, surrendered and released their respective interests to the wife, for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. But a petition by the three for the payment of the fund to the son was refused, on the ground that this court will not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practice in the protection of married women from the marital control. *Ib.*

A married woman entitled to a reversionary life estate in personal property, in the event of surviving her husband, cannot by consenting to waive her interest give the court the power to dispose of it. *Batt* v. *Cuthbertson*, 2 Ir. Eq. R. 200. Affirmed, 4 Dr. & War. 392.

In 1809, by a marriage settlement, a sum of 1,000*l.* was vested in trustees, upon trust, to pay the interest thereof to the husband and wife for their lives and the life of the survivor ; and, after the death of the survivor, upon trust for the children of the marriage, in such shares as the husband should appoint, and, in default of appointment, share and share alike. There were three daughters issue of the marriage, and in 1824 the husband died without appointing the fund, leaving his wife and three daughters him surviving. A suit having been instituted in relation to the property of the mother and daughters, this sum of 1,000*l.* was paid into court, invested in government stock, and transferred to the credit of the cause. One of the daughters subsequently married, but without making any settlement of her share of the fund. The three daughters, having attained their full age, entered into a consent that the entire fund should be paid to the mother. This consent was signed, as well by the three daughters, as by the mother, and the husband of the married daughter. Upon a bill filed for the purpose of effectuating this consent :—Held, that the court had no jurisdiction to take the consent of the married daughter to dispose of her interest in the remainder expectant upon the death of her mother, the tenant for life of the fund, and that the bill could not be supported. *Boæ* v. *Jackson* or *Boæ*, Dru. 42 ; 6 Ir. Eq. R. 174. And see *S. C.*, 2 Con. & L. 605.

Release of Prior Estate.]—A wife entitled to a reversionary interest in a chose in action cannot by obtaining a release of the previous estate effectually dispose of the property. *Story* v. *Tonge*, 7 Beav. 91 ; 13 L. J., Ch. 191.

A feme covert being entitled to a reversionary interest in a sum of money obtained a surrender of the prior interest of the tenant for life. The court, with the consent of the married woman, ordered payment of that sum. *Lachton* v. *Adams*, 5 L. J., Ch. 382. And see *Creed* v. *Perry*, 14 Sim. 592.

Settlement by Infant Wife.]—On the marriage of a female infant her reversionary interest in choses in action was settled under the court for her separate use for life, with remainder to her children. She afterwards contracted two subsequent marriages, but no further settlement was executed on those occasions. Part of the reversionary interests fell into possession during the first coverture, and part during the second, and were transferred to the trustees :—Held, first, that although the deed made during infancy was not binding in respect of the reversionary interests as against the wife surviving, still she might, while discovert, adopt it for her benefit. Secondly, that the wife having survived, and not having called for transfer of the fund, must be deemed to have acquiesced in and adopted it, as it was for her interest to do so. Thirdly, that she must be deemed to have married her second husband on the faith that her property was protected by the settlement, and that he was bound by it. Fourthly, that the third husband who had notice of the settlement previous to his marriage, and had for some years after acquiesced in it, was bound thereby, and had no interest in the settled property. *Ashton* v. *M'Dougall*, 5 Beav. 56 ; 11 L. J., Ch. 344 ; 6 Jur. 447.

Contract for Sale.]—Consent of a married woman taken in court de bene esse, and with much doubt, under a bill by her and her husband, for execution of a contract for sale of her reversionary interest in stock : consent not taken until the subject is ascertained. *Woollands* v. *Crowcher*, 12 Ves. 174.

A fund in which a married woman has a reversionary interest was transferred to a purchaser, on her consent taken in court. *Howard* v. *Damiani*, 2 Jac. & Walk. 458.

Election.]—Quære, can a married woman, entitled to a reversionary chose in action, elect to take a legacy against the will of her husband. *Wall* v. *Wall*, 15 Sim. 513 ; 16 L. J., Ch. 305 ; 11 Jur. 403.

A married woman cannot, by election, part with her reversionary choses in action. *Williams* v. *Mayne*, 16 W. R. 173 ; Ir. R. 1 Eq. 519.

Charge on Expectancy.]—A married woman can give a valid charge on her expectancy under the will or as one of the next of kin of a living person. *Flower* v. *Buller*, 49 L. J., Ch. 784 ; 15 Ch. D. 665 ; 43 L. T. 311 ; 28 W. R. 948.

A fund in court was subject to a trust, to be laid out upon land, which was to be settled in trust for A. for life, and after her decease in trust to pay a sum of money to a married woman :—Held, to be at least doubtful whether the married woman could affect her reversionary interest in the money charged on the land. *Hobby* v. *Collins*, 4 De G. & Sm. 289 ; 20 L. J., Ch. 199 ; 15 Jur. 835.

Money to be Laid out in Land.]—Money subject to be laid out in the purchase of land, "or otherwise advantageously," is not within the 4 & 5 Will. 4, c. 92, s. 68, and therefore a married woman could not, in 1849, by a deed acknowledged, release a reversionary interest in such money, it being mere personalty. *Smithwick* v. *Smithwick*, 5 L. T. 23.

Power to Appoint under Settlement.]—Consols stood in the names of two deceased trustees of a marriage settlement, which gave the husband the dividends for life in case he should survive his wife, with remainder to the child or children of the marriage ; or in case there should be no child, then to the person whom the wife should appoint ;

and in default, to the husband, if living, or, if dead, to the wife's next-of-kin. The wife, being fifty-eight, and having had no child, assigned all her interest in the fund to her husband, and, on the petition of husband and wife, the court ordered that the right to transfer the fund might vest in the husband, and that he might transfer it to himself. *Ryan's Settlement, In re*, 7 Jur. (N.S.) 1069; 9 W. R. 137.

Fraudulent Representation by Wife.]—A wife, living separate from her husband, represented to G. that she had the power of charging the reversionary interest in a fund to which she was entitled on the death of her husband, the fact being that she was restrained from anticipation during coverture. On the strength of such false allegation, she induced G. to destroy certain bills of exchange he had as securities for money lent to her on her executing an agreement to charge her reversionary interest with the debt, and at the same time entreating G. to make no inquiries as to the truth of her statements, as it would lead to her husband's discovering her liabilities and prevent a reunion:—Held, on the assumption that G. was really ignorant of the trusts of the settlement, that she had been so far guilty of fraud as to make the false allegation binding on her reversionary estate. *Green* v. *Lyon*, 21 W. R. 695.

The court has jurisdiction to sanction on behalf of a married woman a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which she has a reversionary interest. *Wall* v. *Rogers*, 39 L. J., Ch. 204, 381; L. R. 9 Eq. 58.

Payment—Assignor not before the Court.]—A married woman entitled to a reversionary interest in a fund had assigned her interest absolutely, and was resident abroad. Upon the fund coming into possession:—Held, that the assignee was entitled to payment, though the assignor was not before the court. *Hall* v. *Lys*, 2 Eq. R. 42.

ii. *Disposition of, by Husband and Wife, jointly.*

Covenant to Assign.]—A husband, by a deed to which the wife was a party, covenants to assign a contingent portion of the wife's to the uses of the marriage. The husband dies without calling in the portion. The wife is bound by the covenant. *Bash* v. *Dalway*, 1 Ves. 19. *S. C.*, nom. *Bash* v. *Dalway*, 3 Atk. 530.

Form of Stop Order.]—Form of a stop order, where husband and wife join in the assignment of the wife's reversionary chose in action. *Moreau* v. *Polley*, 1 De G. & Sm. 143.

Security for Debt of Husband.]—Husband cannot reduce wife's reversionary interest into possession; if they join in assigning it as security for debt of husband's, and wife survives husband, she takes it disencumbered. *Hornsby* v. *Lee*, 2 Madd. 16.

Female Infant.]—A female infant, being entitled to a reversion of a chose in action, expectant on the decease of the survivor of A. and B., she and her husband covenanted, in contemplation of their marriage, to assign it to trustees in trust, as to one moiety, for the husband absolutely; and as to the other moiety, for the wife and the issue of the marriage. The husband died first, and afterwards A. and B. died:—Held, that the wife was entitled to have the chose in action transferred to her. *Le Vasseur* v. *Scratton*, 14 Sim. 116.

Rent-charge for Life in Reversion.]—A married woman, to whom a rent-charge for life in reversion is devised to her separate use, without the intervention of trustees, joins with her husband in assigning it for a valuable consideration; she is bound by that assignment after the death of her husband. *Major* v. *Lansley*, 2 Russ. & M. 355; 9 L. J. (O.S.) Ch. 102.

Assignment of Charge.]—If a married woman has in equity a charge upon an estate, and she and her husband, for valuable consideration, execute a conveyance of the estate to a third person, such conveyance does not pass the premises in consequence of their having been previously conveyed to a trustee, the instrument may nevertheless operate as an assignment of the wife's charge. *Birch* v. *Calley*, 2 L. J. (O.S.) Ch. 173.

Share of Estate.]—A married woman, who was entitled under a will to one-fifth of a residue, during the pendency of a suit for the administration of the testator's estate, in which she and her husband were plaintiffs, but before the right of the parties had been declared by the court, joined with her husband in assigning her share as a security for a debt due from the husband. The husband died, and afterwards a decree was made directing one-fifth of the residue to be paid to the wife. The assignee had never presented any petition in the suit, nor did he take any steps to enforce his security till after the decree:—Held, that by the decree the wife's share vested absolutely in her free from the husband's debt. Quære as to the validity of the assignment by husband and wife of wife's chose in action to a particular assignee for value as against the wife surviving. *Hutchings* v. *Smith*, 9 Sim. 137; 7 L. J., Ch. 128; 2 Jur. 231.

By articles entered into on the marriage of a female infant, she and her intended husband agreed to assign, on her attaining twenty-one, a share of her deceased grandfather's residuary estate, to which she was entitled under the trusts of his will, to trustees in trust for themselves and their children; and after the lady had attained twenty-one, a settlement was made in pursuance of the articles, but before the settled property was transferred to the trustees the husband died:—Held, that the wife's right to the property by survivorship was not barred. *Ellison* v. *Elwin*, 13 Sim. 309. *S. C.*, nom. *Elwin* v. *Williams*, 12 L. J., Ch. 440; 7 Jur. 337.

Testator gave a third of a moiety of his residuary personal estate to P., who marries, and whilst out of the kingdom she and her husband assigned it in trust for their daughter, provided they died before they came to England. P. afterwards married a second husband, who survived her:—Held, if the mother had continued a widow she would have been entitled to a decree for this third, and no notice would have been taken of the child's interest. *Grosvenor* v. *Lane*, 2 Atk. 180.

Release of Bond.]—The release by husband and wife of a sum of money secured by bond to A., and payable to the wife after A.'s death:—Held, not binding on the wife on her surviving

both A. and her husband. *Rogers* v. *Acaster*, 14 Beav. 445.

Purchaser for Value.]—Where husband and wife, by deed executed by both, assign to a purchaser, for valuable consideration, a moiety of a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life of that fund, and both the wife and the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of her share of the fund against such particular assignee, for valuable consideration. *Purdew* v. *Jackson*, 1 Russ. 1 ; 4 L. J. (O.S.) Ch. 1.

Where husband and wife assign to a purchaser for valuable consideration, a share of an ascertained fund in which the wife had a vested interest, in remainder, expectant on the death of a tenant for life, and both the wife and the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of that share of the fund against such particular assignee for valuable consideration. *Honner* v. *Morton*, 3 Russ. 65. S. P., *Watson* v. *Dennis*, *id.* 90.

If the wife, after her husband's death, execute an assignment of the fund which recites former assignments by the husband, and purports to be made subject to them, she does not thereby recognise or confirm those former assignments. *Ib.*

The wife does not acquiesce in those assignments, or waive her right to claim against them, by forbearing to impeach them till the death of the tenant for life. *Ib.*

Assignment by several Married Women.]—A deed relating to a reversionary interest in a fund was executed by some married women and their husbands. One having survived her husband, who died before the fund fell into possession :—Held, that the deed was not binding on her, and that therefore it was not binding on any of the other parties to it. *Bolitho* v. *Hillyar*, 34 Beav. 180.

Deposit of Title Deeds.]—D., being indebted to C., a married woman, deposited with her certain title deeds, and by his will charged the debt on freehold property. He directed that the debt should not be claimed until the death of the tenant for life, and devised the estate in remainder to C. and others. C., after the death of D., joined with her husband in conveying her interest, by a deed acknowledged to secure sums of money advanced by bankers to her husband. After the death of the tenant for life, C. claimed to have the debt charged on the estate by the will of D. settled upon herself :—Held, that the amount must be paid to the bankers, under the assignment to them by husband and wife. *Williams* v. *Cooke*, 9 Jur. (N.S.) 658 ; 8 L. T. 145 ; 11 W. R. 504.

Mortgage of Policy and Life Interest.]—A husband, being in want of money, effected a policy with an insurance company for the payment of 800*l.* to the survivor of himself and his wife, on the death of either, and on the same day he assigned the policy, and the wife assigned a separate life estate, to the company by way of security for 700*l.* advanced :—Held, that the policy and mortgage were one transaction, and that the assignment of the policy was valid against the wife surviving. *Winter* v. *Easum*, 33 L. J., Ch. 665 ; 10 Jur. (N.S.) 759 ; 12 W. R. 1018.

A wife entitled to reversionary interest for her separate use joined with her husband in assigning it, together with a policy of insurance belonging to him, to a banking company, in trust to receive the assigned moneys and premises, and thereout, after payment of the costs of the assignment, and on keeping on foot the policy, to retain and pay such sums of money as should from time to time be due to the company, and to pay the residue to the husband and wife according to their respective interests therein. The deed contained no proviso for redemption or power of sale :—Held, that the wife was to be regarded as a surety against whom the provisions of the security could not be extended beyond their express terms, and that a decree for a foreclosure or sale could not be maintained. *Stamford, Spalding & Boston Banking Co.* v. *Ball*, 4 De G. F. & J. 310 ; 31 L. J., Ch. 143 ; 5 L. T. 594 ; 10 W. R. 196.

Judicial Separation.] — Where a married woman entitled to a reversionary interest in personalty has joined with her husband in mortgaging such interest, and has afterwards obtained a decree of judicial separation, and is living apart from her husband ; on the property coming into possession she is entitled to it absolutely under 20 and 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8. *Insole, In re*, 35 Beav. 92 ; 35 L. J., Ch. 177 ; L. R. 1 Eq. 470 ; 11 Jur. (N.S.) 1011 ; 13 L. T. 455 ; 14 W. R. 160.

Covenant for Settlement of Future Property.]—On the marriage of a lady, who was entitled under her father's will to interest in his residuary estate and two sums of cash in reversion, expectant on her mother's death or marriage, and to no other property, a settlement was executed whereby the intended husband and wife covenanted that if at any time during the life of the lady any real or personal estate should be given or devised, descend or devolve, be bequeathed or come to her or her husband in her right, it should be settled. The property was to be held by the trustee upon trust to pay the income to the wife or her appointees, to the intent that the same might be and remain a separate personal and inalienable provision for the wife during the coverture ; and upon further trust to pay, assign, or otherwise dispose of the same from time to time to the wife's appointees by deed or will :—Held, first, that the reversionary interest of the wife was bound by the covenant. *Spring* v. *Pride*, 4 De G. J. & S. 395 ; 10 Jur. (N.S.) 646 ; 10 L. T. 473 ; 12 W. R. 892.

Held, secondly, that the wife could not during the coverture affect against herself by way of anticipation any portion of the income arising from them. *Ib.*

The reversionary interests in question, whilst still reversionary, were assigned by the wife by a deed duly acknowledged to the trustee of the settlement by way of sale, he having been removed from his office by deed of even date ; the consideration was in fact in part made up of advances made by him to the husband. The wife received no explanation of her rights when she executed the assignment :—Held, that the sale must be set aside. *Ib.*

Separately-acknowledged Deed.]—Though no assignment can be made of the reversionary interest of a married woman, so as to bind her, in the event of the death of her husband in her

lifetime, and before it falls into possession, yet a perfect conveyance may be made by her and her husband under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 77, of a reversionary interest in the produce of real estate directed to be sold. *Tuer* v. *Turner*, 20 Beav. 560 ; 24 L. J., Ch. 663 ; 3 W. R. 583.

Where a married woman is entitled to a fund to be raised out of real estate on the death of a tenant for life, a deed executed during the lifetime of the tenant for life by her and her husband and the parties entitled to the estate, and acknowledged by her under the Fines and Recoveries Act, will not bar her right. *Hobby* v. *Allen*, 20 L. J., Ch. 199 ; 15 Jur. 835.

A fund of personalty was settled in 1842 upon trust during the joint lives of a husband and wife for the wife for her separate use without power of anticipation, then for the survivor during his or her life, and after the death of the survivor for such of their children as, being sons, should attain twenty-one, or being daughters attain that age or marry, in equal shares. There was no power to invest in purchase of land. The trustees bought a freehold house with part of the fund. The only children were two daughters, who attained twenty-one and married. After this the trustee, the husband and wife, and the daughters and their husbands, by deed duly acknowledged by the daughters, conveyed the estate to such uses as the father and mother should jointly appoint, and in default as the survivor should by deed or will appoint. After the death of the mother the father contracted to sell the estate. The purchaser objected to the title on the ground that, as the purchase of real estate was unauthorised, the interest of the daughters was still to be treated as a reversionary interest in personalty of which they could not dispose :—Held, that the father could make a good title. *Durrant and Stoner, In re*, 18 Ch. D. 106 ; 45 L. T. 363 ; 30 W. R. 37.

iii. *Malins' Act* (20 & 21 *Vict. c.* 57). *Effect.*

By ante-nuptial agreement, a fund belonging to a wife was agreed to be settled to her own use exclusive of her husband, but it was to go to the husband if he survived :—Held, that the wife's contingent interest in the fund after the coverture accrued to her under the settlement, and, therefore, she could not dispose of it, as being within the exception contained in 20 & 21 Vict. c. 57, s. 4. *Clarke* v. *Green*, 2 H. & M. 474 ; 11 Jur. (N.S.) 851 ; 13 L. T. 38.

B. had, under his marriage settlement executed in 1839, a life interest in a sum of money which was vested in trustees to pay the principal to and amongst the issue of that marriage, in such shares as he should appoint. In 1867 a daughter of B. married. On the 10th of December, 1868, B., by deed poll, appointed part of the money to the daughter to be held in trust for her, and assigned to her all his life interest in that part ; —Held, that she was entitled under the settlement of 1839, and that the deed of 1868 was not, within 20 & 21 Vict. c. 57, an instrument executed after the 31st of December, 1857, so as to enable her to dispose of her interest in the sum appointed to her. *Butler, In re*, Ir. R. 3 Eq. 138.

A legatee, who is also a debtor to the testator's estate, cannot claim payment of the legacy without paying the debt ; and a legacy given to a married woman, but payable by law to the husband, is in the same position for this purpose as a legacy to the husband himself, subject to her right of survivorship where the interest is reversionary, and to her equity to a settlement when it became vested in possession. Where, however, the legacy to the wife is reversionary, and she, with her husband's concurrence, under the provision of 20 & 21 Vict. c. 57, assigns it to a purchaser for value, the deed acknowledged under the statute overreaches the jus mariti, and the purchaser takes the legacy discharged from all right of retainer which the executor might have asserted against the husband. *Batchelor, In re, Sloper* v. *Oliver*, 43 L. J., Ch. 101 ; L. R. 16 Eq. 481 ; 21 W. R. 901.

Semble, that if the husband had previously assigned his interest the case would have been different. *Ib.*

Exceptions from Act.]—By an ante-nuptial agreement, a fund belonging to a wife was agreed to be settled to her own use, exclusive of her husband, but it was to go to the husband if he survived :—Held, that the wife's contingent interest in the fund after the coverture accrued to her under the settlement, and therefore she could not dispose of it, as being within the exception contained in 20 & 21 Vict. c. 57, s. 4. *Clarke* v. *Green*, 2 H. & M. 474 ; 11 Jur. (N.S.) 851 ; 13 L. T. 38.

8. Mortgages and Charges.

a. Generally.

Joint Power to Mortgage.] — A husband's estates were limited to himself for life, with remainder to such uses as he and his wife should jointly appoint, for the purpose of raising money by way of mortgage or otherwise, and subject thereto to a termor to raise certain moneys due from the husband, with remainder to the wife for life, and with an ultimate remainder to the husband and wife in moieties. The husband and wife exercised the joint power, and thereby raised money for the use of the husband :—Held, that the case was not one in which the wife's estate had been pledged or charged for the husband's moiety of the estate under the limitations of the settlement subsequent to the joint power. *Scholefield* v. *Lockwood*, 4 De G. J. & S. 22.

By a partition deed of real estate of which a wife was joint tenant, land was conveyed to such uses as she and her husband should appoint, and in default to her separate use during their joint lives, with remainder to the survivor for life, and ultimate remainder to her in fee. She joined in mortgages under the power to secure repayment of advances to her husband, and he afterwards executed a composition deed under the Bankruptcy Act of 1861, assigning all his property to trustees for the benefit of creditors. He afterwards sold the estate and requested the trustees to release it on the ground that only his life estate passed to the trustees, and that his wife was entitled to throw on his life estate the debt, which far exceeded it in value :—Held, that she was so entitled, and that the trustees ought therefore to release the property. *Trueman, Ex parte*, 42 L. J., Bk. 1 ; 21 W. R. 105.

Wife joining in Security by Husband—Effect of.]—When a feme covert having separate property, joins in a security for money advanced to

her husband, the court acts upon it, not as an agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents and profits of that property, and not by sale or mortgage. The death of the husband after the filing of the bill, and before the hearing, makes no difference. If the feme covert insist upon the exercise of undue influence by the husband, she must prove it, and it is not for the plaintiff to prove a negative. *Field* v. *Sowle*, 4 Russ. 112.

Deposit of Bond with Bankers.]—A bond was vested in a trustee in trust, as to income, for a married woman for life, for her separate use, with remainder in trust for her issue; and in default of issue, in trust for such persons as the married woman alone, notwithstanding coverture, should by deed, or instrument in writing, to be by her sealed and delivered in the presence of, and to be attested by, two credible witnesses, appoint. The husband being indebted to his bankers, on the balance of an account current, the married woman deposited the bond with the bankers, with a letter signed by her to the effect, that in consideration of the bankers paying, or having already paid, the cheques of the husband, or otherwise advancing him sums of money, she thereby guaranteed the repayment thereof; and that she deposited, as a collateral security, the bond, which she undertook to assign to the bankers on request:—Held, that the consideration was sufficient, and that the separate life interest of the wife was effectually charged; but that the latter not having been executed and attested as required by the power, the court would not under the circumstances give effect to it as an appointment. *Thackwell* v. *Gardiner*, 5 De G. & Sm. 58.

A married woman having a charge on settled estates for her jointure, joined with her husband in mortgaging them and another estate of which he was absolute owner. Afterwards the husband sold the unsettled estate, the mortgagees joining, and the purchase-money was paid partly in reduction of the mortgage debt and partly to the husband. The wife did not join in the conveyance, but consented to the transaction:—Held, that whatever equity the wife might have against her husband or the estate which had been sold, she had no equity to charge the mortgagees with the sum paid to her husband. *Noyes* v. *Pollock*, 55 L. J., Ch. 513; 32 Ch. D. 53; 54 L. T. 473; 34 W. R. 383—C. A. And see *Skottowe* v. *Williams*, 7 Jur. (N.S.) 665; 4 L. T. 719—L. JJ.

Resorting to Husband's Property before Wife's.]—Where the bankrupt and his wife executed a power of appointment of the wife's estate to a creditor as security for a debt due from the bankrupt:—Held, that the creditor might prove for the whole debt without giving up the security, it being incumbent on him to recover what he could from the bankrupt's estate before he resorted to the property of the wife. *Hedderley, Ex parte, Hicklin, In re*, 2 Mont. D. & D. 487.

Creditor of Husband getting Himself made Trustee of Wife's Property.]—Securities obtained from a married woman having property settled to her separate use, by a creditor of her husband, who, by suppressing that fact, procured himself to be appointed one of the trustees, his co-trustee not being a party to the transaction, set aside. *Dalbiac* v. *Dalbiac*, 16 Ves. 116.

Execution of, by Wife shortly before Marriage.] — Under the will of her father, Mrs. M'Wade was interested for life in the profits of a mine. A fortnight before her marriage she executed a mortgage of her interest to secure the payment to her mother, Mrs. Brodhurst, of a sum of money. Mrs. M'Wade, with her children, was residing with her mother. This was a bill by the husband (a pauper) and his children (he being their next friend) seeking to have the mortgage (of which he alleged he knew nothing before marriage) set aside, or that an account should be taken of what, if anything, was due to Mrs. Brodhurst:—Held, that the bill must be dismissed so far as it regarded the mortgage, there being no evidence of fraud. *M'Wade* v. *Brodhurst*, 34 L. T. 924—C. A. Affirming 24 W. R. 232.

Husband's Reversionary Interest in Wife's Estate—Costs.]—A husband mortgaged his interest in his wife's reversionary personal estate. The wife died in the husband's life, and before the fund fell into possession. Expenses were incurred in taking out administration by persons entitled to the equity of redemption, without any express request by the mortgagee:—Held, that the mortgagee was entitled to priority over such costs. *Saunders* v. *Dunman*, 47 L. J., Ch. 338; 7 Ch. D. 825; 38 L. T. 416; 26 W. R. 397.

Trustee — Same Hand to pay and to receive—Statute of Limitations.]—Where a married woman was, under a will, entitled for life for her separate use to the income of a sum of money which the trustee of the will had lent to the husband on the security of a mortgage, and the husband and wife had lived together in amity for a period of more than twenty years after the date of the mortgage, during which time the husband had never paid any interest on the mortgage debt, or given any written acknowledgment of the mortgage to the mortgagee-trustee for the wife:—Held, that the husband retained the interest as a gift from the wife: that it was the same hand to pay and to receive: that, therefore, no payment over was requisite: and, consequently, that the statute of limitations did not run, and the mortgage was still subsisting. *Hawes, In re, Burchell* v. *Hawes*, 62 L. J., Ch. 463; 3 R. 133; 67 L. T. 756; 41 W. R. 173.

Mistake as to Title.]—Where husband and wife executed a mortgage of her property, as to which it was at the time supposed she had power over the fee, but afterwards it appeared that she and her husband had only life interests, and as to her to her separate use:—Held, that the deed operated to the extent of the interests which they each had. *Wainwright* v. *Hardisty*, 2 Beav. 363.

Settlement — Inquiry.] — When a married woman executes a mortgage there is no obligation on the mortgagee to inquire whether a settlement was made on her marriage. *Lloyd's Banking Co.* v. *Jones*, 54 L. J., Ch. 931; 29 Ch. D. 221; 52 L. T. 469; 33 W. R. 701.

Agreement to charge Expectancy on Death of Living Person.]—A married woman can give

a valid charge on her expectancy under the will or as one of the next-of-kin of a living person. *Flower* v. *Buller*, 49 L. J., Ch. 784; 15 Ch. D. 665; 43 L. T. 311; 28 W. R. 948.

And such a charge will be enforced after that person's death against separate estate bequeathed by his will to the married woman. *Pike* v. *Fitzgibbon* (14 Ch. D. 837) followed. *Ib.*

Such an agreement in writing is not void for want of consideration where it appears on the face of it that the money, to secure which the charge is given, was borrowed for and received by the husband, and it otherwise appears that such money was partly expended in discharging the liabilities incurred in keeping up the joint establishment of the husband and wife. *Ib.*

Where in such an agreement it was recited that A. was or might become "entitled to certain moneys under the will" of B., or as one of his next of kin to certain interests in his estate, "and that A. had agreed to charge all such interests so as aforesaid expectant" upon the death of B., and A. thereby assigned "all the interest to which she might become entitled as aforesaid expectant upon the death" of B. by way of security:—Held, that all the interest and not only the cash taken by A. under B.'s will was charged. *Ib.*

Semble, that in any case "moneys" would have carried railway debentures. *Ib.*

Covenant by Husband and Wife—Equitable Defence.]—Action upon a covenant by the defendant and wife to pay money. Equitable plea, that the defendant and wife, by the deed in question, mortgaged lands of which they were seised in fee in right of the wife, to the plaintiff in fee, as a security for money (of which the sum pleaded to was parcel) lent by the plaintiff to the defendant and wife, at the request of the latter, for the purpose of repaying with the sum a sum borrowed of another person by the defendant and wife, also at her request, for the purpose of discharging a debt of the wife contracted before marriage; that the wife died, leaving the plaintiff her heir-at-law, who thereupon became entitled to the equity of redemption in fee, in addition to the legal estate in fee-simple in the lands; that the lands were of more value than the moneys as to which the plea was pleaded, and all costs, &c., and became, upon the death of the wife, the primary fund for paying the moneys to which the plea was pleaded, which sums, as the plaintiff was entitled to the lands and the moneys and the equity of redemption, were in equity satisfied before action by the value of the lands:—Held, that the plea disclosed facts which would entitle the defendant to an absolute and perpetual injunction, and was therefore good as an equitable defence. *Gee* v. *Smart*, 8 El. & Bl. 313; 26 L. J., Q. B. 305; 3 Jur. (N.S.) 1056; 5 W. R. 761.

Advances by Husband for Improvements on Faith of Settlement.]—A married woman and her husband, by deed duly acknowledged by her, reciting that the husband had begun to make improvements on the wife's land, and that they were therefore desirous of settling it to the uses thereinafter declared, conveyed, or purported to convey, the land to certain uses. On the faith of this settlement the husband made considerable improvements on the property, and money was advanced by the plaintiff on mortgage of the husband's interest in it, in which mortgage a person having a life estate by title paramount concurred:—Held, that supposing the legal estate not to have passed, the settlement was good in equity by way of contract for valuable consideration. *Crofts* v. *Middleton*, 25 L. J., Ch. 513; 2 Jur. (N.S.) 528; 4 W. C. 439—L. JJ.

—— **Subsequent Divorce.**]—A husband, who lays out money in repairing and improving his wife's realty, cannot, after being divorced from her à vinculo matrimonii on account of her adultery, come into equity to have such money declared a charge on the estate. *Hamer* v. *Tilsley*, 1 Johns. 486; 29 L. J., Ch. 32; 5 Jur. (N.S.) 1344; 1 L. T. 54; 8 W. R. 20.

Mortgagee has Notice of Wife's Capacity.]—Upon a marriage, an estate was vested in trustees for the wife for life, for her separate use, and after the death of her husband, for such persons as she should by her deed or will appoint. She appointed the reversion expectant on her death, to secure money lent to her husband; and subsequently she executed another deed, and appointed the estate to her son:—Held, that a mortgagee contracting with a married woman must be taken to have known that she could only charge that which was settled to her separate use. *Hobday* v. *Peters*, 29 L. J., Ch. 780; 8 W. R. 512.

Held, also, in the absence of fraud or misrepresentation that the reversion expectant on her death was not subject to the mortgage debt, and that the son as appointee took the estate discharged of the mortgage. *Ib.* And see *Durnford* v. *Lane*, 1 Bro. C. C. 106; and *Martin* v. *Martin*, 2 Russ. & My. 507.

Evidence that Mortgage for Benefit of Wife.]—A husband and wife joined in mortgaging the wife's separate estate, and the husband covenanted to secure the repayment of the debt:—Held, that parol evidence might be admitted to show that the money so borrowed was for the benefit of the wife; that the husband's joining in the mortgage deed was only by way of suretyship; and that his estate would be indemnified by the separate estate of his wife. *Gray* v. *Dowman*, 27 L. J., Ch. 702; 6 W. R. 571.

Husband Paying off Incumbrance on Wife's Property.]—A husband paying off an incumbrance, subject to which the estate stands limited to his wife for life for her separate use with remainder as she shall by will appoint, is, in the absence of evidence of a contrary intention, entitled to the charge as against the estate. Whether it is a charge on the husband's estate which is paid by the wife, or a charge on the wife's estate paid by the husband, the same presumption attaches to the transaction. *Outram* v. *Hyde*, 24 W. R. 268.

Specific Performance Decreed against Wife.]—Where lands were conveyed to the use of the wife for life, or of such person as she, by writing under seal, should appoint, and in default in trust to pay her the rents for her separate use, and she, during coverture, by writing not under seal, with her husband on a loan to him, agreed to execute a mortgage of the trust premises when required, and she survived her husband:—Held, that having a legal estate vested in her, and the power to enter into such agreement, she was bound to a specific performance.

Stead v. *Nelson*, 2 Beav. 245 ; 9 L. J., Ch. 18 ; 3 Jur. 1046.

Assignment of Annuity — Anticipation.]—Where there was a bequest of an annuity to a feme sole for her life, for her separate use, free from the control of any husband she might marry, without anticipation :—Held, that an assignment of such annuity, made by the annuitant and her husband after marriage, by way of security, was valid. *Johnson* v. *Freeth*, 6 Sim. 423, n. ; 5 L. J., Ch. 143.

Further Advance to Husband alone—Consols.]—A married woman, entitled for life, for her separate use, to the dividends of consols standing in the names of trustees, joined with her husband in assigning her interest to secure 400*l.* advanced to herself and him upon their joint receipt, and such further advances as might be made either to her or her husband. Soon afterwards the mortgagee advanced to the husband alone, upon his sole receipt, a further sum :—Held, that no further receipt or acknowledgment from the wife was necessary, and that the security comprised as well the further as the original advance. *Greenough* v. *Sherrock*, 10 L. T., 316.

Charge of Reversionary Interests.]—A wife living separate from her husband, represented to G. that she had the power of charging the reversionary interest in a fund to which she was entitled on the death of her husband, the fact being that she was restrained from anticipation during coverture. On the strength of such false allegation she induced G. to destroy certain bills of exchange he had as securities for money lent to her on her executing an agreement to charge her reversionary interest with the debt, and at the same time entreating G. to make no inquiries as to the truth of her statements, as it would lead to her husband's discovering her liabilities and prevent a reunion :—Held, on the assumption that G. was really ignorant of the trusts of the settlement, that she had been so far guilty of fraud as to make the false allegation binding on her reversionary estate. *Green* v. *Lyon*, 21 W. R. 695. *But see* 21 W. R. 830.

Mortgage of Policy—Payment of Premiums by Mortgagee.]—By a marriage settlement a policy of assurance on the life of C. was assigned to trustees for the benefit of the wife for her separate use, for life, and after her death as she should appoint. The husband covenanted that he would pay the premiums, and in default the trustees were authorised to apply the income for that purpose. Subsequently the wife appointed the reversion in the policy by way of mortgage to secure sums of money advanced to her, with interest at 5 per cent. The husband and the trustees refused to pay the premiums, and they were paid by the mortgagees. On the death of C. the mortgagees claimed to be repaid out of the policy moneys the sums they had advanced for keeping the policy on foot, with interest at 5 per cent. :—Held, that they were entitled to immediate payment of the premiums paid by them, with interest at 4 per cent., and to a charge for the remaining 1 per cent. upon the reversion of the policy moneys. *Gill* v. *Downing*, L. R. 17 Eq. 316 ; 30 L. T. 157 ; 22 W. R. 360.

Mortgage of Consols—Limitations giving Wife Absolute Title.]—By a settlement a sum of 3,500*l.* consols was settled upon P. for her life, to her separate use ; and after her decease, to such persons as she should by will appoint ; in default of appointment, for her executors and administrators. P. mortgaged to F., for security of 1,300*l.* and interest. Afterwards P. and F. presented this claim to have the 1,300*l.* raised by a sale of the requisite amount of consols, and paid to F., and to have the residue transferred to P. : —Held, that P. was (subject to the mortgage rights of F.) absolutely entitled to the fund. *Page v. Soper*, 22 L. J., Ch. 1044 ; 17 Jur. 851.

Voluntary Joint Settlement—Mortgage by Wife.]—Husband and wife, by a voluntary deed, assigned a term of years of the wife to trustees. She, having survived him, mortgaged the term : —Held, that the first deed wholly divested the wife's interest, and that the subsequent mortgage by her was no revocation thereof within the 27 Eliz. c. 4, and conferred no estate on the mortgagee. *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1035 ; 20 L. J., C. P. 177 ; 15 Jur. 512.

Advances in Excess of Agreed Limit.]—A. B., a married woman, conveyed her separate estate to C. D. in trust to sell, &c., and pay a debt due to him from her, and further advances, not exceeding in the whole more than 400*l.*, and to hold the surplus for her separate use. C. D. afterwards made further advances, far exceeding the limit, part of which was paid upon bills drawn on him by A. B., with directions "to charge the same to the account of" her separate estate :—Held, that C. D. was not entitled to appropriate his receipts, in the first place, in payment of the advances not covered by the security, the court considering that C. D.'s receipts could not be considered as indefinite payments ; that he had them only for the purpose of paying off the charge, and afterwards for A. B.'s separate use ; and that, upon the true construction of the instruments, C. D. was bound to apply the separate estate, which he received, in satisfaction of the charge, and could only consider the surplus, after such satisfaction, as subject to the disposition of C. D., or liable to such ordinary lien as he might acquire by advancing money to her. *Smith* v. *Smith*, 3 Beav. 80.

Wife Restrained from Anticipation.] — *See* col. 1075.

b. Right to Redeem.

Intention.]—In a conveyance, by way of mortgage, by a husband of his wife's chattels real, the court will look at the instrument to ascertain the real intention of the mortgagor : whether merely to give a security, or, also, to actually change the property in the equity of redemption ; and such intention is to be ascertained by applying to the instrument the ordinary rules of construction, coupled with the presumption on which the court acts in such cases. *M'Cullagh* v. *Littledale*, Ir. R. 9 Eq. 465. And see *Clark* v. *Burgh*, 2 Coll. 221 ; 14 L. J., Ch. 398 ; 6 Jur. 679.

—— **Wife's Intention.**]—Husband and wife joined in executing a mortgage in fee of the wife's estate, reserving the equity of redemption to the husband and his heirs. The husband subsequently, out of moneys belonging to the wife, paid off the mortgage, and the estate was reconveyed to the husband and his heirs. After

the husband's death the wife filed a bill against the son and heir-at-law of the husband for a reconveyance of the estate; and the evidence showing that the wife, in joining in the mortgage, did not intend to deprive herself of the benefit of the equity of redemption, and was ignorant of the effect of the proviso for redemption, a decree for a reconveyance to the wife in fee was made accordingly. *Stansfield* v. *Hallam*, 29 L. J., Ch. 173; 5 Jur. (N.S.) 1334; 1 L. T. 179; 8 W. R. 34.

Where a wife joins in a mortgage deed, her equity of redemption is not released if there is no express contract on her part to do so, and that at any rate the title was too doubtful to be forced upon the purchasers. *Bettin's Trusts, In re*, L. R. 12 Eq. 553; 25 L. T. 404; 19 W. R. 1052.

Bankruptcy of Husband — Disclaimer.]—A husband and wife mortgaged in fee land in which they were seised in right of the wife, to whom the equity of redemption was reserved by the mortgage deed. The husband became bankrupt; and in a suit by the wife for a settlement of the equity of redemption on her and her children, and for redemption as against the mortgagee, and for foreclosure against the assignees and the husband, the assignees disclaimed, and a decree was made giving the wife the right to redeem as against the mortgagee, and settling the whole fee upon herself and her children, the husband not objecting. (See *Gleaves* v. *Paine*, 1 De G. J. & S. 87; 32 L. J., Ch. 182; 7 L. T. 811; 11 W. R. 273.) The mortgagee afterwards applied in the bankruptcy, and was there allowed to prove the whole amount of his mortgage debt against the bankrupt's estate:—Held, first, that the disclaimer of the assignees was intended only to accelerate the wife's right to redeem, if she elected so to do; but if she elected not to redeem, and her bill was consequently dismissed with costs against the mortgagee, the assignees would no longer be bound by their disclaimer; their interest in the bankrupt's estate would remain unaffected by the dismissal of the bill, and they would be restored to their right to the bankrupt's life interest in the property. *Paine, Ex parte, Gleaves, In re*, 3 De G. J. & S. 458; 32 L. J., Bk. 65; 9 Jur. (N.S.) 701; 11 W. R. 553.

—— **Redemption by Wife.**]—A husband and wife assigned leasehold premises, of which the husband was possessed in her right, to a mortgagee for securing money then lent, and interest, by a deed containing a proviso for redemption by the husband and wife, or either of them, or the representatives of either. The husband subsequently became insolvent, and the mortgagee filed a claim seeking a foreclosure against the assignee in insolvency, and the insolvent and his wife. The married woman proved that her husband had been without employment, and that she and her child were destitute, and claimed an equity to a settlement out of the mortgaged property:—Held, that the married woman had no equity to a settlement; but the proviso for redemption being on repayment of the sum advanced by the insolvent and his wife, the power to redeem must be given to the married woman as well as to the insolvent's assignee. *Hill* v. *Edmonds*, 5 De G. & Sm. 603; 16 Jur. 1133.

—— **Pledge of Mixed Property.**]—Where wife in security for husband's debt pledges her separate property mixedly with his in the same instrument, she, as between herself, her husband, and his assignee in insolvency, is entitled to have husband's property first applied. *Aguilar* v. *Aguilar*, 5 Madd. 414.

Sale—Surplus Moneys—Husband's Executor.]—A husband and wife appointed by way of mortgage real estate legally settled, but subject to an absolute power in the husband and wife. On redemption it was provided that the reconveyance should be reserved to the uses of the settlement. There was a power of sale under which any surplus purchase money was to be held on trust for the husband, his heirs, executors, administrators, and assigns. The power of sale was exercised after the death of the husband:—Held, that the surplus purchase money belonged to the personal representative of the husband. *Jones* v. *Davies*, 47 L. J., Ch. 654; 8 Ch. D. 205; 38 L. T. 710; 26 W. R. 554.

Reservation of Equity of Redemption to Husband.]—Where husband and wife mortgage wife's estate, and equity of redemption is reserved to the husband and his heirs, without recital or special circumstances to show the intention to make a new settlement of estate, the husband has the equity of redemption, as he before had the legal estate only in jure uxoris. *Ruscombe* v. *Hare*, 6 Dow, 1; 19 R. R. 1.

Wife Foreclosed.]—The equity of redemption of a mortgage comes to a feme covert, against whom and her husband a bill is brought to foreclose; the feme covert shall be foreclosed absolutely, and shall have no time to show cause after the death of her husband. *Mallack* v. *Galton*, 3 P. W. 352.

Wife's Right after Mortgagee's Title absolute.]—Wife entitled in her own right, and also by settlement, to estate which had been mortgaged by her husband, and suffered to become absolute in mortgagee. Wife, after death of husband entitled to redeem. *Hill* v. *Bristol (Bishop)*, Dick. 526. And see *Corbett* v. *Barker*, 3 Anstr. 755; 4 R. R. 856.

Suit—Wife Party by next Friend.]—In a suit by husband and wife for redemption of real estate of the wife, she ought to be a party separately by her next friend, as having an interest distinct from that of her husband. *Smith* v. *Etches*, 9 L. T. 476; 12 W. R. 192.

The husband, though bankrupt, is a proper party, as having the legal estate. *Ib.*

c. Wife's Equity to Exoneration.

Presumption of Application to Husband's Use.]—Presumption, that money borrowed by a husband on the security of his wife's estate is applied to his use. The husband is bound to exonerate the estate; but that equity may be rebutted by parol evidence, that the money was applied in discharge of the wife's debts. *Kinnoul (Earl)* v. *Money*, 3 Swanst. 208, n. And see *Hudson* v. *Carmichael*, 1 Kay, 613; 23 L. J., Ch. 893; 18 Jur. 851.

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raised by husband and wife from wife's estate. *Id.* 217, n.

Covenant by Husband—Wife's Property.]—A. and his wife mortgage the wife's estate, and A. covenants to pay the money, but the equity of redemption is reserved to them and their heirs; A. dies, and his wife survives: the mortgage shall be discharged out of the husband's estate. *Pocock* v. *Lee*, 2 Vern. 604.

—— **Wife's Mortgage.**]—Where a feme sole makes a mortgage, or takes an estate subject to a mortgage, and afterwards upon a transfer her husband covenants to pay the money, his personal estate shall not be liable. Secus, where the husband has received the money himself. *Bagot* v. *Oughton*, 1 P. W. 348; Fort. 332.

Bar to Exoneration—Disclaimer by Wife.]—Wife barred from her right to be exonerated out of the assets of her husband, in respect of money raised by mortgage of her estate, and received by him, by telling executor she would not raise her claim, and no difference, whether legacies were paid before or after. Parol evidence of her declarations admissible to prove that it was not applied for the husband's use, not to prove the transaction itself different from what it appears to be by the instruments and the other evidence, as that it was intended as gift to him. *Clinton* v. *Hooper*, 1 Ves. J. 173; 1 R. R. 102.

Proof of application of money raised on wife's estate to her use bars her demand on husband's assets. Wife does not stand in the place of mortgagee. *Id.* 181.

No Mortgage of Wife's Estate.]—If there is no proper mortgage of the wife's estate there will be no exoneration. *Scholfield* v. *Lockwood*, 4 De G. J. & S. 22; 33 L. J., Ch. 106; 9 L. T. 1258; 12 W. R. 114.

Bill to Redeem—Next Friend.]—A bill to redeem a mortgage on the real estate of a married woman, should not be filed by husband and wife merely, but by the wife by her next friend, making her husband a co-plaintiff. And this is the right course even where the husband is a bankrupt. *Smith* v. *Etches*, 1 Hem. & M. 558; 10 Jur. (N.S.) 124. Affirming 9 L. T. 476; 12 W. R. 192.

III. *FUND OF MARRIED WOMAN IN COURT—PAYMENT AND TRANSFER.*

1. In General.

Special Act—Substituted Machinery for Protection.]—Where an act of parliament authorised the purchase of lands in which a feme covert is interested, and gave the court of exchequer authority to distribute the purchase-money amongst the parties beneficially entitled, the exercise of that authority by the court is in lieu of the solemnities ordinarily required for the conveyance of the real property of a feme covert, or on the payment of her money out of court. *Ellison, Ex parte*, 2 Y. & Coll. 528; 7 L. J., Ex. Eq. 49; 1 Jur. 283.

Appointment of Trustee to Receive.]—A testator gave a legacy to a trustee, to invest it for the benefit of E. S., independent of the control of her husband. On a bill by the husband and wife against the trustee, to have it declared that the wife was absolutely entitled to the fund, and to have the same transferred to her or to her husband, by her direction, or in her right:—Held, that the wife was entitled to the entire disposal of the fund, but that the husband could not obtain it in that suit, and it was referred to the master to approve of a trustee, to whom the fund might be transferred upon the trust declared in the will, and to approve of a deed declaring that trust. *Simons* v. *Horwood*, 1 Keen, 7.

Husband and Wife living Separate.]—A fund was brought into court, being the arrears of an annuity charged on real estate in favour of a married woman. Husband and wife both applied for the fund; they had lived separate for a long period, but the wife was not in fault; the wife had a separate estate for life, and a jointure settled on her after her husband's death, and supported herself and children, the husband failing to contribute to their support, although possessed of a sufficient estate. The court granted the application of the wife, and ordered the fund to be paid to her. *Warren* v. *Newton*, 7 Ir. Eq. R. 211.

Order for Payment to Husband vests Interest in Him.—Money ordered to be paid to the husband in right of his wife, is a vested interest in him. *Heygate* v. *Annesty*, 3 Bro. C. C. 362.

Ill-treatment of Wife.]—Application by husband for interest of wife's money in court, refused on her affidavit of ill-treatment. *De Manneville* v. *De Manneville*, 10 Ves. 56.

Identity.]—Where a fund belonging to a married woman was about to be settled, the court will not be satisfied with her sole testimony to the identity of parties. *Anon.*, 1 Jur. (N.S.) 1084.

Whole Fund paid to Adulteress.]—The court, under very peculiar circumstances, ordered the whole income of a fund in court belonging to a feme covert, who had committed adultery, to be paid to her, on terms. *Lewin, In re*, 20 Beav. 378.

Misdescription of Wife.]—The court will make a payment of money out of court to a married woman entitled thereto, notwithstanding that she is misdescribed in the petition, where the husband gives his consent. *Clark* v. *Clark*, 14 L. T. 98; 14 W. R. 449.

Bank of England — Transfer to Married Woman.]—The Bank of England does not permit a transfer into the name of a married woman alone. Therefore, where through misapprehension an order had been obtained for such a transfer, the court will alter the order by directing the accountant-general to pay the sum into the hands of the feme covert, she appearing personally again in court and consenting. *Waybank's settlement, In re*, 2 Jur. (N.S.) 324.

Trustee—Refusal to Pay to Husband.]—A trustee is always justified in refusing to pay over a wife's fund to the husband, even at her request, and insisting on affording her an opportunity of asserting her equity to a settlement. *Swan, In re*, 2 Hem. & M. 34; 12 W. R. 738.

—— **Advance by, on Misrepresentation.**]—A wife was entitled in remainder to a share of moneys in the hands of a trustee. She deserted her husband, and married another man. The trustees, relying upon her representations that she was legally married, advanced a portion of her reversionary share to the bigamous husband. The fund having fallen into possession:—Held, that the trustee was answerable to the husband for the money which he had so advanced. *Sporle* v. *Barnaby*, 10 Jur. (N.S.) 1142: 11 L. T. 412; 13 W. R. 151.

Order for Payment to Husband—Petition.]—An order for payment to the husband, of money to which the wife is entitled, cannot be inserted in the order on further directions, but must be obtained by petition, although the wife consents. *Campbell* v. *Harding*, 6 Sim. 283.

Claim by Assignee—Notice to Wife.]—In 1824 husband and wife assigned the reversionary interest in a legacy. In 1826, the cestui que vie being dead, the money was paid into court to the credit of the cause, not to be paid out without notice to the married woman. On the application of the representative of an assignee of 1815 to have the fund, notice having been duly given to the married woman, but she having taken no steps for or against the application, an order was made accordingly, but notice of this order was to be given to the married woman forthwith. *Doody* v. *Higgins*, 2 Jur. (N.S.) 1068.

Settled Estates Act—Fund in Court under Married Women's Property Act, 1882.]—Notwithstanding the provision of s. 50 of the Settled Estates Act, 1877, that when a married woman consents to an application to the court under the act, she is to be examined apart from her husband as to her consent, such an examination is not now necessary in the case of a woman who has married since the commencement of the Married Women's Property Act, 1882. *Riddell* v. *Errington*, 26 Ch. D. 220; 50 L. T. 584; 32 W. R. 680.

A sum of money was in court under the Settled Estates Act (19 & 20 Vict. c. 120), subject to the trusts of a marriage settlement. There was no issue, and the wife was past child bearing. Under the settlement the survivor of the husband and wife was entitled absolutely in default of children:—Held, that, upon the execution of a deed acknowledged by the wife, the court would order the fund to be transferred to the joint account of the husband and wife. *Belt, In re*, 37 L. T. 272; 25 W. R. 901.

Proceeds of Realty under £200.]—The court will not permit a married woman to elect to take her share of proceeds of sale of real estate as personalty without her separate examination, even where the share does not amount to 200*l*. *Shaw, In re, Topham* v. *Burgoyne*, 49 L. J., Ch. 213; 41 L. T. 670.

Purchase-money in Court of Land taken by Railway Company.]—Where purchase-money paid into court by a railway company belongs to a married woman, the court will pay it out to her without deed acknowledged, but simply upon her examination. *Hayes, In re*, 9 W. R. 769.

A share of the purchase-money of an entailed estate taken by a company paid out to the husband of a married woman upon her consent, without a disentailing deed as to the particular share being required. *Tyler, In re*, 8 W. R. 540.

Election on Separate Examination.]—The purchase-moneys of real estate to which a married woman was absolutely entitled having been paid into court by a railway company under the Lands Clauses Consolidation Act, 1845, s. 69, upon a petition by the owner and her husband for payment out to the latter:—Held, that the married woman might elect upon her separate examination in court to take the fund as personalty, and an order was, by her consent, made for payment out to her husband without a deed. *Robins's Estate, In re*, 7 W. R. 705.

2. CONSENT AND SEPARATE EXAMINATION.

a. **When Necessary and Effect.**

Payment to Husband—Consent of Wife.]—Where a married woman will consent to have part of her fortune (in court) paid to her husband, it must be so. *Dimmock* v. *Atkinson*, 3 Bro. C. C. 195.

—— **Whole Fortune.**]—The court refused to let the whole of wife's fortune be paid to her husband, although she was present in court, and consented to it. *Higham, Ex parte*, 2 Ves. 579. And see *Sherling* v. *Rochfort*, 8 Ves. 164.

Voluntary Settlement—Transfer to Trustees of.]—There must be the consent of the married woman previously to an order that funds belonging to her, although not in court, shall be transferred to the trustees of a voluntary settlement. *Henry* v. *Ogle*, Coop. C. C. 447.

Wife joining in Fine.]—Wife may dispose of personal estate as well as real by joining in fine with husband, over which she has absolute power, and on her consent her whole fortune was paid over to husband, though stated to be insolvent. *Willats* v. *Cay*, 2 Atk. 67.

Payment of Annuity to Husband.]—A life annuity had been given to a married woman by will, and the husband and wife applied for an order for payment of the annuity to the husband. The registrar refused to draw up the order unless the consent of the wife was taken:—Held, that her consent was not necessary. *Shilleto* v. *Collett*, 7 Jur. (N.S.) 385.

Lands Clauses Act—Election to take Purchase-money as Personalty.]—The purchase-moneys of real estate to which a married woman was absolutely entitled, having been paid into court, by a railway company, under the Lands Clauses Consolidation Act 1845, s. 69, upon a petition by the owner and her husband for payment out to the latter:—Held, that the married woman might elect upon her separate examination in court to take the fund as personalty, and an order was, by her consent, made for payment out to her husband without a deed. *Robbins's Estate, In re*, 27 W. R. 705.

Legacy—Advance to Husband—Husband to Insure.]—A legacy being left upon trust for the separate use of a married woman during her life, without power of anticipation, and, after her decease, for her children, with power to the trustees to advance 1,000*l*., part thereof, to place her in any trade, business, profession, or

employment, or otherwise, or for her preferment or advancement in the world; and this legacy having been transferred into court in this cause to the account of the legatee and her children, the court, on the petition of herself and her husband, advanced to her 1,000*l.*, to be employed with another 1,000*l.*, belonging to the husband, in establishing him in an advantageous partnership with two other persons, in a lucrative business with which he had been connected for thirteen years, upon his effecting an insurance upon his own life in the names of two trustees appointed by the court, to be held by them upon the trusts of the said legacy, and also entering into a bond in a proper penalty to the same trustees to secure the due payment of the premiums upon such policy of insurance. *Phillips* v. *Phillips*, 1 Kay, 40.

The court will not order payment to a married woman on her separate receipt without examination. *Gibbons* v. *Kibbey*, 7 Jur. (N.S.) 1298; 5 L. T. 416; 10 W. R. 55.

Taking—No connection of Husband to be present.]—No person connected with the husband ought to be present when a married woman's examination as to her consent is taken. *Bendyshe, In re*, 26 L. J., Ch. 814; 3 Jur. (N.S.) 727.

And see FINES AND RECOVERIES.

As to Examination of a Married Woman as to her Equity to a Settlement.]—*See* col. 1118.

As to Examination of a Married Woman on Removal of Restraint on Anticipation.]—*See* col. 1086.

b. Separate Estate.

Paid out without Examination.] — Money settled to the separate use of a married woman is paid out of court without any personal examination. *Lechmere* v. *Brotheridge*, 32 Beav. 353.

On payment to a married woman, on her separate receipt, of a fund in court belonging to her absolutely to her separate use, it is not necessary that she should be separately examined. *Anon.*, 3 Jur. (N.S.) 839.

—— **Leave to Apply.**]—Bequest to a married woman to her separate use, the court would not order payment into her hands, but ordered the legacy to be carried to her account, with liberty to her to apply. *Owen* v. *Lys*, Taml. 404.

Marriage after Married Women's Property Act, 1870.]—A fund standing to the separate credit of a married woman, unless married after the Married Women's Property Act, 1870, will not be paid to her by the court, even on her separate receipt, without her separate examination. Secus, where the marriage was after the act, and the applicant takes under an intestacy. *Deignan* v. *Deignan*, 13 L. R., Ir. 278.

Annuity.]—Money bequeathed to be invested in an annuity for the life of a married woman for her separate use, paid to the husband upon her consent taken in court. *Gullan* v. *Trimbey*, 2 Jac. & Walk. 457.

Settled Stock.]—Settlement of stock to the separate use of a married woman for life, and after her death for her husband absolutely. Decree, upon the bill of the husband and wife, for a transfer to him upon his personal security. *Chesslyn* v. *Smith*, 8 Ves. 183.

Appointment of Trustee.]—A testator gave a legacy to a trustee in trust to invest it for the benefit of E. S., independent of the control of her husband; on a bill by the husband and wife against the trustee, to have it declared that the wife was absolutely entitled to the fund, and to have the same transferred to her, or to her husband by her direction, or in her right, it was held that the wife was entitled to the entire disposal of the fund, but that the husband could not obtain it in that suit, and it was referred to the master to approve of a trustee to whom the fund might be transferred upon the trust declared in the will, and to approve of a deed declaring that trust. *Simons* v. *Horwood*, 1 Keen, 7.

Trustees — Refusal — Presence of Wife in Court.]—The course is not to establish a deed between husband and wife on her separate estate without the presence of the wife in court, where the trustees put the parties to file a bill. *Milnes* v. *Busk*, 2 Ves. J. 500.

Consent taken in Court.]—Husband and wife joined in a petition asking payment to the husband of a sum which represented an annuity bequeathed to the separate use of the wife. The consent of the wife to the prayer of the petition was taken in court. *Wordsworth* v. *Dayrell*, 2 Jur. (N.S.) 631; 4 W. R. 689.

Where there was a fund in court to which a married woman was entitled absolutely under a will, the court directed that she should attend, and give her consent, and sign a separate receipt for the money, her husband appearing by counsel, and consenting to the payment. *Mawe* v. *Hearside*, 30 L. J., Ch. 937; 7 Jur. (N.S.) 817; 9 W. R. 649.

Transfer into Joint Names.]—Stock in court, settled absolutely to the separate use of a married woman, ordered, upon her petition, to be transferred into the joint names of herself and her husband, her separate examination and consent being dispensed with. *Crump, In re*, 34 Beav. 570.

c. Amount.

Ascertained, Must be.]—Court will not receive feme covert's consent to bar her equity until her share is ascertained. *Jernegan* v. *Baxter*, 6 Mad. 32.

Court will not act in disposition (according to her direction) of fund in court of feme covert, until the amount of her share be ascertained, or of any specific part of it. *Godber* v. *Lawrie*, 10 Price, 152.

And see *Moss* v. *Dunlop*, 29 L. J., Ch. 39.

Waiver of Equity to a Settlement.] — A married woman can waive her equitable right to a settlement out of a fund in court to which she has been declared entitled, although the clear amount payable in respect of such fund has not been ascertained. *Packer* v. *Packer*, 1 Coll. C. C. 92.

See EQUITY TO A SETTLEMENT, col. 1118.

The court cannot take the consent of the wife to the disposal of her fortune, unless the amount is ascertained. *Edmonds* v. *Townshend*, 1 Anstr. 93.

Sum under £200.]—Payment of a sum of money under 200*l.* to the husband, in right of the wife; ordered, notwithstanding a suggestion that the petition had not her concurrence. *Elworthy* v. *Wickstead*, 1 Jac. & Walk. 69.

Money in court belonging to a married woman, if less than 200*l.* will be paid to the husband, although she has been deserted by him, and she opposes the application. *Foden* v. *Finney*, 4 Russ. 428; 6 L. J. (O.S.) Ch. 153.

A consent in the case that one-fourth of 500*l.*, to which a feme covert was entitled, be paid to her and to her husband, was made a rule of court without the feme covert being examined to waive her equity. *Loughney* v. *Lahiffe*, 3 Ir. Eq. R. 511.

In a suit by an executor to administer his testator's estates, where the fund to be administered was divisible in equal shares among many persons ascertained by the master, the court ordered the apportionment to be made by affidavit at the hearing. Where the share of a married woman was subject to payment of costs unascertained, which might be expected to reduce it to 200*l.* or less, the court, to save further expense, ordered it to be paid to the husband, and dispensed with any examination as to the consent of the wife. *Roberts* v. *Collett*, 1 Sm. & G. 138.

—— **Ward of Court.**]—A ward of court was entitled to an income of more than 200*l.* a year for her life for her separate use, but she was not restrained from anticipation. An allowance was was made for her maintenance, and the surplus was accumulated in court. She attained twenty-one, and the next day married. She then, by her next friend, petitioned for payment of the accumulations to herself on her separate receipt:—Held, that the fund must be paid out to the wife on her separate receipt, but, though the fund was under 200*l.*, she was required to attend and be examined separately as to her consent. *White* v. *Herrick*, 38 L. J., Ch. 679; L. R. 4 Ch. 345; 20 L. T. 386; 17 W. R. 522.

Sum over £200.]—The court will not make any other than the usual order for the payment of money exceeding 200*l.*, belonging to a feme covert, out of court, although the amount will be reduced below that sum, after payment thereout of certain costs, to which the sum is liable. *Beaman* v. *Dodd*, 13 L. J., Ch. 141.

Sum under £500.]—The court will make an order for payment out of a fund in court, not exceeding 500*l.*, to a wife, with her husband's consent, on her separate receipt, without requiring her separate examination. *Morton, In re*, 31 L. T. 82.

Residue Subject to Costs.]—A married woman entitled to residuary estate is only entitled to the residue subject to the payment of costs. Therefore, when by consent in court of a married woman entitled to the residue of an estate which had been the subject of a common administration suit, an order had been obtained for the settlement of the funds on her, but the minutes, as taken down in the registrar's book, did not provide for costs, leave was given, in drawing up the order, to provide for costs out of the said residue, without any further consent on the part of the married woman, as being a dealing with the fund in which she had no voice. *Musgrove* v. *Flood*, 1 Jur. (N.S.) 1086.

Mortgage — Part Satisfaction.]—The court, in settling a fund in court, will not, as against a mortgagee, let a married woman, to whom the fund belongs, receive a portion of it on her separate receipt, but, after directing payment of a sum in part satisfaction of the mortgagee's claim, will settle the residue of the fund upon her and her children. *Grant, In re*, 13 L. T. 583.

Reservation of Part of Annuity.]—A personal annuity was bequeathed to a married woman for life, and ordered to be paid out of the dividends of a fund in court. The court refused to pay out the whole fund on an assignment of the annuity by the husband and wife, but reserved a sum to meet the annuity in case she should survive the husband. *Godfrey, In re*, Ir. R. 1 Eq. 531.

d. Where Married Woman Abroad.

Form of payment of wife's money to husband when the parties are abroad. *Minet* v. *Hyde*, 2 Bro. C. C. 663.

A married woman living in America being entitled to a legacy, a commission to examine her would have been necessary; but as she had been examined under a commission issued by the American Government, that was considered sufficient. *Campbell* v. *French*, 3 Ves. 322.

Form of separate examination of a married woman, taken by commission. *Bryant, Ex parte*, 1 Ves. & B. 507.

Wife's legacy not to be paid to the husband without her consent taken before commission, she being abroad. *Bourdillon* v. *Adair*, 3 Bro. C. C. 237.

Where a fund is standing in a cause to the credit of a married woman whose domicil is Scotch, the court will not, on petition, order it to be transferred to her husband, but will order a commission to take the consent of the wife. The practice of the court is not affected by the 23 & 24 Vict., c. 86. *Ireland* v. *Trembaith*, 13 L. T. 626; 14 W. R. 275.

e. Revocation of Consent.

Death of Husband before Order.]—A married woman, upon a separate examination, expressed her wish that a fund in court, standing to her credit, should be transferred to her husband, and an order and transfer were made accordingly, but the husband died before the order was made. No consideration passed between the husband and wife:—Held, that she was entitled to have the fund re-transferred into her name by the personal representative of her husband. *Penfold* v. *Mould*, 36 L. J., Ch. 981; 17 L. T. 39; 15 W. R. 1196.

Previous Insolvency of Husband.]—A feme covert will be allowed to revoke a consent to the payment of her fund in court to her husband, when the object of that consent may be defeated by his previous insolvency. *Watson* v. *Marshall*, 17 Beav. 363; 22 L. J., Ch. 895.

3. AFFIDAVIT OF NO SETTLEMENT.

Requisite on all Applications for Payment to Husband.]—Form of payment of wife's money to husband when the parties are abroad. *Minet* v. *Hyde*, 2 Bro. C. C. 663.

Lord Chancellor said in future, on all applications for wife's money to be paid to husband he should expect an affidavit that there was no settlement on the marriage. *Clayton* v. *Gresham*, 10 Ves. 288.

On an application for payment out of court, of money belonging to a feme covert, it must either be shown that there has been no settlement, or agreement for a settlement; or if any settlement exists, it must be produced, to enable the court to judge whether it affects the fund in question: it is not sufficient to show by affidavit that the particular fund is not the subject of any settlement. *Rose* v. *Rolls*, 1 Beav. 270.

Where a woman who is or has been married, is entitled to a legacy, the court expects a positive affidavit that the legacy has not been in any manner settled, before it will direct payment. *Hough* v. *Ryley*, 2 Cox, 157.

Money devised to be laid out in lands for feme covert in tail, with reversion to her in fee, she chose to have it paid to her husband; not paid without affidavit by the husband and wife that there is no settlement. *Binford* v. *Bawden*, 2 Ves. J. 38. And see *S. C.*, 1 Ves. J. 512.

—— **What Form Necessary.**]—When payment out of court is asked of money belonging to a married woman, an affidavit that the fund is not settled is insufficient. It must be shown either that there is no settlement, or what the settlement was. *Britten* v. *Britten*, 2 Beav. 143.

Fraudulent Settlement.] — Although feme covert, if no settlement was made, may in ordinary cases come in, and desire her fortune to be paid over to her husband, she cannot do so if a fraudulent settlement was made. In that case the wife cannot act upon her fortune remaining in court, and the whole disposal must remain with the court. *Barrington* v. *Grogan*, 2 Moll. 242.

No Settlement Whatever.] — The affidavit, that there is no settlement affecting money in court, the property of the wife, must state that there is no settlement whatever of the money; and it is not sufficient to say, that there is no settlement, nor agreement for settlement, upon the wife affecting the money in question. *Lawrence* v. *Johnson*, 7 Jur. 1122.

Intention to avoid Proposed Settlement.]—The court refused to pay a wife's money to her husband, though she consented in court, and had no children, proposals having been formerly made to settle an equivalent in strict settlement, but which the parties wished to abandon. *Gardner*, *Ex parte*, 2 Ves. 671.

Affidavit by Wife alone.]—A. sold a fund to which his wife was entitled in reversion, and when it fell into possession he was resident in Africa. The wife consented to waive her equity to a settlement, and that the fund should be transferred to the purchaser:—Held, that the usual affidavit that there was no settlement affecting the fund might be made by the wife alone. *Elliott* v. *Remmington*, 9 Sim. 502. S. P., *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423.

It is proper to have an affidavit by the husband as to the absence of a settlement. Where such an affidavit cannot be had, however, payment will be ordered on production of an affidavit by the married woman that there was no settlement, or agreement for a settlement, coupled with another affidavit that the husband had expressly refused to make any affidavit on the subject. *Anon.*, 3 Jur. (N.S.) 839.

Affidavit by Solicitor.]—The court will accept as evidence that there was no settlement on the marriage of a woman resident abroad an affidavit by a solicitor, disclosing facts which make it unlikely that there was a settlement, and stating positively that he was told by the lady and her husband that there was none. *Woodward* v. *Pratt*, 42 L. J., Ch. 891; L. R. 16 Eq. 127.

Petition by Widow.]—Upon a petition by a widow for payment out of court of money to the payment of which she has become entitled since the death of her husband, the court requires an affidavit that no settlement was made on her marriage with her late husband. *Ebrington* v. *Ebrington*, 4 Drew. 545.

Proof of no Children.]—A fund in court belonged in reversion to a married woman. After her death, the husband in 1821 sold and assigned it. The tenant for life died, and it having been found impossible to obtain from him an affidavit of no settlement, the court, in 1858, ordered payment to the assignee without one, on proof of there having been no children. *Clarke* v. *Woodward*, 25 Beav. 455.

Shares under £10—Affidavit dispensed with.]—In paying out of court a sum divisible into shares of less than 10*l.* each, to some of which married women are entitled, the court will dispense with affidavits of no settlement. *Veal* v. *Veal*, 36 L. J., Ch. 816; L. R. 4 Eq. 115.

Where Domiciled Abroad.]—Money belonging to the wife paid to the husband, the parties being subjects of Denmark, and the law of that country not requiring a settlement. *Chapple* v. *Cadell*, Jac. 544.

Where it is sought to have funds belonging to a domiciled Scotch feme covert paid out of court, and any Scotch settlement exists, the court requires the testimony of a Scotch advocate to show that it does not affect the fund. *Todd*, *In re*, 19 Beav. 582.

A fund in court belonging to a married woman, who and her husband were both domiciled in Scotland, was ordered to be paid to the assignee of the husband, without requiring the consent of the wife, upon it being proved, as matter of fact in the cause, that by the law of Scotland a married woman had no equity to a settlement. *M'Cormick* v. *Garnett*, 23 L. J., Ch. 777; 18 Jur. 412; 2 Eq. R. 536; 2 W. R. 403—L. JJ.

On a motion that a fund standing to a separate account of a married woman, a foreigner domiciled abroad, should be paid to her husband, upon affidavit that there was no settlement, and that by the law of the country where the parties were domiciled the husband was entitled to the fund, the court refused to make the order without the consent of the wife. *Schwabacher* v. *Becker*, 2 Sim. & G. (App.) iv.

E. HUSBAND'S LIABILITIES.

1. For Wife's Debts &c., Contracted before Marriage.

By 45 & 46 Vict. c. 75, s. 14.]—*A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this act contained shall operate to increase or diminish the liability of any husband married before the commencement of this act for or in respect of any such debt or other liability of his wife as aforesaid.*

Suits for Ante-nuptial Liabilities—45 & 46 Vict. c. 75, s. 15.]—*A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.*

Cases Decided before preceding Act.]—The Married Women's Property Act, 1870, c. 12 (repealed by act of 1874), extends to property settled to the separate use of a married woman without power of anticipation. *Sanger* v. *Sanger*, 40 L. J., Ch. 372; L. R. 11 Eq. 470; 24 L. T. 649; 19 W. R. 792.

After the passing of that act, and on the same day on which a marriage took place, but subsequently thereto, judgment was entered up against the wife for a debt incurred previously to the marriage. The judgment creditors subsequently obtained a charging order on her interest in a fund in court to the income of which she was entitled for her separate use without power of anticipation:—Held, that the charging order constituted a valid incumbrance on the fund. *Ib.*

Wife's Ante-nuptial Debt—Judgment against the Wife—Action against Husband.]—A judgment having been recovered by the plaintiff in an action brought against a married woman under the Married Women's Property Act, 1882, s. 13, for a debt incurred by her before marriage, but such judgment remaining unsatisfied because she had no separate estate, an action for the debt was afterwards brought by the plaintiff against the husband who had acquired property from his wife to an amount exceeding the debt:—Held, that the judgment recovered against the wife was no defence to the action against the husband. *Beck* v. *Pierce*, 58 L. J., Q. B. 516; 22 Q. B. D. 316; 61 L. T. 448; 38 W. R. 29—C. A.

A feme sole made a promissory note jointly with an accommodation maker, upon which a judgment was obtained by the payee against both; she afterwards married, and (after the marriage) the accommodation maker paid the amount due on the judgment and sued his co-maker and her husband for the amount on an implied contract of indemnity:—Held, that the debt sued for was contracted by the wife before marriage, and consequently, that under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93, s. 12, repealed), the husband was not liable. *Conlon* v. *Moore*, Ir. R. 9 C. L. 190.

—— **Statute of Limitations.**]—A husband cannot be made liable under the provisions of the Married Women's Property Act, 1882, ss. 14, 15, for an ante-nuptial debt of the wife which accrued due against the wife more than six years before the commencement of the action. *Beck* v. *Pierce*, supra.

Husband getting Portion with Wife.]—Though the husband cannot be charged with the wife's debts after her decease unless judgment be obtained in her lifetime, equity will make him answerable where the wife brought him a sufficient estate. *Ball* v. *Smith*, 2 Free. 231.

Enjoyment of House by Wife dum sola.]—A husband is not liable to pay for the enjoyment of a house by his wife dum sola. *Richardson* v. *Hall*, 1 Br. & B. 50; 3 Moore, 307.

Husband must be sued in Wife's Lifetime.]—Husband is liable for wife's debts contracted before marriage, but not unless sued in her lifetime, or she had a separate maintenance. *Lewis* v. *Nangle*, Ambl. 150.

And see *Powell* v. *Bell*, *Blackmore* v. *Ley*, 1 Eq. Abr. 61.

A husband cannot be sued alone for the debt of his wife contracted before marriage. *Mitchinson* v. *Hewson*, 7 Term Rep. 348.

And see *Jordan* v. *Foley*, Sel. Ch. Ca. 19.

Express Promise by Husband.]—An express promise by a husband to pay a debt incurred by his wife, for which he is not otherwise liable, is binding. *Harrison* v. *Hall*, 1 M. & Rob. 85.

Pleading in Action by Creditor.]—In an action against a husband and wife married since the Married Women's Property Act, 1874, for the recovery of a debt of the wife contracted before the marriage, it is not necessary that the state-

ment of claim should allege that the husband has received assets of the wife: it is sufficient that it should simply allege that the husband is liable for the debt, leaving it to the husband to exercise his option of pleading non-liability under the provisions of the act. A demurrer by the husband to the plaintiff's statement of claim in such an action, on the ground that the plaintiff had failed to allege that the husband had received assets, was therefore over-ruled. The effect of the Married Women's Property Acts, 1870 (s. 12) and 1874, considered. *Matthews* v. *Whittle*, 49 L. J., Ch. 359; 13 Ch. D. 811; 43 L. T. 114; 28 W. R. 822.

After Wife's Death.] — A husband is not liable under the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), after his wife's death for her debts contracted before the marriage. *Bell* v. *Stocker*, 52 L. J., Q. B. 49; 10 Q. B. D. 129; 47 L. T. 624; 31 W. R. 183; 47 J. P. 8.

Debts contracted Abroad.] — By the law of Jersey a husband is liable for the ante-nuptial debts of his wife, and the Married Women's Property Act, 1870, Amendment Act, 1874 (37 & 38 Vict. c. 50), does not apply to Jersey:—Held, notwithstanding, that an Englishman married in England after the passing of the act, to a woman who has contracted debts while a feme sole in Jersey, is liable, in an action brought against them in England for those debts, to the extent only of the assets derived from his wife and specified in s. 5 of the act. *De Gruchy* v. *Wills*, 48 L. J., C. P. 726; 4 C. P. D. 362; 41 L. T. 345; 28 W. R. 169.

For Wife's Shares.] — A woman, being entitled absolutely to shares in a company, married in May, 1878, and before the marriage the shares were settled for her own benefit. Upon the winding up of the company:—Held, that the liability of the husband to contribute to the assets of the company was not limited by the Married Women's Property Act, 1874, to the interest acquired in right of his wife, but that he was liable as a contributory in his own right under s. 78 of the Companies Act, 1862. *West of England Bank, In re, Hatcher, Ex parte*, 48 L. J., Ch. 723; 12 Ch. D. 284; 41 L. T. 181; 27 W. R. 907.

"Subsequent Action."] — The Married Women's Property Act, 1874, s. 5, enacts that when a husband after marriage has a judgment bonâ fide recovered against him in any action brought under the act to recover a debt of the wife contracted before marriage, "then to the extent of such judgment the husband shall not in any subsequent action be liable:"—Held, that the words "any subsequent action" mean any action commenced subsequently to the time of bringing the action in which judgment has been recovered, and not merely an action commenced subsequently to the recovery of the judgment. *Fear* v. *Castle*, 51 L. J., Q. B. 279; 8 Q. B. D. 380; 45 L. T. 544; 30 W. R. 271.

As to Wife's Children.]—Formerly a husband was not bound to maintain his wife's children by a previous marriage. *Tubb* v. *Harrison*, 4 Term Rep. 118; S. P., *Cooper* v. *Martin*, 4 East, 76. Though a husband was not bound before 4 & 5 Will. 4, c. 76, to provide for the children of his wife by a former husband, yet if he took them into his house, and they became part of his family, he was deemed to stand in loco parentis, and was liable on a contract made by his wife for their education. *Stone* v. *Carr*, 2 Esp. 1.

If a husband educates a wife's child by a former husband, he cannot recover compensation from such child when it comes of age. *Pelly* v. *Rawlins*, Peake's Add. Cas. 226.

Wife's Creditors priority over her Equity to a Settlement.]—The creditors of a woman remaining unpaid after her marriage in respect of debts incurred before the marriage have a right to be satisfied out of her property, in priority to any equity to a settlement out of it which she may possess. *Barnard* v. *Ford*, *Carrick* v. *Ford*, 38 L. J., Ch. 671; L. R. 4 Ch. 247; 20 L. T. 289; 17 W. R. 478. *See* col. 1118.

Purchase of Estate by Wife before Marriage—Payment of Balance by Husband.]—Where an estate had been contracted to be purchased of a woman who married, leaving part of the purchase money unsatisfied, which was paid by her husband, who took the conveyance to himself, and devised the estate:—Held, that the estate was the property of the wife, subject to a charge in favour of her husband for the amount of the purchase-money contributed by him. *Maddison* v. *Chapman*, 1 John. & H. 470.

Bankruptcy—Set off.]—A debt due from a bankrupt to a married woman, dum sola, cannot be set off against a debt from her husband to the bankrupt. *Bladgen, Ex parte*, 19 Ves. 465; 2 Rose, 249.

Taxation of Costs against second Husband.]—A husband became liable for bills of costs due from his wife, dum sola, and from her former husband, to a solicitor:—Held, that though the relation of solicitor and client did not exist between the solicitor and the second husband, yet that the latter was entitled to a taxation of the bill of costs. *Waring* v. *Williams*, 2 Beav. 1. And see *Eagle, Ex parte*, Buck, 548.

Equity and Wife's Creditors.]—A woman indebted dum sola, marries, and brings a portion to her husband, and dies; equity will not help the creditors against the husband, to the value of what he received with the wife. *Heard* v. *Stamford*, 3 P. Wms. 402; Ca. t. Talb. 173.

So, on the other hand, where a woman, indebted dum sola, marries, and brings no portion to her husband, against whom judgment is recovered for debt, and then the wife dies, equity will not relieve the husband against the judgment. *Ib.*

2. Liability of, for Wife's Debts, &c., Contracted after Marriage.

a. While Living with Wife.

Necessaries — Wife has implied Authority to bind Husband for.]—A wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband chooses to live; or for goods, if she carries on a separate trade with the concurrence of her husband, suitable for such trade. It is not enough, where the burden of proof lies

on the plaintiff, for him to prove facts which are equally consistent with the negative as with the affirmative of the proposition which he has to establish. *Phillipson* v. *Hayter*, 40 L. J., C. P. 14; L. R. 6 C. P. 38; 23 L. T. 556; 19 W. R. 130.

—— **Presumption of Authority to Pledge Credit.**]—Where a wife is living with her husband, the presumption is, that she has his authority to bind him by her contract for articles suitable to that station which he permits her to assume; but that presumption may be rebutted by showing that she had no such authority. *Jolly* v. *Rees*, 15 C. B. (N.S.) 628; 33 L. J., C. P. 177; 10 Jur. (N.S.) 319; 18 L. T. 299; 12 W. R. 473.

The liability of a husband for goods supplied to his wife depends upon whether she is his agent for the purpose of binding him by contracts for goods supplied to her, which is a question for the jury to determine upon the facts of the case; and in determining that question, the extravagant nature of her orders is a matter to be taken into consideration, as showing she had no such authority. *Lane* v. *Ironmonger*, 13 M. & W. 368; 14 L. J. Ex. 35.

Where a wife is living with her husband, and in the ordinary arrangement of their household she gives orders which are proper and not extravagant, it is presumed that she has the authority of her husband. *Emmett* v. *Norton*, 8 Car. & P. 506.

If a feme covert, without any authority from her husband, contracts with a servant by deed, the servant having performed the service stipulated may maintain assumpsit against the husband. *White* v. *Cuyler*, 6 Term Rep. 176; 1 Esp. 200; 3 R. R. 147.

The general rule is, that a wife cannot bind her husband by her contract, except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife is living with the husband) ought to infer agency, if nothing appears to the contrary; but if the order is excessive in point of extent, and such as the husband never would have authorised, that will alone be sufficient to repel the inference of agency. *Freestone* v. *Butcher*, 9 Car. & P. 643.

If it is proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amounts which she has accepted in her own name, payable at her own bankers from her separate funds also goes to prove that the wife was not acting as the agent of the husband; and the fact that the husband sold some of the goods which were supplied to the wife and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband. *Ib.*

A wife is the general agent of her husband with reference to such matters as are usually under the control of the wife. *Ruddock* v. *Marsh*, 1 H. & N. 601; 5 W. R. 359.

Therefore, where the wife of a labourer incurred a debt for provisions for the use of the family, the husband was held liable, though he had supplied his wife with money to keep the house. *Ib.*

When goods for which a wife has ordinarily authority to contract on the part of her husband, such as articles of dress, are ordered by her and delivered at his residence where she also resides, primâ facie the husband is liable, there being a presumption of law in favour of the creditor, and any evidence to rebut the presumption, as that the articles are unnecessarily costly in their character, or that the credit was given exclusively to the wife, must be submitted to the jury. *Jewsbury* v. *Newbold*, 26 L. J. Ex. 247.

The question whether the party who ordered the goods was the wife of the defendant must be raised at the trial; and the point is not raised, but rather waived, by an objection, that the credit was given to the wife alone; and semble, that if the parties live together, and the woman represents herself as the wife of the defendant, that is primâ facie evidence that they were married. *Ib.*

In Matters of Business.]—A wife having carried on business on her own account during the imprisonment of her husband, and he having returned to live with her after his discharge:—Held, that he was liable for articles furnished in his business, with his knowledge, after his return, though the invoices and receipts were in the name of the wife, and she was acknowledged as tenant by the landlord, and rated to and paid the poor and paving rates. *Petty* v. *Anderson*, 3 Bing. 170; 10 Moore, 577; 2 Car. & P. 38; 3 L. J. (o.s.) C. P. 223.

A., who kept a fruiterer's shop, in 1824 became bankrupt, but did not surrender to his commission; and from that time to 1833 the business was carried on by A.'s wife. Fruit was supplied to her between 1828 and 1832, to an amount exceeding 266*l.*, and evidence was given that A. was seen in London a few times between 1824 and 1833, and was arrested at the shop in 1833, and that he attended the marriage of two of his daughters at Marylebone church:—Held, that these facts were evidence to go to the jury, to show that A.'s wife acted as the agent of A., so as to charge him with the price of the fruit, although it might not be sufficient to charge him with necessaries supplied to his wife. *Smallpiece* v. *Dawes*, 7 Car. & P. 40.

A married woman carried on in her maiden name a millinery business separately from her husband. A debtors summons was issued against the husband and wife, claiming the payment of a sum due upon some bills of exchange drawn by the summoning creditor upon and accepted by the wife in her maiden name, and dishonoured. The husband applied to the court to dismiss the summons. He deposed that he never authorised his wife to pledge his credit, and that five years previously he had given notice to the summoning creditor that he had nothing to do with his wife's business:—Held, on this evidence, which was uncontradicted, that the husband was not liable for the debt; that the issuing of the summons was an abuse of the procedure; and that the summons must be dismissed with costs. *Shepherd, Ex parte, Shepherd, In re*, 48 L. J., Bk. 35; 10 Ch. D. 573; 39 L. T. 652; 27 W. R. 310—C. A.

—— **Evidence of Agency of Wife.**]—It is competent to a jury to infer agency in a wife to

accept a notice with respect to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-house, appearing to conduct his business with reference to the transaction in question, and on one of these occasions giving directions to the foreman. *Plummer* v. *Sells*, 3 N. & M. 422.

Money Lent or Paid.—A husband is liable for a loan of money to his wife made at his request. *Stevenson* v. *Hordie*, 2 W. Bl. 872.

Where a sum of money was advanced to a wife who was living with her husband, and after her death the husband promised to repay the sum when convenient to him, but stated he had not been privy to the loan:—Held, that there was evidence to go to the jury, that the wife had borrowed the money with the sanction of the husband, or that she proposed so to do, and that he had ratified her act. *West* v. *Wheeler*, 2 Car. & K. 714.

A husband is not liable for money lent to his wife, though it is afterwards applied by her in procuring necessaries, for the supply of which he would have been liable. *Knox* v. *Bushell*, 3 C. B. (N.S.) 334.

A. lent B.'s wife 59*l.* for the purpose of enabling her to pay debts, and to provide herself a passage to the Cape of Good Hope, whither she was going to join her husband, at his direction, and so she applied it:—Held, that A. could not recover any part of the amount from B. *Ib.*

An action, in the absence of an express promise, cannot be maintained against a husband for money either lent to the wife to conduct, or actually paid out by a stranger in conducting, at the wife's request, an indictment against the husband, for an assault upon his wife. *Grindell* v. *Godmore*, 1 N. & P. 168; 5 A. & E. 755; 2 H. & W. 339; 6 L. J., K. B. 31.

A husband, who was a sea-captain, handed over his income, amounting to more than 1,000*l.* a year, to his wife for the support of herself and the household, of which she was the responsible manager. The wife got into difficulties, and borrowed from her sister various sums amounting in all to 1,327*l.*, for which a proof was tendered in the subsequent bankruptcy of the husband on the ground that the wife had authority to pledge his credit:—Held, that although in certain cases it might be that an authority to a wife to pledge her husband's credit would be presumed, even though that which the wife did was to borrow money, viz., where a wife borrowed money to pay for absolute necessaries, yet in the present case that had not been done: that the allowance made by the husband to the wife was ample for all purposes; and that there being no authority either in law or in fact to the wife to incur the debt, the proof in question against the husband's estate could not be admitted. *Vernall, Ex parte, Cook, In re*, 10 Morrell, 8.

Education of Child.]—In an action for a school bill, it appeared that the defendant's wife took the child (her niece) to the plaintiff's school, and that the defendant had visited her while there; but there was no evidence of any communication between the plaintiff and the parent of the child:—Held, that the fact of the defendant having paid for articles for domestic use ordered by his wife, was evidence for the jury of her authority to charge him with the education of the child. *M'George* v. *Egan*, 7 Scott, 112; 5 Bing. (N.C.) 196; 3 Jur. 266.

Costs of Solicitor to Defend Wife.]—Where a wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence:—Held, that he was liable to an attorney, whom she employed to defend her, and by whom he knew she was defended. *Shepherd* v. *Mackoul*, 3 Camp. 326; 14 R. R. 752.

Wife's Funeral.]—When a wife whose husband has separated from her dies, the husband is bound to provide for her a funeral at a reasonable expense, and if he does not do so, any person who voluntarily employs an undertaker, and pays him for performing such a funeral, is entitled to recover the sum so expended from the husband in an action for money paid. *Ambrose* v. *Kerrison*, 10 C. B. 776; 20 L. J., C. P. 135. And see *Bertie* v. *Chesterfield* (*Lord*) 9 Mod. 31.

To whom Credit given.]—It is a question of fact, whether a tradesman who furnishes goods to a wife gives credit to her or her husband; if the credit is given to her, the husband is not liable, though the wife lives with him, and he sees her in possession of some of the goods. *Bentley* v. *Griffin*, 5 Taunt. 356. See *Taylor* v. *Brittan*, 1 Car. & P. 14, n.; *Dixon* v. *Hurrell*, 8 Car. & P. 817.

If wearing apparel is supplied to a married woman in quantities unsuitable to her husband's degree, and without his knowledge, for which the credit is to be given to her, and her promissory note is taken in payment, the husband is not liable for any part of the goods; and in an action against him for their value, it is not necessary to prove that his wife was supplied with suitable wearing apparel from any other quarter. *Metcalfe* v. *Shaw*, 3 Camp. 22; 13 R. R. 740.

Revocation of Implied Authority.]—Where the husband neither does nor assents to, any act to show that he has held out his wife as his agent, to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. The question is one of fact. The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband and wife. Otherwise where such management did not exist. A. was the manager of a limited company's hotel at Bradford—where the wife acted as manageress—they cohabited—he made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes in London, the bills for which were at first made out in her name and were paid by her. She afterwards incurred, with the same tradesmen, a debt for clothes, payment for which was demanded from the husband, with whom previously, they had had no communication:—Held, that the husband was not liable—that under the circumstances here the mere fact of cohabitation did not raise a presumption of agency, nor require a proof of notice not to trust the wife. *Debenham* v. *Mellon*, 50 L. J., Q. B. 155; 6 App. Cas. 24; 43 L. T. 673; 29 W. R. 141; 45 J. P. 252—H. L. (E.).

A husband who is able and willing to supply his wife with necessaries, and who has forbidden

her to pledge his credit, will not be held responsible for necessaries bought by her. Thus, where a proof was tendered in the bankruptcy of a husband in respect of the amount due for certain dresses and other articles of attire supplied to the wife, to whom an ample allowance was made, and a direction given by the husband not to incur debt :—Held, that there was no evidence of any authority, either express or implied, to the wife to pledge the husband's credit ; and proof against his estate could not be allowed. *Holmes, Ex parte, Cook, In re*, 10 Morrell, 12.

—— **Evidence of Authority.**]—Where a wife had in one single instance bought goods, which were delivered at the lodgings of her mother, without her husband's knowledge, but for which he subsequently paid :—Held, in an action for other goods, also bought by the wife from the same tradesman, and delivered at the lodgings of the mother, but at a different place, that evidence of the facts was proper to be left to the jury, to show an agency in the wife, and a sanction of her dealings by her husband ; and the jury having found for the plaintiff, the court refused to disturb the verdict. *Filmer* v. *Lynn*, 4 N. & M. 559 ; 1 H. & W. 59.

In an action for goods supplied by a tradesman to a wife while living with her husband, the question for the jury to decide, in order to find the husband liable, is, whether the wife was authorised by him to purchase the goods, and not merely whether they were necessaries for the wife in her station of life. *Reid* v. *Teakle*, 13 C. B. 627 ; 22 L. J., C. P. 161 ; 17 Jur. 841.

If an action is brought against a husband for the price of goods supplied to his wife, who is living with him, it lies on the husband to show that the goods were furnished under such circumstances as that he is not liable to pay for them. *Clifford* v. *Laton*, 3 Car. & P. 15 ; M. & M. 101.

A husband who supplies a wife with necessaries in her degree, is not liable for debts contracted by her without his previous authority, or subsequent sanction. *Seaton* v. *Benedict*, 5 Bing. 28 ; 2 M. & P. 66 ; 6 L. J. (o.s.) C. P. 208.

What are Necessaries—Articles of Dress.]—In an action for the price of articles of dress, supplied to the wife of a defendant, on her orders, while they were living together, but without his actual assent or knowledge, the question whether they are necessaries, and suitable to her estate and degree as his wife, depends on one hand, not only on his actual but apparent income as represented to the world by the rate at which he lives, and allows her to live : and, on the other hand, it depends partly upon the supply of similar articles which, in fact, she may have had at the time of ordering the goods in question. Apart from the authority implied in law, to pledge his credit for necessaries, there may be an authority implied, in fact, from his approving of her having such things, and knowing that she had no means for paying for them ; and thus, if a husband approves of his wife's hunting, and going to balls, and knows she has no separate income, or not sufficient to pay for the requisite dresses, there may be an authority, implied in fact, to pledge his credit for them, as otherwise she would not be able to obtain them. So far as the question depends on her having a separate income or allowance, the question is not only whether it is adequate to the expenses, which he tacitly encourages and allows, but whether it is paid, and when the question is as to an express prohibition to the wife to order goods on credit, it must appear that there was a direct, present, positive, absolute prohibition, and not a mere complaint of extravagance, or a declaration as to the future, that if such extravagance is continued, he will not be answerable for her debts. *Morgan* v. *Chetwynd*, 4 F. & F. 451.

See *Jewsbury* v. *Newbold*, 26 L. J., Ex. 247.

A husband living with his wife, and who makes her a sufficient allowance for dress, is not liable for dresses supplied to her without his knowledge ; and the fact of the wife having, within a particular period, purchased various articles of dress of different tradesmen, is admissible to rebut the presumption, arising from cohabitation, of an implied authority to contract for necessary clothing. *Reneaux* v. *Teakle*, 8 Ex. 680 ; 22 L. J., Ex. 241 ; 17 Jur. 351 ; 1 W. R. 312.

A married woman living with her husband, who made her an allowance for dress, incurred without his authority a bill for dress. An action having been brought against the husband for the amount :—Held, first, that evidence was receivable to show that she had incurred other debts of the same kind with other parties. *Ib.*

Held, secondly, that it was improperly left to the jury to say whether the goods in respect of which the action was brought were fitting for her station in life. *Ib.*

If a husband, not separated from his wife, makes an allowance to her for the supply of herself and family with necessaries during his temporary absence, and a tradesman, knowing this circumstance, supplies her with goods, the husband is not liable for the amount. *Holt* v. *Brien*, 4 B. & Ald. 252.

If a married lady, who has sufficient clothes, goes contrary to her husband's wish to a watering-place, and to balls, and for that purpose orders dresses, some of them expensive and unsuitable to her husband's circumstances, he is not bound to pay for any of them ; and it is immaterial whether the tradesmen knew these facts or not, and whether the clothes the lady had before were paid for or not ; and the fact that the husband afterwards saw some of the dresses does not vary the case, if it is shown that he disapproved of the conduct of his wife in ordering them. *Atkins* v. *Curwood*, 7 Car. & P. 756.

Where husband and wife are cohabiting, it is a presumption of fact, that she is his agent for ordering articles supplied to their establishment, which are suitable to the station which he allows her to assume ; but, if they be unsuitable to that station, a presumption arises that she was not his agent to pledge his credit for them. *Harrison* v. *Grady*, 12 Jur. (N.S.) 140 ; 13 L. T. 369 ; 14 W. R. 139.

It is for the husband, and not the jury, to fix the standard of living for his family. *Ib.*

—— **Costs of employing Solicitor against Husband.**]—The costs of a solicitor, employed by a married woman to institute proceedings on her behalf against her husband to obtain a decree of judicial separation, are not necessaries for which the husband is liable, unless there was at least great probability of ultimate success ; and to entitle a solicitor so employed to recover the costs from the husband, or to prove for them against the husband's estate, he must, in the absence of actual success, be at least able to show that he made proper investigation and inquiry into all

the circumstances of the case before he commenced the proceedings. *Hooper, In re, Baylis* v. *Watkins*, 33 L. J., Ch. 300 ; 10 Jur. (N.S.) 114 ; 9 L. T. 741 ; 12 W. R. 324.

—— **Doctoring — Disease communicated by Husband.**]—Baron gives feme the foul distemper,; A. lends the wife 30*l.* to pay the doctor for her cure : baron devises lands for the payment of his debts ; this 30*l.* is a debt of the husband, and A. is a creditor in the doctor's place. *Harris* v. *Lee*, 1 P. Wms. 482 ; Pre. Ch. 502.

—— **Supply of Furniture—Repairs—Agency.**]—Where a husband and wife were living together, and furniture was supplied for, and work done at, the house on the order of the wife, but the husband took part in making selections, and giving directions as to the execution of the orders :—Held, that the husband was liable to pay for the goods and work, although he had expressly prohibited her from pledging his credit, and they had agreed together that she should pay for the goods and work. *Jetley* v. *Hill*, 1 Cab. & E. 239.

Furniture for a house may be considered a necessary, provided it is suitable to the rank and income of the wife. *Hunt* v. *De Blaquiere*, 3 M. & P. 108 ; 5 Bing. 550 ; 7 L. J. (O.S.) C. P. 198; 30 R. R. 737.

—— **Jewellery.**]—Where a tradesman clandestinely supplied a gentleman's wife with jewellery, unnecessary for her station in life, and there was no evidence, either express or implied, that the husband assented to the contract :—Held, that he was not liable. *Montague* v. *Benedict*, 3 B. & C. 631 ; 5 D. & R. 532 ; 3 L. J. (O.S.) K. B. 94 ; 27 R. R. 444. *S. C.*, 1 Car. & P. 356, 502.

—— **Looking after Lunatic Husband.**]—T. having become lunatic was taken to an asylum in London. His wife, who at the time of her marriage was entitled to separate estate, removed to London in order to be near her husband, and borrowed money on his credit to meet the expenses of such removal of herself and her husband, and to provide herself with necessaries. T. died, and a bill was filed for the administration of his estate. The persons who made the advance to the wife carried in their claim for the amount against T.'s estate :—Held, that the claim must be allowed. *Davidson* v. *Wood*, 32 L. J., Ch. 400 ; 9 Jur. (N.S.) 589 ; 8 L. T. 476 ; 11 W. R. 719—L.JJ.

Husband a Lunatic.]—By marriage a wife acquires the right to be maintained according to the estate and condition of her husband, of which she cannot be divested except by her own misconduct, and therefore it is no defence to an action against a husband, for necessaries supplied to his wife, that at the time they were so supplied he was confined in an asylum as a dangerous lunatic. *Read* v. *Legard*, 6 Ex. 637 ; 20 L. J., Ex. 309 ; 15 Jur. 494.

In an action for the price of necessary repairs done to the defendant's house, it appeared that he was a lunatic, and that the work was done by order of his wife, with knowledge on the part of the plaintiff of the husband's lunacy. The wife had always received a sufficient allowance from her husband's estate :—Held, that the husband was not liable, as, under the circumstances, the wife had no more authority to pledge his credit than she would have had if he had been sane, and had provided her with means for all necessaries. *Richardson* v. *Du Bois*, 10 B. & S. 830 ; 39 L. J., Q. B. 69 ; L. R. 5 Q. B. 51 ; 21 L. T. 635 ; 18 W. R. 62.

Husband absent Abroad.]—Where a husband is sought to be charged with supplies furnished to his wife during his absence from England, it lies upon the plaintiff to show what means of subsistence the wife possessed. *Bird* v. *Jones*, 3 Man. & Ry. 121.

An officer in the army, being required to join his regiment in the East Indies, left his wife in England, and settled a certain sum upon her, which was regularly paid :—Held, in an action by a tradesman for goods delivered at the house in which the wife was living, that it was not to be treated as a case of separation, but that the questions for the jury were, 1st, whether the goods supplied were necessaries, considering the condition in life of the husband ; 2ndly, whether the sum of money settled was sufficient ; and 3rdly, whether it was or was not notorious in the neighbourhood that the wife was living in a style not justified by the rank of her husband ; and the jury having found the first question in the negative, and the others in the affirmative :—Held, that their verdict must be for the defendant. *Dennys* v. *Sargeant*, 6 Car. & P. 419.

Where a man, who had been in the habit of dealing with a butcher for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad :—Held, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received ; she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it ; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties. *Smout* v. *Ilbery*, 10 M. & W. 1 ; 12 L. J., Ex. 357.

b. While Living Apart from Wife.

i. *By Mutual Consent.*

Wife having Separate Maintenance.]—A husband is not liable for necessaries furnished to his wife living apart from him (there being no evidence of the cause of separation), if she has a sufficient separate maintenance, although no part of it is supplied by the husband. *Clifford* v. *Laton*, 3 Car. & P. 15 ; M. & M. 101 ; *Hyde* v. *Price*, 3 Ves. 445.

If husband and wife separate by mutual consent, the husband is liable for reasonable maintenance for his wife, unless she has a competent provision either from the husband or from some fund of her own ; and if she has such provision, it lies on the husband to show that. *Dixon* v. *Hurrell*, 8 Car. & P. 717.

A mere notice by a husband that he will not pay for goods supplied to his wife, will not avail him, if, under the circumstances of the separation, he is liable ; but if the husband and wife both deal with the same tradesman, and the latter agrees with the husband not to charge him for goods to be supplied to the wife, the tradesman cannot, after that, charge the husband for such goods. *Ib.*

In an action against a husband, for lodging and necessaries supplied to his wife, who lives

separately from him without any fault of her own, and who is possessed of funds of her own, the question is, whether she has such means as are adequate to her support, according to her situation in life. *Lidlow* v. *Wilmot*, 2 Stark. 86; 19 R. R. 684.

A voluntary pension from the crown to a wife during pleasure, will not exempt the husband from being liable to be sued by his wife's creditors, by whom she was supplied with necessaries. *Thompson* v. *Harvey*, 4 Burr. 2177.

—— **Creditor may follow Maintenance but not Portion.**]—A woman living apart from her husband and having a separate maintenance contracts debts, the creditors by a bill in this court may follow the separate maintenance whilst it continues, but when that is determined and the husband dead, they cannot by a bill charge the jointure with these debts. *Kenge* v. *Delavall*, 1 Vern. 326.

Goods Ordered by Wife to be sent to Third Person.]—If a wife living apart from her husband orders goods to be addressed and sent to a third person, and they are sent to the house of such third person, that not being the place of abode of the wife, the husband is not liable to pay for those goods. *Reeve* v. *Conyngham* (*Marquis*), 2 Car. & K. 444.

Husband making Wife adequate Allowance.]—If husband and wife live separate, and he pays her an adequate allowance for her support, he is not liable to be sued for her debts, although the separation is not by deed, and there is no written agreement between them with respect to the allowance. *Hodgkinson* v. *Fletcher*, 4 Camp. 70; 15 R. R. 725.

Where a husband, living apart from his wife, allows her sufficient for her maintenance, he is not liable for necessaries supplied to her; and notice to the tradesman of that allowance is immaterial, and need not be given. *Mizen* v. *Pick*, 3 M. & W. 481; 1 H. & H. 163; 7 L. J., Ex. 153.

A husband is not liable for necessaries furnished to his wife, after a tradesman has had notice from the husband that she had a separate maintenance. *Rawlyns* v. *Vandyke*, 3 Esp. 250.

But if a husband, living in a state of separation from his wife, suffers his children to reside with their mother, he is liable for necessaries furnished to the children. *Ib.*

If husband and wife are living apart, and the husband makes the wife a sufficient allowance for her support, he is not liable in an action by a tradesman for goods supplied to her, and it is immaterial whether the tradesman knew of such an allowance or not. *Reeve* v. *Conyngham* (*Marquis*), 2 Car. & K. 444.

If husband and wife are living separate and apart, and the husband makes the wife a regular allowance of a sufficient sum for her maintenance, which is regularly paid, this is sufficient to repel the inference of agency, and he is not liable for any debt she may contract; and it is not necessary that there should be any deed of separation; but the allowance must be such as the jury shall think sufficient, reference being had to the station of the parties and the income of the husband. *Holder* v. *Cope*, 2 Car. & K. 437.

Where a husband consents to his wife living apart from him, on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his credit, though the allowance is inadequate. *Biffin* v. *Bignell*, 7 H. & N. 877; 31 L. J., Ex. 189; 8 Jur. (N.S.) 647; 6 L. T. 248; 10 W. R. 322.

A deed of separation between husband and wife, even although executed by the wife under restraint, and securing an allowance duly paid, is an answer to an action against the husband for necessaries supplied to the wife. *Mallalieu* v. *Lyon*, 1 F. & F. 431.

But after a decree for restitution of conjugal rights, the wife not having been really restored to cohabitation, but placed under improper restraint, is, on her escape from such restraint, authorised to bind her husband for necessaries. *Ib.*

When a wife lives apart from her husband under an agreement by which she is to receive a specified income for her maintenance, and is not to apply to him for anything more, she has, so long as he fulfils those conditions, no authority to pledge his credit; nor can any such authority be implied from the alleged inadequacy of her income. *Eastland* v. *Burchell*, 47 L. J., Q. B. 500; 3 Q. B. D. 432; 38 L. T. 568; 27 W. R. 290.

A husband and wife executed a deed of separation, by the terms of which the wife retained the income of property settled to her separate use on marriage. The husband covenanted to pay her 20*l.* a year towards the maintenance of three of the children of the marriage, and the wife covenanted to maintain these children until they were twenty-one, and not to apply for further assistance to her husband. The husband had kept up the annual payment of 20*l.* in accordance with the terms of the deed. A tradesman sued them in the county court to recover the price of meat supplied to the wife after the separation, and the judge at the trial, on hearing the wife's evidence, found that her income was insufficient for her support, and ruled that she had authority to pledge her husband's credit for the price of the meat. On appeal:—Held, that this ruling was wrong, and that the wife, after the separation, had no implied authority to pledge her husband's credit. *Ib.*

—— **Adequacy—Question for Jury.**]—If a husband has not turned the wife out of doors, and they have separated in consequence of differences, the question will be, whether the husband has given the wife sufficient for necessaries suitable to his degree; for if he has, he is not liable to her debts even for necessaries. *Emmett* v. *Norton*, 8 Car. & P. 506. S. P., *Hodgkinson* v. *Fletcher*, 4 Camp. 70.

—— **Onus probandi on Husband.**]—Where, on the separation of husband and wife, the former, by deed, absolutely transferred to trustees for the wife certain personal property, no longer to be liable to his interference; in an action against the husband for a debt subsequently contracted by the wife, the defendant must show that the trustees gave effect to the deed by taking possession. *Barrett* v. *Booty*, 8 Taunt. 343.

—— **How far an Answer to Action for Necessaries.**]—A separate maintenance secured by a deed executed by the husband and wife, but not by her trustee, is void, and such separate maintenance is no answer to an action for necessaries furnished to her, after having left her own house,

though she solicited to be received again by her husband. *Ewers* v. *Hutton*, 3 Esp. 255.

—— **Right of Husband to Savings of Allowance.**]—A husband and wife ceased to live together, without any divorce or deed of separation, he allowing her a sum per week. Out of the allowance thus made she saved some money, with which she bought stock, but afterwards sold out and made a gift of the proceeds to a third party:—Held, that the husband was entitled to those proceeds, and might maintain an action to recover them; aliter, if she had disposed of them in the payment of debts incurred for necessaries, or parted with them for a good and valuable consideration. *Messenger* v. *Clark*, 5 Ex. 388; 19 L. J., Ex. 306; 14 Jur. 748.

Covenant by Husband with Third Person.]—If husband and wife separate by deed, and the former covenants with A., her sister, to pay to his wife, or such person as she should appoint, a certain weekly allowance, during their separation, and the wife afterwards lives with A., and is by her supplied with necessaries, and the husband fails to pay the stipulated allowance to his wife, A. may maintain an action against the husband for such necessaries. *Nurse* v. *Craig*, 2 Bos. & P. (N.R.) 148.

A husband who had separated from his wife, agreed that a deed of separation should be prepared and executed:—Held, that the husband was not liable for the expenses of his wife's trustee in procuring a counterpart to be prepared and executed, in the absence of any promise to pay that expense. *Ladd* v. *Lynn*, 2 M. & W. 265; M. & H. 27; 6 L. J., Ex. 73; 1 Jur. 42.

A husband who allows his wife a separate maintenance, and promises to pay the amount of a debt which she contracts in a state of separation, cannot afterwards recede from his promise, on the ground that the plaintiff knew that he allowed his wife a separate maintenance, and that he made the promise under a misapprehension of law. *Hornbuckle* v. *Hornbury*, 2 Stark. 177; 19 R. R. 698.

No Allowance made to Wife.]—Where husband and wife live apart by mutual consent, and nothing is said, and she has no means, and cannot maintain herself, a jury may infer that the husband meant his credit should be pledged by her. *Johnston* v. *Sumner*, 3 H. & N. 261; 27 L. J., Ex. 341; 4 Jur. (N.S.) 462; 6 W. R. 574.

In an action against a husband for goods supplied to his wife, who lives apart from him, the onus lies on the plaintiff to show either an express or implied authority from the husband to the wife to pledge his credit. *Ib.*

Such an authority cannot be implied when they part upon terms negativing any such authority, and making a provision for her not shown to be insufficient for her maintenance. *Ib.*

Where a wife separated from a husband under an agreement with his father for a specific weekly sum, which was not paid, and a tradesman having recovered about that amount for board and lodging:—Held, in an action by another tradesman for clothes supplied to her, that the husband was liable if the clothes were suitable to her position in society as his wife. *Collier* v. *Brown*, 3 F. & F. 67.

Though the wife, in the case of a separation by consent without an allowance, primâ facie deals for her husband, he will be discharged, if the dealing took place on the credit of another. *Harvey* v. *Norton*, 4 Jur. 42.

Money Lent or Paid.]—There is no authority in law, in a married woman, living apart from her husband, to borrow money on his credit. *Paule* v. *Goding*, 2 F. & F. 585.

—— **In Equity.**]—A party who advances money to a married woman, whose husband, resident abroad, makes no provision for her maintenance, for the express purpose of providing necessaries, and which is actually expended by the wife for that purpose, does not thereby obtain an equitable right against the husband for the repayment of the money so advanced. *May* v. *Skey*, 16 Sim. 588; 18 L. J., Ch. 306; 13 Jur. 594.

Medical Expenses—Allowance not regularly Paid.]—A husband and wife were living apart. The husband allowed the wife 12*l.* 10*s.* per month, which, however, he did not pay regularly, and directed her not to run up bills. She incurred expenses for medical attendance in part rendered necessary by his cruelty:—Held, that he was liable for these expenses. *Beale* v. *Arabin*, 36 L. T. 249.

Ratification.]—Although a husband is not cohabiting with his wife, yet if she improvidently takes up goods of a tradesman for which he would not otherwise be liable, he assents to the contract, if, having any control over the goods, he does not cause them to be returned to the vendor. *Waithman* v. *Wakefield*, 1 Camp. 120; 10 R. R. 654.

Evidence of Authority.]—In an action against a husband for goods supplied to his wife living apart from him, the plaintiff must give some evidence of the circumstances of the separation, to show that the wife had authority to bind her husband for necessaries. *Edwards* v. *Towels*, 6 Scott (N.R.) 641; 5 Man. & G. 624; 12 L. J., C. P. 239.

—— **Funeral Expenses.**]—The estate of husband is liable to funeral expenses of wife, though she had lived separate from him, and had separate maintenance. *Bertie* v. *Chesterfield (Lord)*, 9 Mod. 31. And see *Ambrose* v. *Kerrison*, 10 C. B. 776; 20 L. J., C. P. 135.

A wife many years before voluntarily left her husband's house, and went to reside at her brother's about a mile distant, where she continued to live apart from her husband until her death, when her brother, without any communication with the husband, buried her in a suitable manner:—Held, that the brother was entitled to sue the husband for the expenses of the funeral. *Bradshaw* v. *Beard*, 12 C. B. (N.S.) 344; 31 L. J., C. P. 273; 8 Jur. (N.S.) 1228; 6 L. T. 458.

Husband not Bound to inform Tradesman of Separation.]—A husband is not bound to give notice to a tradesman, with whom he has dealt for ready money during his cohabitation with his wife, of his separation from her, and the consequent revocation of her ordinary authority to bind him by her contract for necessaries. *Wallis* v. *Biddick*, 22 W. R. 761.

If he had, during the cohabitation, authorised

her to deal with the tradesman on credit, he would have been bound to give notice of the revocation of that authority on the separation. *Ib.*

Re-cohabitation — Judicial Separation — Alimony.]—By a deed of separation in 1862, a husband and wife covenanted that the wife should not be compelled to cohabit with the husband, that she might dispose of her own property, that she might live where she pleased, and that the husband should pay to her 100*l.* a year while she should live chastely. From 1862 until 1872 the husband and wife lived apart; but in 1872 they resumed cohabitation. In 1879 they again separated, and in 1881 the wife obtained a decree of judicial separation, with alimony at the rate of 180*l.* per annum. In an action by a lodging-house keeper against the husband for food and lodging supplied to the wife between July and October, 1882, the husband pleaded the deed of 1862, and that the 100*l.* a year therein covenanted to be paid by him to his wife had been so paid:—Held, that the deed was not rescinded by cohabitation having been resumed in 1872, that the decree for alimony did not affect the deed, and that the payment by the husband of the agreed sum was an answer to the action. *Negus* v. *Forster*, 46 L. T. 675; 30 W. R. 691—C. A.

ii. *Owing to Wrongful Act of Husband.*

Cruelty.] — If a husband conducts himself towards his wife with such a degree of misconduct and of cruelty as to render it no longer safe for her to remain in his house, she is justified in leaving her home, and goes forth into the world with a credit for the necessaries of life suitable to her condition; and those who, from charity, or other motives, are willing to provide them, are entitled to recover a compensation from the husband. *Emery* v. *Emery*, 1 Y. & J. 501; 6 Price, 336; 30 R. R. 834.

No ill-treatment by a husband of the wife, short of personal violence, or such as to induce a reasonable fear of it, will enable a stranger to maintain an action against her husband for necessaries furnished to her subsequently to her leaving his house. *Horwood* v. *Heffer*, 3 Taunt. 421. And see *Corbett* v. *Poelnitz*, 1 Term Rep. 5.

Where a husband by his cruelty compels his wife to live apart from him, he is liable upon contracts made by her for necessaries, notwithstanding she, in fact, receives from him an allowance which is found by the jury to be insufficient, regard being had to his means and position in life. *Baker* v. *Sampson*, 14 C. B. (N.S.) 383.

An action lies against a husband for the reasonable costs of proceedings at law and in equity, instituted by an attorney against him on behalf of his wife, who had been forced to leave his house by extreme ill-treatment; the husband having previously tendered to the plaintiff the rent of a cottage occupied by the wife after her departure, and undertaken to pay the bill of costs, if reasonable. *Williams* v. *Fowler*, M'Clel. & Y. 269.

Where a husband separated from his wife, by his violent conduct renders it necessary for her to exhibit articles of the peace against him, he is liable to expenses thereby incurred, although he allows her a separate maintenance. *Turner* v. *Rooks*, 2 P. & D. 294; 10 A. & E. 47; 8 L. J., Q. B. 211.

Divorce Proceedings — Before 20 & 21 Vict. c. 85, s. 26.]—A husband separated from his wife by a divorce (à mensâ et thoro) for adultery on his part, with a decree for alimony, was liable for necessaries supplied to the wife if he omitted to pay the alimony. *Hunt* v. *De Blaquiere*, 5 Bing. 550; 3 M. & P. 108 L. J. (O.S.) C. P. 198; 30 R. R. 737.

A husband was liable for necessaries supplied to his wife, pending a suit between them in the ecclesiastical court, until alimony was assigned; nor did a decree, directing the alimony to be paid from a date preceding the time when the necessaries were supplied, remove his liability. *Keegan* v. *Smyth*, 8 D. & R. 118; 5 B. & C. 375; 4 L. J. (O.S.) K. B. 189; 29 R. R. 273.

A wife having sued her husband in the consistory court, obtained a decree against him for alimony. He removed the cause into the arches court. The decree then became, in law, inoperative; but the husband continued making the payments under it; and it was proved that if he had omitted doing so, a new decree could, by a short process, have been obtained from the arches court, but that such application was not usually made unless payment of the alimony was discontinued:—Held, that he was not liable for necessaries supplied to the wife while the above payments were going on, and that such payments could not be considered a voluntary allowance. *Wilson* v. *Smyth*, 1 B. & Ad. 801; 9 L. J. (O.S.) K. B. 155.

After a sentence of divorce, ab initio, the liability of a husband for the debts of his wife does not continue. *Anstey* v. *Manners*, Gow, 10.

Wife Apprehensive of Personal Violence.]—If a wife, from reasonable apprehension of personal violence, leaves her husband's house, and it becomes necessary, for her protection, that she should obtain a divorce à mensâ et thoro, the law gives her authority to pledge her husband's credit for the expenses of the proceeding, and the question as to the husband's liability is, whether, at the commencement of the proceeding, there was such reasonable ground in fact for anticipating ill-treatment that the divorce was necessary for the protection of the wife. *Brown* v. *Ackroyd*, 5 El. & Bl. 819; 25 L. J., Q. B. 193; 2 Jur. (N.S.) 283; 4 W. R. 229.

Such reasonable ground is not furnished by a momentary ebullition of temper on the part of the husband, nor by a threat of violence, from which no serious intention to commit violence can be inferred. *Ib.*

If a wife quits her husband's house, under a fair apprehension of personal violence, that is equivalent to her husband's turning her out of doors. *Houliston* v. *Smyth*, 3 Bing. 127; 10 Moore, 482; 2 Car. & P. 22; 3 L. J. (O.S.) C. P. 200; 28 R. R. 609. *And see* col. 740.

Husband taking Prostitute into House.]—If she quits her husband's house because he brought a common woman to reside in it, that is also a sufficient reason for her going; and if the husband is sued for necessaries supplied to her, it is no answer to the action that she had committed adultery previously to the credit being given, if the husband did not know it till after the credit. *Ib.*

Wife put under Improper Restraint.]—A reasonable apprehension on the part of a wife that her husband intends to place her under improper restraint, will warrant her removal to a separate residence, and thereby render him liable for necessaries. *Tempany* v. *Hakewill*, 1 F. & F. 438.

Improper restraint of a wife in a madhouse is, for this purpose, personal violence; and therefore a party supplying her with necessaries may recover for them against the husband. *Houliston* v. *Smyth*, 3 Bing. 127; 10 Moore, 482; 2 Car. & P. 22; 3 L. J. (O.S.) C. P. 200; 28 R. R. 609.

Turning Wife out of Doors.]—A husband, without misconduct on the part of his wife, refused to receive her into his house:—Held, that an action might be maintained against him for money lent to his wife, at his request, and for money paid for her necessary support and clothing, at his request, it being proved that the money so lent and paid was actually expended for and in the purchase of necessaries for the wife. *Johnston* v. *Manning*, 12 Ir. C. L. R. 148.

—— **Adultery—Connivance.**]—In an action against a husband for necessaries supplied to his wife it appeared that the wife had committed adultery with the connivance of her husband, and the husband subsequently turned her out of doors; that she had no means of support; and that the plaintiff supplied her with the necessaries in question while she was living separate from her husband:—Held, that the husband was liable. *Wilson* v. *Glossop*, 57 L. J., Q. B. 161; 20 Q. B. D. 354; 58 L. T. 707; 36 W. R. 296; 52 J. P. 246—C. A.

If a husband by selling up all the furniture turns his wife out of doors without providing her with the means of obtaining necessaries suitable to her estate and degree, it is a presumption of law, which cannot be rebutted, that she was turned out with her husband's authority to pledge his credit for such necessaries, and medical attendance is such a necessary. *Forristall* v. *Lawson*, *Connelly* v. *Lawson*, 34 L. T. 903.

If a husband has turned his wife out of doors, and given notice either by a general advertisement in the newspapers, or by particular notice to individuals not to trust her, he cannot exempt himself from a demand for necessaries furnished to her while so living apart from him. *Harris* v. *Morris*, 4 Esp. 41.

Where a husband turns away his wife, and she is unable to maintain herself, she has an authority of necessity to pledge his credit for goods supplied to her. *Johnson* v. *Sumner*, 3 H. & N. 261; 27 L. J., Ex. 341; 4 Jur. (N.S.) 462; 6 W. R. 574.

Where a wife is turned out of the house by her husband without necessaries, and without the means of procuring them, it is a presumption of law, incapable of being rebutted, that she has authority to pledge his credit for necessaries suitable to her station. *Harrison* v. *Grady*, 12 Jur. (N.S.) 140; 13 L. T. 369; 14 W. R. 139.

If a husband turns his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose. *Shepherd* v. *Mackoul*, 3 Camp. 326; 14 R. R. 752.

Desertion.]—When a husband had taken his wife to a particular place, and left her there with an intention on his part of not returning to her, of which she was not aware, and she not having been furnished with funds, had gone into debt with the plaintiff for lodging and board, and the defendant, after being applied to by the plaintiff, wrote to him in such a way as to imply acquiescence in her continuing there, these circumstances were left to the jury as evidence of liability. *Jenner* v. *Hill*, 1 F. & F. 269. *And see* col. 747.

—— **Money Lent in Consequence of.**]—A husband deserted his wife, and left her unprovided for, and the plaintiff advanced her money to pay for necessaries supplied for her maintenance, and she applied it accordingly:—Held, that the plaintiff was entitled in equity to recover from the husband such sums as had been expended in necessaries. *Deare* v. *Soutten*, L. R. 9 Eq. 151; 21 L. T. 523; 18 W. R. 203.

A person who advances to a deserted wife money, to enable her to supply herself with necessaries, has no demand, enforceable at law, against the husband for the advances, but has a remedy in equity against him for so much of the money as is actually applied by the wife in paying for necessaries. *Jenner* v. *Morris*, 3 De G. F. & J. 45; 30 L. J., Ch. 361; 7 Jur. (N.S.) 375; 3 L. T. 871; 9 W. R. 391.

—— **Claim in respect of Children.**]—But a person who takes the wife into his house cannot maintain any action for the education of the children. *Hodges* v. *Hodges*, Peake's Add. Cas. 79; 1 Esp. 441; 4 R. R. 889.

Where a wife living separately from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, has the custody of their child under the age of seven years against the husband's will but by force of an order made under 2 & 3 Vict. c. 54, the reasonable expenses incurred in providing for it are part of the wife's reasonable expenses, for which she has by law authority to pledge her husband's credit. Blackburn, Mellor and Lush, JJ., Cockburn, C.J., dissentiente. *Baseley* v. *Forder*, 9 B. & S. 599; 37 L. J., Q. B. 237; L. R. 3 Q. B. 559; 18 L. T. 756.

Law Costs—In respect of Restitution of Conjugal Rights.]—A husband having deserted his wife without cause, and left her without means of subsistence, she by advice of an attorney instituted a suit for restitution of conjugal rights, and obtained a decree for alimony pendente lite. She also, by the advice of the same attorney, took the opinion of counsel whether a verbal promise of a settlement made by the husband at the time of the marriage could be enforced in equity. She further consulted her attorney as to the best means of dealing with tradesmen who had supplied her with necessaries and were pressing her for money, and also with the landlord of a house in which she and her husband had lived, who was threatening to distrain for rent upon furniture in the house, which had been hers before marriage, but had become her husband's on marriage:—Held, that all these steps taken by the wife were reasonably necessary under the circumstances, and that she had an implied authority to pledge her husband's credit in respect thereof, and that on the death of her husband her attorney was entitled to recover his costs from the husband's executors, including the costs for expenses preliminary to the suit.

Wilson v. *Ford*, 37 L. J., Ex. 60 ; L. R. 3 Ex. 63 ; 17 L. T. 605 ; 16 W. R. 482.

—— **Of Procuring a Divorce.**]—A wife is entitled to pledge her husband's credit for all the costs as between solicitor and client reasonably incurred by her in respect to the institution and prosecution of a divorce suit against her husband. *Ottaway* v. *Hamilton*, 47 L. J., C. P. 725 ; 3 C. P. D. 393 ; 38 L. T. 925 ; 26 W. R. 783 —C. A.

A solicitor employed by a wife to prosecute a divorce suit against her husband, which terminated in a decree absolute for a dissolution of the marriage, had his costs in the suit taxed, as between party and party, in the divorce court. He then sued the husband for costs incurred before but in reference to the institution of the suit ; extra costs in the suit as between solicitor and client, disallowed on the taxation as between party and party ; and the extra costs, as between solicitor and client, of rectifying the wife's marriage settlement after decree nisi, these costs having been allowed on taxation as between party and party :—Held, that the wife could pledge her husband's credit for, and the solicitor was entitled to recover, such of the costs included in all the three classes as had been reasonably incurred. *Ib.*

The costs of a suit justifiably instituted by a wife against her husband for a divorce or a judicial separation, are necessaries for which she may pledge his credit. *Stocken* v. *Pattrick*, 29 L. T. 507.

A wife, living apart from her husband, consulted attorneys respecting the ill-usage she had received from her husband, consisting of his adultery and cruelty. They therefore made inquiries, and having satisfied themselves that there were good grounds for legal proceedings, they commenced a suit in the divorce court on the wife's behalf. Before such suit was brought to a hearing, she and her husband came to an arrangement whereby he executed a deed securing to her an annual allowance. The attorneys having sued the husband for their bill of costs, the jury, in reply to questions left to them by the judge, found that there was legal cruelty ; that they made full inquiries to satisfy themselves and to justify them in acting as her solicitors ; but that it was not necessary in order to obtain the deed of separation, to carry on the proceedings by filing the petition in the divorce court :—Held, that the action was maintainable, and that the costs incurred by the attorneys in the proceedings at the suit of the wife were (subject to taxation) properly chargeable against her husband. *Ib.*

A husband is liable to an action at the suit of his wife's solicitor, for costs necessarily incurred by her in filing a petition in the divorce court for a judicial separation on the ground of cruelty and adultery, although the petition is not proceeded with, and the course prescribed by the practice of the divorce court for obtaining the wife's costs has not been pursued. *Rice* v. *Shepherd*, 12 C. B. (N.S.) 332 ; 6 L. T. 432.

The costs of a solicitor employed by a married woman to institute proceedings on her behalf against her husband to obtain a decree of judicial separation are not necessaries for which the husband is liable, unless there was at least great probability of ultimate success ; and to entitle a solicitor so employed to recover the costs from the husband, or to prove for them against the husband's estate, he must, in the absence of actual success, be at least able to show that he made proper investigation and inquiry into all the circumstances of the case before he commenced the proceedings. *Baylis* v. *Watkins*, 33 L. J., Ch. 300 ; 10 Jur. (N.S.) 114 ; 9 L. T. 741 ; 12 W. R. 324—L. JJ. *And see* col. 954.

—— **In respect of Proceedings of Habeas Corpus.**]—An attorney had been employed by a wife (while she was for just cause living apart from her husband) to resist a habeas corpus which the husband had procured to be issued to recover from her the possession of their child, aged over seven years, and now sought to recover from the husband the costs of the proceedings, averring specially that the wife was living separately from her husband, on account of his cruelty ; that the work was done upon the retainer of the wife, and at her request, and that it was necessary for the purpose of maintaining her rights :—Held, that, upon the facts alleged, the attorney was not entitled to recover. *Mecredy* v. *Taylor*, Ir. R. 7 C. L. 256 —Ex. Ch. Reversing Ir. R. 6 Eq. 336 ; 20 W. R. 252.

Onus probandi in Action for Necessaries.]—To make a husband liable for his wife's board and lodging at the house of a third person, when the wife leaves in consequence of a dispute, it must be shown, either that his conduct rendered it improper for her to live with him, or that he knew where she was residing, and did not make any offer to take her back, except upon conditions which he had no right to make. *Reed* v. *Moore*, 5 Car. & P. 200.

If a tradesman brings an action against a husband for goods furnished to his wife, while she was living apart from her husband, it is for the tradesman to show that her so living proceeded from some cause which would justify it. *Mainwaring* v. *Leslie*, 2 Car. & P. 507 ; M. & M. 18; 31 R. R. 691. S. P., *Clifford* v. *Laton*, 3 Car. & P. 15 ; M. & M. 101.

iii. *Owing to Wrongful Act of Wife.*

Adultery.]—A husband is not bound to receive or to support his wife after she has committed adultery, though he has before committed adultery himself, and turned her out of doors without any imputation on her conduct. *Govier* v. *Hancock*, 6 Term Rep. 603 ; 3 R. R. 271.

If a husband has put away his wife for adultery, he is not liable even for necessaries supplied to her, if it is proved on the trial of an action for the price of such necessaries, that she has been guilty of adultery. *Hardie* v. *Grant*, 8 Car. & P. 512.

If a husband puts away his wife on a charge of adultery, and informs a tradesman with whom his wife has been dealing, that he has so done, the tradesman cannot recover for articles supplied her unless they are necessaries, and the tradesman proves that the wife was actually in want of them ; even though no evidence is given of adultery. *Ib.*

When husband and wife do not live together, and the husband has turned the wife out of doors, the law makes her his agent to order such things as are reasonable and necessary for herself ; but if she is living in open adultery, her husband is not bound by any contract she may

make, even for necessaries. *Emmett* v. *Norton*, 8 Car. & P. 506.

The adultery of a wife living apart from her husband destroys her implied agency to bind him by her contracts for necessaries. *Cooper* v. *Lloyd*, 6 C. B. (N.S.) 519.

In such a case the wife herself is an admissible witness to prove the adultery. *Ib.*

A husband went abroad in 1852, leaving his wife and three children here with (what the jury found to be) a sufficient provision for their proper maintenance in his absence. On his return, in 1856, he found that his wife had formed an adulterous connection with another man who lived with her, and passed by her husband's name, and he immediately removed his children:—Held, that he was not liable for medicines and attendances provided for his children at the wife's request, although the plaintiff was not aware of the state in which she was living at the time. *Atkyns* v. *Pearce*, 2 C. B. (N.S.) 763; 26 L. J., C. P. 252; 3 Jur. (N.S.) 1180. *And see* col. 798.

—— **How far Divorce Proceedings Evidence of.**]—In an action for necessaries supplied to the wife of the defendant whilst living apart from him, the defendant relied for defence upon the adultery of the wife, to establish which he put in proceedings in a suit against her in the divorce court, in which it was found by the jury that she had been guilty of adultery with the co-respondent, but in which there was no decree, the jury having also found that the petitioner had committed adultery:—Held, that, there being no judgment in the divorce court altering the status of the parties, the proceedings therein afforded no defence to the action. *Needham* v. *Bremner*, 1 H. & R. 731; 35 L. J., C. P. 313; L. R. 1 C. P. 583; 12 Jur. (N.S.) 434; 14 L. T. 437; 14 W. R. 694.

—— **Wife Continuing to Reside in Husband's House.**]—The defendant's wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued to live in a state of adultery:—Held, that the husband was liable for necessaries furnished to her, unless it appeared that the plaintiff knew, or ought to have known, the circumstances under which she was living. *Norton* v. *Fazan*, 1 Bos. & P. 226; 4 R. R. 785.

—— **Condoned — Subsequent Ill-usage.**]—Though a wife has been guilty of adultery, but the husband takes her again into his house, if he afterwards turns her out he is liable for necessaries furnished to her. *Harris* v. *Morris*, 4 Esp. 41.

Leaving Husband Voluntarily.]—Where, in pursuance of articles of separation securing a maintenance to the wife, she quits her husband's house against his wishes, and continues to live apart from him, although he is willing and wishes to receive her back and provide for her in his own house:—Semble, that he is not liable to be sued by tradesmen for debts contracted by her, even for necessaries. *Hindley* v. *Westmeath (Marquis)*, 6 B. & C. 200; 9 D. & R. 351; 5 L. J. (O.S.) K. B. 115; 30 R. R. 290.

c. Cohabitation with Woman other than Wife.

When Woman Treated as Wife.]—Although a man is conclusively liable for necessaries supplied to a woman while he is living with her as his wife; when they have separated he is not liable for necessaries supplied to her on the ground that he has lived with her, and represented her as his wife, if he can show that in point of fact they are not married. *Munro* v. *De Chemant*, 4 Camp. 215.

If a man allows a woman to use his name, and pass for his wife, he will be bound to pay for goods furnished to her even by a man who knew that the parties were not married. *Watson* v. *Threlkeld*, 2 Esp. 637; 5 R. R. 760.

Where a man, who had for some years cohabited with a woman who passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad:—Held, that the woman might have the same authority to bind him by her contracts for necessaries, as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death but before notice of it had been received. *Blades* v. *Free*, 9 B. & C. 167; 4 M. & Ry. 282; 7 L. J. (O.S.) K. B. 211.

If a man marries a woman, and holds her out to the world as his wife, he does not discharge himself from his liability for necessaries supplied to her, by proving a previous marriage between himself and another woman, unless he brings home a clear knowledge of the celebration of the first marriage to the person who supplied the necessaries to the second wife. *Robinson* v. *Nahon*, 1 Camp. 245.

Cohabitation by a man, for many years, with a woman, and introducing her as his wife, was admitted as some evidence of a marriage, in an action by a third party against him as her husband, for necessaries or money supplied to her. *Paule* v. *Goding*, 2 F. & F. 585.

The defendant and a Mrs. S., his mistress, lived together as husband and wife four years, and occupied three residences successively. At each time of their coming into a house plaintiff was employed to do work and furnish materials for the fitting up. Mrs. S. as well as the defendant gave directions, and the defendant sanctioned her orders and paid the bills; the plaintiff knew that she was only his mistress. While residing in the third house they separated, but Mrs. S., without the defendant's sanction, sent for the plaintiff to that house which she had not left, and ordered fittings up for a new house of her own. The plaintiff did the work, and had not in the meantime any notice of the separation:—Held, in an action for the last-mentioned work and goods, that it was a proper question for the jury, whether or not the defendant had given the plaintiff reason to believe that Mrs. S., at the time of the orders, continued to be the defendant's agent, and that on their finding in the affirmative the defendant was liable. *Ryan* v. *Sams*, 12 Q. B. 460; 17 L. J., Q. B. 271; 12 Jur. 745.

The mere fact that a man has allowed a woman to call herself by his name, he not cohabiting with her, nor otherwise holding her out as his wife, will not suffice to make a primâ facie case against him of liability for her debts. *Gomme* v. *Franklin*, 1 F. & F. 465.

Quære, whether a woman who cohabits with a man, assumes his name, and represents herself as his wife, can maintain trespass against a sheriff for taking in execution furniture alleged to be her property, but being in the house in which the parties resided. But it having been left to the jury to say whether, under the circumstances,

the property might not have been given up by the woman to the man during cohabitation, and they having found it in the affirmative, the court refused to disturb the verdict. *Edwards* v. *Farebrother*, 2 M. & P. 293 ; 3 Car. & P. 521 ; 7 L. J. (O.S.) C. P. 72.

Deed Agreeing to Pay Annuity—Consideration for.]—Past seduction and cohabitation are not a good consideration to support an annuity. *Beaumont* v. *Reeve*, 8 Q. B. 483 ; 15 L. J., Q. B. 141 ; 10 Jur. 284.

—— **Pleading.**]—The declaration stated that the defendant had seduced, debauched, and cohabited with the plaintiff, and it was agreed that no further immoral connection should take place between them, and the defendant, as a compensation to the plaintiff, and in consideration of the premises, agree to pay her an annuity during her life. Held, bad, on demurrer. *Ib.*

See also CONTRACT.

3. FOR WRONGFUL ACTS OF WIFE.

A wife possessed authority from her husband, a papermaker, to give in his absence certain requisite excise notices and receipts, without which paper could not be legally removed from the mill, though the making of it might continue. She had also paid excise duty by his authority. But it did not appear that she had any other authority from him respecting the manufacture, or to remove paper at all. She afterwards removed paper in an illegal manner, and pledged it, stating that she wished to make up a sum to pay duty with. The husband having been proceeded against for such removal :—Held, that her former acts were evidence to be left to the jury to decide whether or not the illegal act was done by his authority. *Att.-Gen.* v. *Riddell*, 2 Tyr. 523 ; 2 C. & J. 493 ; 1 L. J., Ex. 182.

A wife may be guilty of a forcible entry in the dwelling-house of her husband, and other persons also if they assist her in the force, although her entry in itself is lawful. *Rex* v. *Smyth*, 1 M. & Rob. 155.

A man is answerable to a third person for what is done by his wife, so long as the relation of husband and wife continues, though they may be permanently living apart, at least if it is not shown that the wife at the time was living in adultery. *Head* v. *Briscoe*, 5 Car. & P. 484.

In trover, the plaintiff having proved a taking of the goods from his premises by the defendant, and a subsequent demand and refusal, the defendant may prove under not possessed, that the plaintiff's wife, with his authority, gave the goods to the defendant in discharge of a debt due to him from the plaintiff. *Ringham* v. *Clements*, 12 Q. B. 260 ; 17 L. J., Q. B. 289.

A bailiff seized the goods of the plaintiff under a fi. fa. against a third person, and deposited them in an outbuilding of an inn, with the assent of the innkeeper. The innkeeper's wife assisted him in the management of his business. On a demand being made to her to deliver up the goods, she said she had seen the attorney of the plaintiff in the original suit ; that he had told her not to bother herself about them, he would see her harmless, and that she would not give them up :—Held, in an action against the innkeeper and his wife, in which was alleged a conversion by her to her husband's use, that this refusal was evidence of a conversion by her. *Catteral* v. *Kenyon*, 2 G. & D. 545 ; 3 Q. B. 310 ; 6 Jur. 507 ; 11 L. J., Q. B. 260.

A married woman is responsible for all torts committed by her during coverture, and the husband must be joined as a defendant, and consequently they are liable for frauds committed by her as for other personal wrongs ; but when the fraud is directly connected with a contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband cannot be sued for it together with the wife. *Liverpool Adelphi Loan Association* v. *Fairhurst*, 2 C. L. R. 512 ; 9 Ex. 422 ; 23 L. J., Ex. 163 ; 18 Jur. 191 ; 2 W. R. 233.

Action against a husband and wife, for that she fraudulently represented to the plaintiff that a bill of exchange was accepted by her husband, whereby the plaintiff was induced to discount the same, the bill not having been so accepted : —Held, by Erle, C.J., and Byles, J., that these facts did not constitute a cause of action against the husband and wife, but by Williams and Willes, J.J., that the fraudulent representation not being shown to have been connected with any contract of the wife's, these facts did constitute such a cause of action. *Wright* v. *Leonard*, 11 C. B. (N.S.) 258 ; 30 L. J., C. P. 365 8 Jur. (N.S.) 415 ; 5 L. T. 110 ; 9 W. R. 944.

A husband is liable in damages to a servant who has sustained an injury by riding in a defective cart by the directions of the wife. *Miell* v. *English*, 15 L. T. 249.

Married Women's Property Act, 1882.] — The Married Women's Property Act, 1882, does not abolish the liability of a husband for his wife's wrongful acts, and the plaintiff may sue the husband and wife jointly or the wife alone for wrongs committed by her after the marriage. *Seroka* v. *Kattenburg*, 55 L. J., Q. B. 375 ; 17 Q. B. D. 177 ; 54 L. T. 649 ; 34 W. R. 543.

After Dissolution of Marriage.] — One who has obtained a sentence of dissolution of marriage in the divorce court is not liable to be joined in an action for a tort committed by his wife during the coverture. *Capel* v. *Powell*, 17 C. B. (N.S.) 743 ; 34 L. J., C. P. 168 ; 10 Jur. (N.S.) 1255 ; 11 L. T. 421 ; 13 W. R. 159.

Forcible entry for Rates—Resistance—Authority.]—A wife has implied authority to resist a forcible entry by a constable in executing a distress warrant for rates. *Rossiter* v. *Conway*, 58 J. P. 350.

4. FOR WIFE'S BREACH OF TRUST.

Breach of Trust before Marriage.]—Liability of husband for the breach of trust of his wife before marriage. *Palmer* v. *Wakefield*, 3 Beav. 227.

Defaults of feme trustee chargeable to Husband.]—The defaults of a feme trustee during coverture are chargeable to her husband. *Smith's Estate, In re, Clifford* v. *Washington*, 48 L. J., Ch. 205.

A testator appointed his wife and two others executors and trustees ; directed his business and a leasehold house to be sold, and gave the residue (which was principally leasehold property) to his wife, directing that if she married

again it should be settled to her separate use for life—then he bequeathed the house "if not sold, and the money settled as above stated, and all money, &c., so settled upon her for her lifetime" to certain other persons; but if his wife should not marry again he left the property to her own disposal at her death. The widow married again two years after testator's death; the leaseholds were not converted, and she received the entire income till her death, twenty-nine years afterwards, by which time the greater portion of the terms of years had run out. Her second husband, who survived his wife and her co-trustees, never acted in the trust:—Held, that the leaseholds ought to have been converted upon the widow's second marriage, and that the second husband was liable as a trustee having legal control over the trust property, for a breach of trust in permitting the tenant for life to receive the entire income of the unconverted property. *Ib.*

The husband was ordered to recoup to the trust estate the difference between the income of the leaseholds received by himself or his wife during the coverture, and the dividends which would have been produced by a sale thereof at the time of her marriage and investment of the proceeds in consols. *Ib.*

Semble, that the excess of income thus received by the tenant for life must be held as received by husband through her hands. *Ib.*

Breach of Trust by Negligence.]—A husband's liability for his wife's breaches of trust extends to breaches of trust arising from negligence, and is not confined to losses caused by her active misconduct. *Bahin* v. *Hughes*, 55 L. J., Ch. 472; 31 Ch. D. 390; 54 L. T. 188; 34 W. R. 311—C. A.

Trust of Land for Creditors—Wife taking Profits—Third Husband.]—A. settled his lands for payment of his debts, but the trustees never acting, his wife, after his death, entered and took the profits; she married a second, and then a third time, still continuing to take the profits. An unsatisfied creditor appearing, decreed, that the third husband should account for what had been received by himself and the second husband, and the wife when sole. *Gilpin* v. *Smith*, 1 Ch. Cas. 80.

Life Estate—Wasting Assets.] — Husband, though parted from his wife, charged in equity with his wife's wasting of goods which were devised to her for her life only. *Paget* v. *Read*, 1 Vern. 143.

5. As to Other Liabilities.

Assault on Wife during Coverture.]—A wife after being divorced from her husband cannot sue him for an assault committed upon her during coverture. *Phillips* v. *Barnet*, 45 L. J., Q. B. 277; 1 Q. B. D. 436; 34 L. T. 177; 24 W. R. 345.

Wife guilty of Fraud.]—Where a feme covert has been guilty of fraud solely without the husband, no precedent of his paying costs. *Cotton* v. *Luttrell*, 1 Atk. 453.

Wife Concurring in Mortgage when no Power.]—If a wife concurs with her husband in mortgaging property over which she has no power, the husband is primarily liable, unless the wife received the money for her separate use; and the court will direct an inquiry as to this fact. *Thomas* v. *Thomas*, 2 K. & J. 79; 25 L. J., Ch. 159; 1 Jur. (N.S.) 1160; 4 W. R. 135.

Wife Trading—Husband taking Profits.]—Feme covert trades with her husband's consent, and gives bills for money; he receives the profits. She dies and leaves a stock-in-trade; he shall be answerable for the debts contracted in the trade. *Bowyer* v. *Peake*, 2 Freem. 215.

Separate Trading—Debtor's Summons against Husband.]—A married woman carried on in her maiden name a millinery business separately from her husband. A debtor's summons was issued against the husband and wife, claiming the payment of a sum due upon some bills of exchange drawn by the summoning creditor upon and accepted by the wife in her maiden name, and dishonoured. The husband applied to the court to dismiss the summons. He deposed that he never authorised his wife to pledge his credit, and that five years previously he had given notice to the summoning creditor that he had nothing to do with his wife's business:—Held, on this evidence, which was uncontradicted, that the husband was not liable for the debt; that the issuing of the summons was an abuse of the procedure; and that the summons must be dismissed with costs. *Shepherd. Ex parte* and *In re*, 48 L. J., Bk. 35; 10 Ch. D. 573; 39 L. T. 652; 27 W. R. 310. *See* col. 1095, and cols. 1027, 1115.

Contract for benefit of Husband—Ratification.]—A contract entered into and paid for by a wife, without the knowledge, but for the benefit, of her husband, is valid and binding when ratified by the husband. *Millard* v. *Harvey*, 34 Beav. 237.

Maintenance of Wife.]—*See* Poor Law.

VI. CURTESY.

1. When it Arises.

Tenant by the curtesie of England is where a man taketh a wife seised in fee simple or in fee taile generall or seised as heir in tail especiall, and hath issue by the same wife male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England. Co. Litt. s. 35.

The Married Women's Property Act, 1882, has not affected the right of a husband to an estate by the curtesy in the undisposed-of real estate of his wife. *Hope* v. *Hope*, 61 L. J., Ch. 441; [1892] 2 Ch. 336; 66 L. T. 522; 40 W. R. 522.

Tenancy by curtesy must come out of the inheritance. *Summer* v. *Partridge*, 2 Atk. 47.

It is a continuance of inheritance in husband. *Ib.*

It cannot exist where children take by virtue of remainder over, and not by descent from their mother. *Ib.*

To entitle husband, the inheritance must descend on children. *Ib.*

There shall be a tenancy by the curtesy of a trust as well as of a legal estate. *Watts* v. *Ball*, 1 P. W. 108.

Mother receiving profits, and continuing in possession as guardian in socage, is a sufficient seisin of daughter to be entitled as tenant by

curtesy; but ejectment without confession of lease, entry, and ouster, would not be sufficient. *Sterling* v. *Penlington*, 9 Mod. 247.

A papist may be tenant by the curtesy. *Witherington* v. *Banks*, Sel. Ch. Ca. 30; 3 P. W. 49, n.

The evidence of a father claiming an estate for life as tenant by the curtesy will be considered sufficient proof that his child was born alive, when it was acquiesced in and acted upon by the father of the wife, who was residing in the house. *Jones* v. *Ricketts*, 31 L. J., Ch. 753; 7 L. T. 43; 10 W. R. 576.

On the death of a wife her husband, in the absence of any disposition by her, becomes entitled jure mariti to her equitable interest in chattels real settled to her separate use. *Archer* v. *Lavender*, Ir. R. 9 Eq. 220.

Lands on which there were leases for years existing, and a rent incurred, descended on a wife as tenant in tail general, who survived three months after the rent day incurred. Though she made no entry, nor received any rent during her life, yet this was such a possession in the wife as made the husband tenant by the curtesy. *De Grey* v. *Richardson*, 3 Atk. 469.

The husband would have been tenant by the curtesy if the wife had died before the rent day came. *Ib.*

Money by marriage articles to be laid out in land to uses of husband and wife for life, then to the children as they should appoint, in default of appointment equally, but if one to that one in tail, reversion to husband in fee. There is one daughter; the trustee pays it to her and her husband, she not being sui juris, nor separately examined; the payment not sufficient to make it considered as money, and sister of the half-blood may claim the reversion in fee from the father; but the husband of the other sister who was tenant in tail will be tenant by curtesy. *Cunningham* v. *Moody*, 1 Ves. 174.

A., tenant in tail, with power to lease, remainder to B., the wife of C., made leases exceeding his power. By will he devised some benefits to B., but B. elected to take her estate tail in opposition to the will. After her death, C. claimed as tenant by the curtesy, though he also derived and accepted benefits under testator's will. C. brought ejectment against the lessees:—Held, that the lessees could not raise an equity against C., holding as tenant by curtesy under B.'s election of her estate tail, but their bill was retained that they might have satisfaction from testator's assets. *Darlington* (*Earl*) or *Cavan* (*Lady*) v. *Pulteney*, 2 Ves. J. 544; 3 Ves. 384.

Devise to A. and her heirs, but if she died leaving issue, then to such issue and their heirs. A. died, leaving issue:—Held, that her husband was not entitled to be tenant by the curtesy. *Barker* v. *Barker*, 2 Sim. 249.

Devise to wife, remainder to issue male of her body, and to heirs male of such issue male, remainder over. She had issue a son, who died in her lifetime, and then she died; but being heir at-law to testator, the reversion in fee descended on her:—Held, that the husband shall not be tenant by curtesy. *Boothby* v. *Vernon*, 9 Mod. 148.

By a marriage settlement, the wife's freehold estates were vested in a trustee, in trust for her separate use during her life, remainder for such persons as she should appoint by deed or will; and in default of appointment, in trust for her right heirs. The wife died without having made any appointment, leaving her husband and a son surviving. After her death the trustee sold the estate under a power in the settlement, which directed the proceeds to be invested in the purchase of other lands, or on mortgage, or in the funds, and the securities to be held on the trusts aforesaid:—Held, that on the wife's death the husband became equitable tenant by the curtesy of the estates, and therefore was entitled to the interest of the purchase money during his life. *Follett* v. *Tyrer*, 14 Sim. 125; 13 L. J. (N.S.) Ch. 441; 8 Jur. 528.

Although the right of the husband as tenant by the curtesy of an equitable estate of the wife may perhaps be excluded by a possession of the estate strictly adverse to the husband and wife, and to all other parties interested under the settlement, during the whole period of coverture; yet the possession of the estate in conformity with the equitable interest of the cestui que trustent for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy. *Parker* v. *Carter*, 4 Hare, 400.

There is no estate by the curtesy issuing out of an estate pur autre vie. *Stead* v. *Platt*, 18 Beav. 50.

Where money is given to be laid out in land, for a place of retirement for testator's sister, "to be for ever entailed on her issue," the husband of one of the daughters of the sister entitled as tenant by the curtesy to one-third. *Dodson* v. *Hay*, 3 Bro. C. C. 404.

S. being entitled under a will to real and personal estate marries twice, having issue by both husbands, and concurs with her second husband in mortgaging property belonging to them both, levying three fines. The second husband becomes insolvent, and a deed of arrangement is executed to which the husband and wife, assignee and mortgagee, are parties, whereby it is agreed, that in consideration of a small sum, to be paid in part liquidation of the mortgage, the mortgagee shall give up certain property of the husband's to the assignee, for the creditors, the joint property of the husband and wife being charged with the remainder of the mortgage, reserving the power of sale, and subject thereto in trust for S. for her separate use; so that she might dispose of her property by deed or will attested by three witnesses as a feme sole, with a proviso that her intestacy, entire or partial, should not prejudice her husband's right as administrator. The deed was acknowledged, and S. died intestate, her husband administered to her estate, and her eldest son claimed to have the mortgage paid off, to receive back whatever the mortgagee had received since S.'s death, and subject to the mortgage, claimed the freeholds free from the right of the husband to curtesy:—Held, that the husband was entitled to curtesy, that there was no right to exonerate S.'s estate, and that the husband being her representative made no difference. *Wheeley* v. *Garfield*, 4 W. R. 700.

A. devised 300*l.* to be laid out in land, and settled to the use of her daughter and her children, and if she died without issue, to go over. She married B., and had a child by him, and she and the child being dead, and the moiety not laid out, on a bill brought by B.:—Held, the money to be considered as land, and the plaintiff

to be tenant by the curtesy. *Sweetapple* v. *Bindon*, 2 Vern. 536.

Money is to be invested in land, and settled on a woman in tail. She marries, has a child, and dies before the money is laid out. The husband shall have the interest of the money for his life. A man shall be tenant by curtesy of a trust as well as of a legal estate. *Otway* v. *Hudson*, 2 Vern. 585.

A husband may be tenant by the curtesy of the wife's equitable estate, but not of a mortgage in fee, unless there be a foreclosure, or the mortgage has subsisted so long as that the court will not be induced to grant a redemption; nor of a condition. *Casborne* v. *English*, 1 Atk. 606; 2 Eq. Abr. 728, pl. 6; 2 Jac. & Walk. 194.

In gavelkind lands a husband may be tenant by the curtesy without having issue; but it is only of a moiety of the wife's lands: and it ceases if the husband marries again. *Ib.*

Husband may be tenant by curtesy of the wife's equity of redemption. *Ib.*

A., by will, directed his trustees to convey his freehold lands to his daughter, P., and so as that she alone should receive the rents, and so as her husband should not intermeddle therewith; and from and after her decease, in trust for the heirs of the body of the said P. for ever:—Held, that this was an executory trust, and that the wife took an estate for life only; therefore the husband could not have curtesy; sed secus, if it had been an estate tail. Lord Hardwicke said in this case, that the devise being to the wife's separate use, would not bar the husband; for here is a sort of seisin in the wife. And though Coke says that to make a tenancy by the curtesy there ought to be an inchoate right in the husband in the wife's lifetime, he does not say he should be seised of the rents and profits. *Roberts* v. *Dixwell*, 1 Atk. 607.

A husband may be tenant by the curtesy of a trust for payment of debts, or of an equity of redemption devised to the wife for her separate use; for in a trust for payment of debts it is only a chattel interest in the trustees; and the first taker has a freehold over. *Ib.* See also *Tradd* v. *Downs*, 2 Atk. 304. And see *Stead* v. *Platt*, 18 Beav. 50.

As to circumstances amounting to Waiver of Curtesy, see *Stone* v. *Godfrey*, 5 De G. M. & G. 76; 23 L. J., Ch. 769; 18 Jur. 524.

Though in settlement there was a direction to pay rents, &c., of wife's equitable estate of inheritance to her separate use for life, yet husband might be tenant by curtesy. *Morgan* v. *Morgan*, 5 Madd. 408.

The rents under a will being to be applied to the separate use of the wife, and the trustees who had the fee in all the real estate being to permit her to dispose of it, the whole legal estate of the inheritance was in them, and therefore neither in law nor equity was the husband tenant by the curtesy. *Hearle* v. *Greenbank*, 3 Atk. 716.

Where a testator gave real estate to his children and their heirs, as tenants in common, to hold to such as should be daughters, to them or her, "independently of any husband or husbands she or they might have, and free from his or their control and liabilities, and to be assigned and disposed of as she or they might think fit, by any deed or will in writing," and one daughter married, had issue, and died without exercising her power of disposition:—Held, that the words were sufficient to exclude every possible interest of the husband, and that he took no estate by the curtesy. *Moore* v. *Webster*, 36 L. J., Ch. 429; L. R. 3 Eq. 267; 15 L. T. 460; 15 W. R. 167.

When freeholds were devised to trustees upon trust to hold the same unto and to the use of A., her heirs and assigns, for ever, for her separate use, and A. died, leaving a husband and child surviving, without having made any disposition of the property:—Held, that the husband became tenant by the curtesy. *Appleton* v. *Rowley*, 38 L. J., Ch. 689; L. R. 8 Eq. 139; 2 L. T. 600.

When a wife's real estate did not fall into possession till after her husband's bankruptcy and discharge:—Held, that the husband, though there had been issue of the marriage, had not at the time of his bankruptcy any such contingent interest in the estate, as tenant by the curtesy, as passed to his assignees. *Gibbins* v. *Eyden*, 38 L. J., Ch. 377; L. R. 7 Eq. 371; 20 L. T. 516; 17 W. R. 481.

A wife having an estate tail settled to her separate use without power of anticipation as to the income may by a disentailing deed enlarge her estate tail into a fee simple, and limit the fee to her separate use, with a power to dispose of it so as to defeat her husband's title by the curtesy, notwithstanding the bankruptcy of her husband. *Ib.*

A testator died in 1875, having by his will, dated in 1872, devised a freehold estate to his daughter (the plaintiff's wife), her heirs and assigns, for her separate use. The daughter died in 1874, in the lifetime of the testator, leaving an only child, who was her heiress at law. The plaintiff claimed to be entitled for his life as tenant by the curtesy:—Held, upon demurrer, that the plaintiff was entitled for his life to the property devised by the testator as tenant by the curtesy. *Eager* v. *Furnivall*, 50 L. J., Ch. 537; 17 Ch. D. 115; 44 L. T. 464; 29 W. R. 649.

Evidence of Father.]—The evidence of a father claiming an estate for life as tenant by the curtesy will be considered sufficient proof that his child was born alive, when it was acquiesced in and acted upon by the father of the wife, who was residing in the house. *Jones* v. *Ricketts*, 31 Beav. 130; 31 L. J., Ch. 753; 10 W. R. 576.

Limitation to Separate Use.] — When real estate is limited to the separate use of a wife, so as to leave to the husband no legal or equitable interest in the estate, he cannot be a tenant by curtesy. *Moore* v. *Webster*, 36 L. J., Ch. 429; L. R. 3 Eq. 267; 15 L. T. 460; 15 W. R. 167.

A testator devised a freehold estate to his daughter (the plaintiff's wife), her heirs and assigns, to her separate use. The daughter died after the date of the will in the lifetime of the testator, leaving the only child her heiress-at-law. The plaintiff claimed the estate as tenant by the curtesy:—Held, that he was so entitled. *Eager* v. *Furnivall*, 50 L. J., Ch. 537; 17 Ch. D. 115; 44 L. T. 464; 29 W. R. 649; 45 J. P. 503.

Equitable Estate of Inheritance to Separate Use.]—It is now settled that where a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by deed or will, her husband is entitled to curtesy. *Cooper* v. *Macdonald*, 47 L. J., Ch. 373; 7 Ch. D. 288; 38 L. T. 191; 26 W. R. 377.

The husband is tenant by the curtesy of the equitable inheritance of his wife, notwithstand-

ing a direction to pay the rents and profits to her separate use during the coverture. *Morgan* v. *Morgan*, 5 Madd. 408.

On the death of a wife, her husband, in the absence of any disposition by her, becomes entitled jure mariti to her equitable interest in chattels real settled to her separate use. *Archer* v. *Lavender*, Ir. R. 9 Eq. 220.

Fee-simple with Executory Devise Over.]—Where there is a devise in fee-simple, with an executory devise over, the husband's right to curtesy attaches on the first estate, and is not defeated by its determination. *Buckworth* v. *Thirkel*, 10 Moore, 235, n.; 3 Bos. & P. 652, n.; 4 Dougl. 323.

Gift Over to Issue.]—Devise to A. and her heirs; but if she died leaving issue, then to such issue and their heirs. A. died, leaving issue:—Held, that her husband was not entitled to be tenant by the curtesy. *Barker* v. *Barker*, 2 Sim. 249.

Trust for Separate Use—Power of Appointment.]—Freehold property was conveyed by a deed of settlement to trustees for the separate use of the wife for life, with remainder to such persons as she should appoint, and, in default of appointment, to her right heirs for ever. The trustees had power to sell and hold the proceeds upon the like trusts. The wife died without exercising the power, leaving her husband and an only son surviving her. The trustees sold the property after the wife's death:—Held, that the husband was entitled to the purchase-money for life by the curtesy. *Follett* v. *Tyrer*, 14 Sim. 125; 13 L. J., Ch. 441.

Estate pur autre vie.]—There is no estate by the curtesy issuing out of an estate pur autre vie. *Stead* v. *Platt*, 18 Beav. 50.

Tenancy Initiate not Consummate.]—A., being lessee for a term of years of lands, the lessor devised them in fee to A.'s wife. A. had issue by his wife:—Held, that A. held the term and the fee in separate and distinct rights, and that the term was not merged, and that the fact that A. had issue by his wife made no difference, for the wife being still alive, the tenancy by the curtesy was only initiate, and not consummate. *Jones* v. *Davies*, 5 H. & N. 766; 29 L. J., Ex. 374; 8 W. R. 628. Affirmed on appeal, 7 H. & N. 507; 31 L. J., Ex. 116; 8 Jur. (N.S.) 592; 6 L. T. 444; 10 W. R. 464—Ex. Ch.

2. Incidents.

Where a husband is but tenant by the curtesy of his wife's estate, he cannot affect that estate without her joining. *Incledon* v. *Northcote*, 3 Atk. 436.

Tenant by curtesy shall have the aid of equity against a trust term assigned in trust to attend the inheritance. *Snell* v. *Clay*, 2 Vern. 324.

Tenant must keep down Interest.]—A tenant by the curtesy must keep down interest. *Casborne* v. *English*, 1 Atk. 606.

No Forfeiture by Adultery.]—The husband does not forfeit his estate by the curtesy, nor the wife her jointure, by adultery. *Walker, In re*, Ll. & G. t. Sugd. 326.

Insolvency of Husband.]—Under a settlement made upon the marriage of M., his daughter C. became upon his death, subject to the rights of her husband, tenant in tail in possession of a certain real estate and absolutely entitled to a share of personalty. M., by his will, gave to C. an annuity of larger value than her share under the settlement for her separate use, which she was required to accept in lieu of her share under the settlement. C.'s husband was an insolvent, and his assignee refused to give up her husband's interest in the settled property:—Held, that as to the share of personalty, which was outstanding in the trustees, the court, electing on C.'s behalf to take under the will, could order it to be made over in accordance with the testator's directions, but that, as to the realty, the court could not affect the estate which had passed to the assignee, and that C. must make compensation to the amount of rents and profits withheld. *Griggs* v. *Gibson*, 35 L. J., Ch. 457; L. R. 1 Eq. 685; 14 W. R. 513.

Voluntary Settlement.]—A married woman, having become entitled under a will to freehold and leasehold property for her sole and separate use, joined her husband in making a settlement, whereby the husband and wife conveyed the freeholds and the husband alone demised the leaseholds, subject to the annual payment of a shilling, if demanded, to trustees, upon trust for the wife for her separate use for life, remainder to the husband for life, remainder for the children (if any), with ultimate remainder to the wife absolutely. Two years afterwards the husband and wife (there being no children of the marriage) made a mortgage of the property:—Held, that the conveyance by the husband, though binding on the estate by the curtesy which he would have had in his wife's freeholds if there had been issue, in the absence of any conveyance by her, was not sufficient to raise a consideration moving from the husband; and that the settlement was voluntary and void under the statute as against the mortgagee. *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; 49 L. T. 156; 31 W. R. 884.

VII. Dower and Freebench.

1. Of What Lands.

Generally—Meaning of "Thirds."]—The word "thirds" is a general expression which may signify, according to the intent and scope of the instrument in which it is used, the interest of a widow in any property, personal or real, of her deceased husband in case of his intestacy. *Sambourne* v. *Barry*, 6 Ir. R., Eq. 28.

—— **Death of Dowress.**]—The claim to dower is extinct on the death of the widow. *White* v. *Parnther*, 1 Knapp, 179.

—— **Alien.**]—By the common law of England an alien woman married to an Englishman is not entitled to dower. *Wall's Case*, 6 Moore, P. C. 216; 12 Jur. 145.

—— **Marriage in Scotland.**]—A marriage celebrated in Scotland (but not between persons who go thither for the purpose of evading the laws of England) will entitle the woman to dower in England. *Ilderton* v. *Ilderton*, 2 H. Bl. 145.

Seisin — Freeholds.] — A., on his marriage with C., being equitable tenant in tail of certain lands, conveyed, by deed of 1804, these lands to B., as an indemnity against incumbrances on other lands purchased by B. from A.; the legal fee subsequently descended upon A., on the death of his father. Semble, C. became dowable out of the lands. *Lloyd* v. *Lloyd*, 2 Con. & L. 592; 4 Dr. & War. 354.

A. purchases lands in his eldest son's name, and puts him into possession, and the son falling sick, takes a declaration of trust from him; and after the son's recovery, he is permitted to remain in possession; the son marries and dies, and the father gets a conveyance from his younger son, who took as heir to eldest. The eldest son's wife shall have dower in these lands. *Bateman* v. *Bateman*, 2 Vern. 436.

The conuzee of a fine is not so seised as to give his wife a title to dower. *Sneyd* v. *Sneyd*, 1 Atk. 442.

Husband borrowing an estate for the purpose of getting out of court 14,000*l.* therein, to be laid out in lands to him in tail, and by means thereof the fee simple vesting in him for a time, though under an agreement that it was only for that particular purpose:—Semble, wife is dowable of this estate. *Henley* v. *Webb*, 5 Madd. 407.

A., seised in fee of estates let at the time of his marriage upon leases for lives which do not expire during the coverture, his wife is not entitled to dower. *D'Arcy* v. *Blake*, 2 Sch. & Lef. 387.

A widow concurred in a partition of her husband's estate, and released a moiety allotted to the other tenant in common from her dower, the other moiety was conveyed to the trustees of her husband's will:—Held, that she was entitled to dower out of the entirety of the latter moiety. *Reynard* v. *Spence*, 4 Beav. 103; 5 Jur. 478.

—— **Estate of Inheritance in Possession—Interest Equal to.**]—Under the will of M., who died in 1844, certain real estate and funds settled to devolve with the realty stood limited, subject to a prior life interest, to the use of the plaintiff for life, with remainder to the use of his second and subsequently born sons successively in tail male, with remainder to the use of his first son in tail male. In 1872, J., the only son of the plaintiff, executed a disentailing assurance, by which the real estate was assured, subject to the prior limitations, to the use of him, his heirs and assigns, and the personalty upon trust for him, his executors, administrators, and assigns. In 1883 the first tenant for life died, and in 1884 the life estate of the plaintiff ceased by reason of his non-compliance with a name and arms clause contained in the will. Thereupon J. became entitled, under the provisions of the will, to an equitable estate in the property during the life of the plaintiff, defeasible in the event of his having a second son, which had not happened. J. died intestate, and without ever having had any issue. The plaintiff was his heir-at-law and the administrator of his personal estate. The defendant was his widow:—Held, that J. had not an estate of inheritance in possession, nor an interest equal to an estate of inheritance in possession, and his widow was, therefore, not entitled to dower. *Michell, In re, Moore* v. *Moore*, 61 L. J., Ch. 326; [1892] 2 Ch. 87; 66 L. T. 366; 40 W. R. 375.

—— **Compensation Moneys.**] — When land belonging to an infant, subject to his mother's right of dower, was taken by a railway company, and the purchase-money, as determined by two valuers, was paid into court:—Held, that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the fund in court. *Hall's Estate, In re*, 39 L. J., Ch. 392; L. R. 9 Eq. 179.

—— **Sale of Lands—Payment of Capitalised Value.**]—In an administration suit, real estate subject to dower was sold and the proceeds paid into court:—Held, that the dowress was entitled to be paid the capitalized value of her dower out of the funds liable thereto. *Gleeson* v. *Byrne*, 25 L. R., Ir. 361.

—— **Out of Improved Value of Land.**]—Where customary lands, between the time of alienation by a husband and of his death, have been improved in value by buildings, the widow is entitled to dower according to their value at the time of his death, although one-third remains not built upon; and if the lands so aliened are, at the death of the husband, in the possession of several persons, whether by the immediate act of the husband or the act of his alienee, dower must be assigned as to one-third of the lands of each of such possessors. *Doe* d. *Riddell* v. *Gwinnell*, 1 G. & D. 180; 1 Q. B. 682; 10 L. J., Q. B. 212.

—— **Land Contracted to be Sold—Gift to Wife of Income of Proceeds of Land.**]—A testator having entered into a contract for the sale of real estate to a purchaser, died before completion. By his will he devised all his real estate to trustees for sale, and of the proceeds to invest 1,000*l.* and pay the income thereof to his widow. He then gave various other legacies out of the proceeds, but made no disposition of the ultimate residue. After the testator's death it was found that no title could be made to a material part of the property comprised in the contract, and thereupon the trustees of the will rescinded the contract:—Held, that the gift to the widow of the income of part of the proceeds of the real estate was a gift to her of an "interest in land" within s. 9 of the Dower Act, 3 & 4 Will. 4, c. 105, and that, therefore, she was not entitled to dower out of any part of her husband's estate. *Thomas, In re, Thomas* v. *Howell*, 56 L. J., Ch. 9; 34 Ch. D. 166; 55 L. T. 629.

—— **Lands Conveyed under Power of Appointment.**]—Where lands were conveyed by A. to such uses as B. should by deed appoint; and in default of and until appointment, to the use of B. in fee; and B. afterwards, in execution of the power, conveyed the lands by deed of appointment to C. in fee; and B., at the time of the appointment, was married:—Held, that his wife was not dowable out of these lands, in case she survived him. *Ray* v. *Pung*, 5 B. & A. 561.

—— **Lands Devised.**]—A., being seised in fee, devised to his son F., and his heirs for ever, all his houses and lands, charged with an annuity to the testator's wife for life, and if F. should have no children, child, or issue, the estate, on the decease of F., to become the property of the heir-at-law, subject to such legacies as F. might leave by will to any of the younger branches of the family. On the death of the testator, F. took possession of the lands devised, and died without issue, leaving his widow surviving, who after-

wards intermarried with another :—Held, that she was entitled to dower out of the devised premises, but with a cesset executio during existing outstanding terms, to which they were subject. *Moody* v. *King*, 10 Moore, 233 ; 2 Bing. 447.

And see *Buckworth* v. *Thirkel*, 10 Moore, 235, n.; 3 Bos. & P. 652, n. ; 4 Dougl. 323 ; 28 R. R. 674.

—— **Conveyed to Trustees under Husband's Will.**]—A widow concurred in a partition of her husband's estate, and released a moiety allotted to the other tenant in common from her dower ; the other moiety was conveyed to the trustees of her husband's will :—Held, that she was entitled to dower out of the entirety of the latter moiety. *Reynard* v. *Spence*, 4 Beav. 103.

—— **Subject to Trust.**]—A husband was seised in fee, subject to a trust term to secure life annuities, and to pay him half the surplus rents : —Held, that his widow was entitled to have her dower set out at once. *Sheaf* v. *Cave*, 24 Beav. 259.

Freeholds — Equitable Interests.] — By the Dower Act, 1833 (3 & 4 Will. 4, c. 105), s. 2, when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land.

A woman is not dowable of a use not executed. *Chudleigh's Case*, 1 Co. 22 ; *Vernon's Case*, 4 Co. 1.

The wife of cestui que trust not to be endowed. If a rent de novo be granted in tail, without any remainder over, and tenant in tail takes wife, and dies without issue, the wife shall not be endowed : because the thing out of which the dower is to arise, is not in being : secus, if the rent were granted in tail, remainder over. *Chaplin* v. *Chaplin*, 3 P. W. 229.

A man, before his marriage, vests the legal estate in trustees in trust for him and his heirs ; equity will not assist the wife in recovering the dower. *Bottomley* v. *Fairfax*, Pre. Ch. 336.

A wife is not dowable out of the trust of a customary freehold. *Godwin* v. *Winsmore*, 2 Atk. 526.

That a wife is not dowable of a trust estate, is now an established doctrine. *Ib.*

In *Banks* v. *Sutton* (2 P. W. 712), Sir Joseph Jekyll took distinction in regard to a trust, where it descends to the husband from another, and not created by himself ; but Lord Talbot afterwards, in the case of the *Att.-Gen.* v. *Scott* (Forrest, 138) determined directly contrary to this distinction. *Ib.*

It is a dying seised of the husband, and not a seisin during coverture, which entitles the widow to freebench. *Ib.*

G. B., by his will, devised his fee simple and freehold estates to T. L. upon trust to pay several annuities, and amongst others, an annuity of 300*l.* to T. L. himself, his heirs and assigns. On a bill filed by the widow of T. L. against a purchaser of T. L.'s annuity of 300*l.*, seeking to be declared entitled to dower out of it :—Held, that the rent-charge was but an equitable interest, and that the legal and equitable estates not being commensurate, the widow could not by means of her husband's legal estate enforce her right of dower in the annuity of 300*l.* *Lyster* v. *Mahoney*, 1 Dr. & War. 236. And see *Selby* v *Alston*, 3 Ves. 341.

Semble, the court, however anxious to aid the wife's equity against the annuity, has no jurisdiction to take the whole estate into its hands and so administer it as to pay the wife a third of such annuity. *Ib.*

H. devised to trustees her freehold premises situate at B., in trust to receive the rents, and after providing for repairs, &c. and applying part of them towards the maintenance of F. S. to let the residue accumulate until F. S. should attain twenty-one, and then to pay such accumulations to him ; but if he should die under such age, without issue living at his decease, &c., "then such accumulations" should be applied for the benefit of the person to whom, and in the like manner and form as, the premises were limited ; and when F. S. should have attained twenty-one, then the trustees were to stand possessed of the premises in trust for him in fee ; but if he should not leave any issue living at his decease, &c., then the premises were to be held in trust for A. S. in fee ; and if she should not leave any issue, &c., then over. F. S. attained twenty-one, intermarried with E. S., and died intestate, and without ever having had issue :—Held, that upon the death of F. S. without issue, A. S. took an equitable estate in fee determinable in the event of her dying without issue, and that E. S., the widow of F. S. was entitled to dower, notwithstanding that the executory devise over took effect. *Smith* v. *Spencer*, 2 Jur. (N.S.) 778 ; 4 W. R. 729.

—— **Equity of Redemption.**]—A widow is not dowable of an equity of redemption. *Dixon* v. *Saville*, 1 Bro. C. C. 325.

The legal estate of a property being vested in A., for the benefit of himself and B. in equal moieties, he mortgaged it unknown to B. B. afterwards paid off the mortgage, and had the legal estate conveyed to him, subject to such equity of redemption as the lands were subject to :—Held, that there was not such a perfect union of the legal and equitable estate in B.'s moiety of the estate, as to give his widow a title to dower. *Knight* v. *Frampton*, 4 Beav. 10.

A party died in 1830, having vested in him a mortgage in fee, and the lapse of time and circumstances were such as to render it very improbable that any party could establish any right to the equity of redemption :—Held, nevertheless, that the widow was not entitled to dower. *Flack* v. *Longmate*, 8 Beav. 420.

Copyhold.]—A widow of tenant in tail of copyhold is entitled to her freebench, though there is no custom as to the freebench of widows of tenants in tail, but only as to the freebench of widows of tenants in fee. *Doe* d. *Norfolk* (*Duke*) v. *Sanders*, 3 Dougl. 303.

The 3 & 4 Will. 4, c. 105, does not apply to freebench. *Smith* v. *Adams*, 5 De G. M. & G. 712 ; 24 L. J., Ch. 258 ; 18 Jur. 968 ; 2 W. R. 698.

The purchaser of a copyhold held of a manor, the custom of which entitled widows of the copyholders to freebench in one moiety of the lands of which their husbands died seised, and took a surrender, but died before admittance :—Held, that his widow was not entitled to freebench at law or in equity. *Ib.*

Copyholds surrendered to a purchaser to uses

similar to the common uses to bar dower, on which surrender the purchaser was admitted to hold as tenant in fee simple, and continued to hold on that admittance till his death; his devisee is bound by the terms of the admittance, and not entitled to claim as appointee under the surrender, so as to defeat the widow's right to freebench. *Powdrell* v. *Jones*, 2 Sm. & G. 407; 24 L. J., Ch. 123; 3 Eq. R. 63; 18 Jur. 1111; 3 W. R. 32.

The 3 & 4 Will. 4, c. 105, does not extend to copyholds. *Ib.*

A., by a settlement on his marriage with B., in order to make some provision for B., in case she should survive him, settled a copyhold estate upon himself for life, with remainder to B. for life:—Held, that B.'s right to freebench out of other copyholds, of which A. died, seised and intestate, was not barred by the settlement. *Willis* v. *Willis*, 34 L. J., Ch. 313; 13 W. R. 533.

A widow's freebench is not subject to her deceased husband's debts. *Spyer* v. *Hyatt*, 20 Beav. 621; 1 Jur. (N.S.) 315; 3 W. R. 294.

A widow held not entitled to freebench out of a moiety of copyholds to which her husband was seised in remainder, subject to an existing life estate. *Ib.* And see *Goodwin* v. *Winslow*, 2 Atk. 256.

—— **Customary Lands.**]—By the custom of a manor, as settled by Car. 1, the widow of a copyholder is entitled to dower out of all the customary lands of which her husband was tenant during the coverture, although he did not die tenant, such lands having been aliened during the coverture by the husband alone, without the wife having been examined in court, or having joined in the surrender. *Doe* d. *Riddell* v. *Gwinnell*, 1 G. & D. 180; 1 Q. B. 682; 10 L. J., Q. B. 212. S. P., *Riddell* v. *Jenner*, 10 Bing. 29; 3 M. & Scott, 673; 2 L. J., C. P. 248.

—— **Gavelkind Tenure.**]—The 3 & 4 Will. 4, c. 105, extends to lands of gavelkind tenure in Kent. *Farley* v. *Bonham*, 2 Johns. & H. 177; 30 L. J., Ch. 239; 7 Jur. (N.S.) 232; 3 L. T. 806; 9 W. R. 299.

—— **Equitable Interest.**]—The widow of the cestui que trust of a copyhold estate shall have her free bench, as well as if her husband had had the legal estate. *Otway* v. *Hudson*, 2 Vern. 585. S. P., *Banks* v. *Sutton*, 2 P. W. 712. Overruled, id. 719, n.

A widow shall not have freebench of trust estate in a copyhold; the entry of the widow as guardian to the son, does not prevent his having such a seisin as to convey title to his customary heir. *Forder* v. *Wade*, 4 Bro. C. C. 521.

Mines.]—Dower is due of mines wrought during the coverture, whether by the husband or by lessees for years; whether paying pecuniary rents or rents in kind; and whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the land of others. *Stoughton* v. *Leigh*, 1 Taunt. 402; 11 R. R. 810.

Semble, that a widow dowable of the real estate of her husband, not having done any act to preclude her from doing so, may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but that she is not entitled to one-third of the royalties as corpus. *Dicken* v. *Hamer*, 1 Dr. & Sm. 284; 29 L. J., Ch. 778.

Timber.]—If timber be cut down upon estates, of which a widow is dowable, before her dower is set out by metes and bounds, the dowress is entitled during her estate to the income arising from one-third of the fund produced by the sale of the severed timber. *Bishop* v. *Bishop*, 10 L. J., Ch. 302.

Trust Estate or Mortgage.]—A. devises a trust estate to B. and his heirs, and dies; B. dies; the wife of B. cannot be endowed of it. *Att.-Gen.* v. *Scott*, Forrest, 138.

Where the husband was only a trustee, it was held, that the wife was barred of her dower, though contrary to *Nash* v. *Preston* (1 Cro. 191). And such was said to be the constant practice of the court. *Noel* v. *Jevon*, 2 Freem. 43.

A party died in 1830, having vested in him a mortgage in fee, and the lapse of time and circumstances were such as to render it very improbable that any party could now establish any right to the equity of redemption:—Held, nevertheless, that the widow was not entitled to dower. *Flack* v. *Longmate*, 8 Beav. 420.

Shares.]—The shares in the navigation of the river Avon, under the statute 10 Ann, are real estates, and subject to dower. *Buckeridge* v. *Ingram*, 2 Ves. J. 652.

Mines—Other Lands.]—Dower may be assigned of mines, either collectively with other lands, or separately of themselves: it must be assigned by metes and bounds, if practicable: otherwise, either by a proportion of the profits, or separate alternate enjoyment of the whole for short proportionate periods. *Ib.*

—— **Open Mines.**]—If land assigned for dower contains an open mine, a tenant in dower may work it for her own benefit. *Stoughton* v. *Leigh*, 1 Taunt. 402; 11 R. R. 810.

A. died intestate, seised of real estates under which were seams of coal, but no mines had been opened at the time of his death. Upon a bill being filed in equity by his infant daughter and heiress-at-law by her next friend for the administration of his estate, it was by the order of the court declared that the intestate's widow was entitled to dower out of his freehold estates, and it was referred to the master to inquire what was due to the widow for dower from the death of the intestate, and the widow was appointed receiver of the rents and profits of the estate, and was directed to pay the interest of a sum to be raised by mortgage, to retain a sum for the maintenance of the infant, and to pay the residue of the rents and profits into court to the account of the infant, and the master was ordered to prosecute an inquiry directed by a decree on the hearing, respecting the leasing the estates for coal mines. Under an order of the court the widow, as receiver, felled poles and small timber on the real estate, and accounted for the proceeds of the sale in passing her accounts. Afterwards the widow again married. The master found it would be fit that the whole estate should be let for coal mines. An order was made approving of a provisional agreement entered into for a lease, and directed that the agreement should be carried out by a lease to be settled in chambers. A lease was afterwards settled, in which the infant granted and demised, and the widow as guardian, with the consent of her second husband, granted, demised, leased, and confirmed all the mines

under the estate, except within a certain area round a house, the rents and royalties (and a rent or sum of 4*l.* 4*s.* for every acre of the surface used for raising coal) being reserved to the infant. All the covenants were entered into by or with the infant:—Held, that the proceedings which had taken place did not amount to an assignment of dower. *Dicken* v. *Hamer*, 1 Dr. & Sm. 284; 2 L. T. 276.

When land belonging to an infant, subject to his mother's right of dower, was taken by a railway company, and the purchase money, as determined by two valuers, was paid into court:—Held, that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the fund in court. *Hall's Estate, In re*, 39 L. J., Ch. 392; L. R. 9 Eq. 179.

Assignment—Of Excessive Dower.]—If the heir, being of full age, assigns excessive dower, he has no remedy at law; if the sheriff assigns excessive dower, the heir may have a scire facias to obtain an assignment de novo; or if the heir under age assigns excessive dower, he may have relief by writ of admeasurement of dower. *Buckeridge* v. *Ingram*, 2 Ves. 652.

—— **Fraud of Sheriff.**]—Equity will relieve against a fraudulent and partial assignment of dower by the sheriff. *Hoby* v. *Hoby*, 1 Vern. 218; 2 Ch. Ca. 160. And see *Sneyd* v. *Sneyd*, 1 Atk. 442.

—— **Ascertaining Lands.**]—Where a widow claims dower merely upon a legal title, but cannot ascertain the lands, equity will assist her to find them out. *Dormer* v. *Fortescue*, 3 Atk. 130. *See* col. 1258.

Non-Assignment.]—The heir, on the death of his ancestor in possession, may enter and remove everybody, except the widow, who has a right to stay until her dower is assigned to her. *Lloyd* v. *Trimleston* (*Lord*), 2 Moll. 81.

—— **Removability of Widow.**]—If dower has not been assigned, a widow has not such an interest in her husband's lands, of which she was dowable, as to render her immovable from the parish in which such land lies. *Rex* v. *Northweald Bassett*, 4 D. & R. 276; 2 B. & C. 724.

2. How Barred or Released.

a. Alienation.

See Dower Act, 1833, s. 4.

Freeholds.]—If a man, previously to marriage, contract to sell an estate, and marries before the conveyance is executed, his wife is not dowable out of the estate. *Loyd* v. *Loyd*, 2 Con. & L. 592; 4 Dr. & War. 354.

Purchase for value, without notice, is not a defence to a suit instituted to enforce a mere legal right, such as dower. *Corry* v. *Cremorne*, 12 Ir. Ch. R. 136.

Plea of purchase for valuable consideration, not good to a bill for dower. *Williams* v. *Lambe*, 3 Bro. C. C. 264.

Certain lands were conveyed to A. B., his heirs, &c., to such uses as C. D. should by deed appoint, and in default of, and until appointment, to the use of C. D. in fee. Afterwards C. D., in execution of power, appoints lands in favour of E. F. in fee; C. D. was married at time of making the appointment. Quære, is wife dowable. *Ray* v. *Pung*, 5 Madd. 310:—Held, she is not. *S. C.*, 5 B. & Ald. 561.

Copyholds.]—If a husband became entitled to copyhold estates by copy of court roll, and granted them out again by copy of court roll, his wife is not entitled to dower out of those estates. *Sneyd* v. *Sneyd*, 1 Atk. 442.

A copyholder for life, where by the custom there is a widow's estate, agrees to sell for his own life, and the life of such widow as he should leave at his death; his widow not bound by this agreement. *Musgrave* v. *Dashwood*, 2 Vern. 45.

Copyholder having power to bar the widow's freebench by surrender, any act by him for valuable consideration will bar her in equity. *Brown* v. *Raindle*, 3 Ves. 256.

Copyhold land purchased by the husband was surrendered to the use of him and his assignees for life, and after his decease to the use of such person for such estate and upon such trust as he by any surrender or by will should surrender or devise; and in default of such surrender or devise, and so far as the same, if incomplete, shall not extend to the use of the husband, his heirs, and assigns for ever at the will of the lord, &c. The husband was admitted in fee, and by will devised the land to a trustee on trust for sale. By the custom of the manor, the title of the wife could only be destroyed by her voluntary surrender:—Held, that she was entitled to her customary dower. *Powdrell* v. *Jones*, 2 Sm. & G. 407; 24 L. J., Ch. 123; 18 Jur. 1111; 3 Eq. R. 63; 3 W. R. 32.

The Statute of Dower, 3 & 4 Will. 4, c. 105, does not extend to copyholds. *Ib.*

Copyholder contracts, for valuable consideration, to sell to his son, and dies before actual surrender; the son held entitled to performance, and to compel the widow to surrender free bench. *Hinton* v. *Hinton*, 2 Ves. 631; Ambl. 277.

b. Testamentary Gifts.

See Dower Act, 1833, s. 7.

General Principle.]—As the right of dower is itself a clear legal right, an intent to exclude that right must be demonstrated by express words, or by clear and manifest implication. *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 452.

In order to exclude such right, the instrument must contain some provision inconsistent with the assertion of the right to demand dower. *Ib.*

Election.]—In determining the obligation of the widow to elect, the court will regard the intention of the testator apparent on the whole of the will. *Warburton* v. *Warburton*, 2 Sm. & G. 163; 23 L. J., Ch. 467; 2 Eq. R. 414; 18 Jur. 415; 2 W. R. 300.

The amount of the provision made by the will is a material circumstance in indicating the testator's intention. *Ib.*

A married woman can elect, so as to affect her interest in real property without deed acknowledged under 3 & 4 Will 4, c. 74, and where she has so elected, the court can order a conveyance accordingly; the ground of such order being that no married woman shall avail herself of fraud. *Barrow* v. *Barrow*, 4 Kay & J. 409; 4 Jur. (N.S.) 1049; 6 W. R. 714.

Whether a wife electing by answer to take her

dower, and not under her husband's will, is bound by such election. *Johnson* v. *Richardson*, Romilly's Notes of Cases, 78.

C., by will, directed that the annual interest only of all the residue of his property should be divided into as many equal parts as there might be children living of W. and his wife, as each came of age; and in case any one of them should die without any children, then his or her share of the annual interest should devolve to the surviving children, share and share alike, and so on successively until the whole amount of the interest of the residue came into the hands of the grandchildren and great grandchildren of W. and his wife. C. bequeathed to his wife, "upon condition of her making no claim upon the residue," an annuity for life; but if she made any claim upon the residue of his property, he bequeathed unto her no part of his property (the annuity was not to be paid); and he directed that all property reverting to his estate, whether leasehold or copyhold property, should, as soon as the amount was obtained, be immediately invested, and the interest to be received for the children of W.:—Held, that the widow was entitled to dower and also to the annuity; that the children of W. living at the death of the testator were entitled, as tenants in common for life, to the income of the real and personal estate, with remainder to all the children of such children, as tenants in common, absolutely; and that in case any child of W. should die without having had a child, his or her share would belong to the survivors for life, and to the children of the survivors absolutely. *Wetherell* v. *Wetherell*, 8 Jur. (N.S.) 814; 7 L. T. 89; 10 W. R. 818.

A testator devised all and singular his freehold and copyhold estates upon certain trusts for the benefit of his family, subject to an annuity to his wife during widowhood, and bequeathed to her the use of his household goods and furniture, also during widowhood:—Held, that she was entitled both to the annuity and to her dower. *Dowson* v. *Bell*, 1 Keen, 761; 1 Jur. 471. S. P., *Harrison* v. *Harrison*, 1 Keen, 765; 6 L. J., Ch. 276.

An annuity is given to a wife in bar of dower, which annuity is to be applied for the maintenance of herself and her children. She may renounce the annuity, take her dower, and yet take any other benefit given her by the will. *Brown* v. *Parry*, Romilly's Notes of Cases, 84; 2 Dick. 685.

Examples.]—A testator, by his will (made in 1861), devised all his real estate and bequeathed his personal estate to trustees upon trusts for sale and conversion; and he directed his trustees, out of the proceeds of such sales, to pay his debts and funeral and testamentary expenses, and to invest the surplus, and out of the income of the investments to pay an annuity to his widow, and subject to such annuity to stand possessed of the investments upon trusts for the benefit of his children. The testator (who had married after the Dower Act came into operation) died entitled to freeholds and copyholds which he had purchased. The conveyances of the freeholds were not made to uses to bar dower, nor did they contain any declaration against dower. The copyholds had not been surrendered to the uses of his will:—Held, that the widow was barred of any right to dower both by s. 4 and by s. 9 of the Dower Act. *Lacey* v. *Hill*, 44 L. J., Ch. 215; L. R. 19 Eq. 346; 32 L. T. 48; 23 W. R. 285.

Held, also, that she was deprived of any right to freebench by virtue of the Wills Act, s. 3. *Ib.*

A testator made various bequests in favour of his wife, including some property to which she was entitled in her own right, and he also gave her an annuity, charged on specified real estate in lieu of dower and free-bench. The wife survived her husband, and during her life received the benefits given her by the will, but never elected whether to take under or against the will, and died intestate, leaving four next of kin, three of whom elected to take under the will, while the fourth, who was her administrator, elected to take against it:—Held, that each of the next of kin had a separate right of election, that neither the election of the majority nor that of the heir and administrator bound the others, and that in taking the accounts on such election the annuity specifically charged in lieu of dower must be brought into account, credit being given for the due proportion of dower. *Fytche* v. *Fytche*, L. R. 7 Eq. 494; 19 L. T. 343.

A widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband, "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower. *Roper* v. *Roper*, 3 Ch. D. 714; 35 L. T. 155; 24 W. R. 1013.

A. seised in fee, devises his houses and demesnes to his wife for her life, at a rent below the actual value, she keeping the same in repair, and not aliening except to the persons in remainder; A. devises the residue of his estate, together with the remainder, after the death of his wife, to B. in fee; the wife electing to take the house and the demesne under the will, cannot have dower thereout, but is entitled to dower out of the residue of the estate. *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444.

Testator gave his wife real and personal estate, in bar, &c., of all dower or thirds which she can have or claim in or out of any part of his real and personal estate, or either of them; he gave the residue to four persons, and afterwards, by codicil, directed them to dispose thereof in charities; part of the residue being invested in real securities, goes according to the statute as undisposed of, and the widow is not barred. *Pickering* v. *Stamford* (*Lord*), 3 Ves. 332. Affirmed, *Id.* 492.

A husband having power to jointure the wife, executes that power by will, and dies seised of estates over which the power did not extend; though the testator did not express an intention that the wife should take the jointure in bar of dower, yet she shall not take both jointure and dower, but shall make election. *Fust* v. *Fust*, Romilly's Notes of Cases, 90.

A widow will not be barred of her dower by a provision made by will, unless there be a clear indication of the testator's intention, or unless some other part of the disposition of his property would be defeated by the widow's taking both. The testator having given all his real and personal estate on trust, in the first place, to pay such provision to the wife is not itself a sufficient indication of such intention. *Thompson* v. *Nelson*, 1 Cox, 447.

Devise or bequest, unless so expressed, does not bar wife's dower. *Brown* v. *Parry*, Dick. 685.

Rent charge devised to a wife not a bar of dower, unless so expressed, or the circumstances such as to show it must be so intended. *Pearson* v. *Pearson*, 1 Bro. C. C. 292.

A. devises lands in trust to pay one-third of the rents to his wife in satisfaction of dower, until his son, then two years old, attains twenty-one. The wife receives a third of the rents from the trustees, and dies; and afterwards the son dies during his infancy. The administrator of the wife shall have her third of the rents till such time as the son might have attained twenty-one. *Coates* v. *Needham*, 2 Vern. 65.

Devise of residue of personal estate to his wife bars not her claim to dower. *Ayres* v. *Willis*, 1 Ves. 230.

A., by will, gave his wife a specific personal legacy, and devised to her a remainder for life in his real estate, in default of issue. This devise is not inconsistent with the widow's claim of dower, so as to overturn the will (as in *Noys* v. *Mordaunt*, 2 Vern. 581), for the widow takes but a temporary excrescent interest, and shall not be excluded. So decreed, on the authority of *Lawrence* v. *Lawrence* (1 Bro. P. C. 591). *Incledon* v. *Northcote*, 3 Atk. 436.

Devise of lands to a man's wife who was entitled to dower, without saying in recompense or satisfaction of her dower, held to be a voluntary gift, and no bar of dower. *Hitchin* v. *Hitchin*, Pre. Ch. 133.

Where the devise of land is in trust for sale, the mode of applying the proceeds does not affect the question, whether the widow is entitled to her dower. *Ellis* v. *Lewis*, 3 Hare, 314; 13 L. J., Ch. 210; 8 Jur. 771.

Where a testator by his will provides amply for his widow, giving her a portion of his estate for her life, and also an annuity charged upon his general estate with powers of distress and entry in case of non-payment, and there was also contained in the will a leasing power for the trustees thereof, which overrode the entire freehold estate, these circumstances were held sufficient to indicate an intention to exclude the testator's widow from her dower. *Hall* v. *Hill*, 1 Dr. & War. 94; 1 Con. & L. 120; 4 Ir. Eq. R. 27.

A power to lease and manage his real estate, given by a testator to his trustees, does not, by itself, raise an implication of the testator's intention to exclude his wife from dower. *Warburton* v. *Warburton*, 2 Sm. & G. 163; 23 L. J., Ch. 467; 18 Jur. 415; 2 Eq. R. 414; 2 W. R. 800.

Powers of or trusts for sale created by will over real estate are not (as leasing powers have been held) inconsistent with a widow's right to dower. *Bending* v. *Bending*, 3 Kay & J. 57; 26 L. J., Ch. 469; 3 Jur. (N.S.) 535; 5 W. R. 435.

There is no such rule as that, where a testator's widow is entitled under his will to what would exceed her dower, she is thereby put to her election. *Ib.*

Nor is her claim affected by any direction as to the distribution of the proceeds. *Ib.*

In two manors in Durham there is no custom or surrendering to the uses of the will but the tenant divests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeasance, that the surrender is to the uses of the surrenderor's will. In this case, the father and maternal grandfather of the testator R. N. both being copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeasance. The legal estate in both descended to the testator. But with regard to the tenements in the manor of H., they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator R. N. in fee. The widow being alive at the time the testator, R. N., made his will, and died, it was held, that the copyholds in the manor of H. passed by his will. With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees upon trust for the testator R. N.:—Held, that there being nothing to separate the legal estate and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor:—Held, that his widow was entitled to free-bench. *Nicholson* v. *Nicholson*, Taml. 319.

Where a testator, by will, made a provision for his wife, who was married to him before 1834, but did not declare that the provision was to be in bar of dower:—Held, that the wife was not dowable out of freeholds which the testator had devised to trustees, with a discretionary power of sale, and power to let from year to year in the meantime. *Taylor* v. *Linley*, 5 Jur. (N.S.) 701.

A testator made a provision for his widow, expressly in lieu and satisfaction of any estate or interest to which she might be entitled as his widow, out of his real and personal estate. The widow enjoyed this provision, but in ignorance of her right to dower:—Held, that the lapse of sixteen years after the testator's death had not affected her rights. *Sopwith* v. *Maughan*, 30 Beav. 235.

A husband, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees, upon certain trusts, being partly for the benefit of his widow:—Held, that the widow was deprived of her right to dower by 3 & 4 Will. 4, c. 105, s. 9. *Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466; 20 L. T. 938; 17 W. R. 907.

Legacy in Satisfaction of — Abatement — Priority.]—A testator married after the 1st of January, 1834, devised all his real estate to his son, and bequeathed to his widow an annuity in satisfaction of her dower. At the date of his death he was seised of lands out of which, but for his will, his widow would have been dowable. The personal estate being insufficient to pay all the legacies in full, the widow claimed, under s. 12 of the Dower Act, 1833 (3 & 4 Will. 4, c. 105), to be paid her annuity in priority over the other legacies:—Held, that alienation by a husband in his lifetime, and alienation by his will, were placed by s. 4 of the act on identically the same footing, and that the right of the widow to priority was not preserved by s. 12 of the act. Dictum in *Roper* v. *Roper* (3 Ch. D. 714), dissented from. *Greenwood, In re, Greenwood* v. *Greenwood*, 61 L. J., Ch. 558; [1892] 2 Ch. 295; 67 L. T. 76; 40 W. R. 681.

Evidence of Election.]—In a writ of dower, in support of a plea of election by the widow to take an annuity secured to her by deed in lieu of dower, the tenant proved a receipt by the demandant, after issue joined and before trial, of

certain dividends mentioned in the deed:—Held, that this, standing alone, was not sufficient evidence to warrant the court in holding (after verdict for the demandant) that the demandant had elected to take the annuity in satisfaction of her dower. *Slatter* v. *Slatter*, 1 Scott, 82; 1 Bing (N.C.) 259; 4 L. J., C. P. 25.

Held, also, that an order made in a suit in equity to which the tenant was no party, and which contained a proviso that the receipt of the money by the demandant should be without prejudice to her right to dower, was admissible to show quo animo she received it. *Ib.*

Priority of Electing Wife over other Legatees.]—A widow dowable out of her husband's lands, having elected to take an annuity given by the will in lieu of dower, the testator's estate being insufficient to pay the legacies in full, is entitled to priority over the other legatees. *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421.

But not if the husband's only real estate was conveyed to him with a declaration against dower. *Roper* v. *Roper*, 3 Ch. D. 214; 35 L. T. 155; 24 W. R. 1013.

c. Dower Uses.

Conveyance to such uses as A. shall appoint, and for default of appointment to him in fee, a mode used to prevent dower. *Maundrell* v. *Maundrell*, 10 Ves. 263.

Husband having power of appointment paramount to right of dower, in default thereof to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser taking a conveyance adapted to pass the interest in the estate as a limitation in fee, was held to take in that way, not by way of appointment, and therefore subject to dower. *S. C.*, 22; 7 Ves. 567. And see *S. C.*, 10 Ves. 246.

A widow, married since the operation of the Dower Act, is entitled to dower out of lands conveyed to her husband before the passing of that act (he being then married), with the ordinary uses to bar dower. *Fry* v. *Noble*, 24 L. J., Ch. 591; 1 Jur. (N.S.) 767; 3 W. R. 599.

And see DECLARATION, infra.

d. Declaration.

See the Dower Act, 1833, ss. 6, 7.

When a Bar.]—A widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband, "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower. *Roper* v. *Roper*, 3 Ch. D. 714; 35 L. T. 155; 24 W. R. 1013.

Dower of a woman, married after the Dower Act, 3 & 4 Will. 4, c. 105, out of an estate made subject to dower by that statute:—Held, not to be excluded by a declaration against dower contained in a conveyance prior to the act. *Fry* v. *Noble*, 20 Beav. 598; 24 L. J., Ch. 591; 1 Jur. (N.S.) 767; 3 W. R. 599. Affirmed, 7 De G. M. & G. 687; 25 L. J., Ch. 144; 2 Jur. (N.S.) 128; 4 W. R. 145.

In 1827 freeholds were conveyed to A. B., a married man, to the usual uses to bar dower, "to the intent that his then present or any future wife might not be entitled to dower." In 1834 the Dower Act passed, giving dower out of estates thus limited (s. 2), but allowing the right to be defeated by a declaration against dower in the conveyance (s. 6), and providing that the act should not extend to any widow married before 1834, or give to any deed previously executed the effect of defeating any right of dower. A. B. contracted a second marriage in 1838, and died seised:—Held, that the declaration in the conveyance did not defeat the second wife's right to dower out of the estate. *Ib.*

In order to prevent a widow from having dower out of lands purchased by her husband, a declaration contained in the deed of conveyance that she shall not be dowable is sufficient, under the 3 & 4 Will. 4, c. 105, s. 6, and the deed need not be executed by the husband. *Fairley* v. *Tuck*, 27 L. J., Ch. 28; 3 Jur. (N.S.) 1089; 6 W. R. 9.

Dower of a woman whose marriage was since 1 January, 1834:—Held, following *Fry* v. *Noble* (supra), not excluded by the ordinary limitations to uses to bar dower in a conveyance before the 4 & 5 Will. 4, c. 105. *Clarke* v. *Franklin*, 4 Kay & J. 266; 6 W. R. 836.

A general devise of real estate is a bar to the widow's dower under the Dower Act, s. 4, and a devise in trust for sale and conversion, with a direction to pay an annuity out of the proceeds to the widow during her life is a like bar under s. 9. *Lacey* v. *Hill*, 44 L. J., Ch. 215; L. R. 19 Eq. 346; 32 L. T. 48; 23 W. R. 285.

A husband, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of his widow:—Held, that the widow was deprived of her right to dower by 3 & 4 Will. 4, c. 105, s. 9. *Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466; 20 L. T. 938; 17 W. R. 907.

Dower of a woman, married after 3 & 4 Will. 4, c. 105, out of an estate made subject to dower by that statute, is not excluded by a declaration against dower contained in a conveyance prior to the act. *Fry* v. *Noble*, 20 Beav. 598; 24 L. J., Ch. 591; 1 Jur. (N.S.) 767; 3 W. R. 599. Affirmed on appeal, 7 De G. M. & G. 687; 25 L. J., Ch. 144; 2 Jur. (N.S.) 128; 4 W. R. 145. S. P., *Clarke* v. *Franklin*, 4 Kay & J. 266; 6 W. R. 836.

Freebench.]—Freebench can be barred by a mere devise without a surrender to the use of the will. *Lacey* v. *Hill*, supra.

A testator, by his will (made in 1861), devised all his real estate and bequeathed his personal estate to trustees upon trusts for sale and conversion; and he directed his trustees, out of the proceeds of such sales, to pay his debts and funeral and testamentary expenses, and to invest the surplus, and out of the income of the investments to pay an annuity to his widow, and subject to such annuity to stand possessed of the investments upon trusts for the benefit of his children. The testator (who had married after the Dower Act came into operation) died entitled to freeholds and copyholds which he had purchased. The conveyances of the freeholds were not made to uses to bar dower, nor did they contain any declaration against dower. The copyholds had not been surrendered to the uses of his will:—Held, that the widow was barred of any right to dower both by s. 4 and by s. 9 of the Dower Act. *Ib.*

Held also, that she was deprived of any right to freebench by virtue of the Wills Act, s. 3. *Ib.*

e. Deed of Wife.

A surrender by the wife of a copyholder with his consent, and after having been separately examined to the use of a purchaser from the assignees of the husband who had become bankrupt, held effectual to bar her right of freebench, if any such existed, by special custom, although at the time of such surrender the purchase not having been completed, the purchaser had not any legal estate in the premises. *Wood* v. *Lambirth*, 1 Ph. 8 ; 5 Jur. 741.

The wife joins in a mortgage, and levies a fine to bar her dower, and in consideration thereof the husband agrees the wife shall have the equity of redemption in lieu of her dower, and afterwards he makes a second mortgage : this agreement was fraudulent as against the second mortgagee, so far as to entitle the wife to the whole equity of redemption, but decreed she should have her dower, notwithstanding the fine. *Dolin* v. *Coltman*, 1 Vern. 294.

Tenant in tail, and his wife, join in a mortgage of the husband's estate, by lease and release, and fine : the proviso reserves the redemption to the husband and wife and their heirs, &c., but the latter part of the deed declares the uses of the fine after payment of the mortgage to the husband and his heirs : the husband dies :—Held, the husband was solely entitled to the estate, and the wife had only a power of redemption to secure her dower. *Jackson* v. *Parker*, Ambl. 687.

A widow of an intestate, whose estate was being administered in chancery, being entitled to dower out of his estate, joined with her infant daughter, who was the intestate's heiress-at-law, in granting a lease of unopened coal mines, all the covenants and reservations being entered into between the infant and the lessee. The widow, who was appointed guardian of her daughter, received the rents and royalties from the coal mines, and paid them into court on her daughter's account. Some time afterwards she claimed dower out of the coal rents and royalties :—Held, that the widow stood in the same position as a tenant for life of the property as to one-third ; and although she had no power to open mines herself, she had power to prevent the remainderman from opening them, but that the effect of the lease and the transactions between the parties was such as to prevent the widow from supporting her claim to dower. *Dicken* v. *Hamer*, 29 L. J., Ch. 778 ; 2 L. T. 276.

By a deed to which a husband and wife were parties, the equity of redemption of the husband was conveyed in lands. The deed recited that the husband and wife had both agreed to join in it, and that the wife intended to acknowledge it, in compliance with the 3 & 4 Will. 4, c. 74, and it was executed by husband and wife and acknowledged by the wife, but her name was not inserted as a co-grantor, nor in the covenants for title :—Held, that, notwithstanding the omission, the wife had extinguished her right to dower. *Dent* v. *Clayton*, 33 L. J., Ch. 503 ; 10 Jur. (N.S.) 671 ; 10 L. T. 865 ; 12 W. R. 903.

Refusal of Wife to Join in Releasing.]—A lessee, who was married in 1832, created a term by way of mortgage of the lands comprised in his lease, and subsequently acquired the fee. He afterwards became bankrupt. Subsequently, by a deed made between his assignees, the mortgagor and the mortgagee, in consideration of the release by the latter of his mortgage debt, the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. The wife of the mortgagor was joined as a party to the deed for the purpose of releasing her right of dower, but she refused to execute it, and after her husband's death she filed a bill to enforce her right to dower :—Held, that, as the widow had not executed the deed, the term was not satisfied, and that it protected the mortgagee against her claim to dower. *Anderson* v. *Pignet*, 42 L. J., Ch. 310 ; L. R. 8 Ch. 180 ; 27 L. T. 740 ; 21 W. R. 150.

A wife, married before the Dower Act, joined, for the purpose of releasing her dower, with her husband in mortgaging his freehold estate to secure his debt. By the mortgage deed the equity of redemption was reserved to the husband :—Held, that the wife's right to dower was extinguished in equity as well as at law, and that she had no right to redeem the estate. *Dawson* v. *Bank of Whitehaven*, 46 L. J., Ch. 884 ; 6 Ch. D. 218 ; 37 L. T. 64 ; 26 W. R. 34.

Held, also, that, as she had pledged no estate recognised by a court of equity, and had undertaken no personal liability on behalf of her husband, she had no right in the character of a surety for his debt to have the value of her dower made good after his death out of the surplus proceeds of sale of the property which had been during his life sold by the mortgagee under a power of sale contained in the mortgage deed. *Ib.*

Release by Widow to Mortgagee—Re-conveyance.]—The owner in fee of certain lands died intestate, leaving a widow entitled to dower thereout. The heir-at-law executed a mortgage of the lands to secure a sum of money advanced to him by a building society. The widow was a party to the mortgage deed, by which, "for the purpose of extinguishing her right to dower," she granted and released the lands to the mortgagees, the trustees of the building society. It was provided by the deed that, upon repayment of the moneys secured thereby, a receipt should be endorsed thereon in the form given by 6 & 7 Will. 4, c. 32, to the intent that the deed should be vacated and the property comprised therein be revested in the person or persons for the time being interested in the equity of redemption therein. The moneys secured by the deed having been repaid, and the statutory receipt indorsed thereon :—Held, that the widow was, notwithstanding the release of her dower contained in the mortgage deed, entitled to have dower assigned to her out of the premises comprised in the deed. *Dawson* v. *Bank of Whitehaven* (6 Ch. D. 218) distinguished. *Meek* v. *Chamberlain*, 51 L. J., Q. B. 99 ; 8 Q. B. D. 31 ; 46 L. T. 344 ; 30 W. R. 228.

Joint Agreement to execute Settlement.]—Marriage articles were executed by a tenant in tail in remainder and his intended wife, whereby he agreed to execute, when he should become entitled in possession, a legal post-nuptial settlement to secure her a jointure of a specified amount ; he subsequently became entitled in possession, but died without executing any such settlement :—Held, that the articles were in equity a bar to the wife's right of dower. *Pennefather* v. *Pennefather*, Ir. R. 6 Eq. 171.

f. Incontinence.

Birth of Bastard Child.]—By the common law of the Isle of Man, confirmed by an ordinance of

the court of tynwald and governor in 1687, a widow is entitled to dower only "dum sola et casta vixerit," and was held to have forfeited it by the birth and affiliation of a bastard child. *Cain* v. *Cain*, 2 Moore, P. C. 222.

A wife forfeits her dower under the 13 Edw. 1, c. 34, by her adultery, though it may have been brought about by the misconduct of her husband. *Bostock* v. *Smith*, 34 Beav. 57. And see *Walker, In re*, Ll. & G. t. Sugd. 326.

Commission of Adultery.]—If a woman leaves her husband of her own free will, and afterwards lives in adultery, she forfeits her claim to dower. *Hetherington* v. *Graham*, 3 M. & P. 399 ; 6 Bing. 139 ; 7 L. J. (O.S.) C. P. 253 ; 31 R. R. 361.

A woman forfeits her dower, under 13 Edw. 1, c. 34, by adultery, without reconciliation, even though she originally departed from her husband's house in consequence of his cruelty. *Woodward* v. *Dowse*, 10 C. B. (N.S.) 722 ; 31 L. J., C. P. 70 ; 8 Jur. (N.S.) 413 ; 9 W. R. 870.

—— **Divorce on Ground of Husband's Misconduct.**]—A wife having obtained a decree for dissolution of marriage in the court for divorce and matrimonial causes on the ground of her husband's misconduct :—Held, by so doing to have lost her right to dower. *Frampton* v. *Stephens*, 51 L. J., Ch. 562 ; 21 Ch. D. 164 ; 46 L. T. 617 ; 30 W. R. 726. *And see* col. 798.

g. Settlement.

Attitude of Equity.] — Equity will execute a contract in bar of dower entered into before marriage, by an adult woman not under disability, where such contract is reasonable, although by its terms the lady, being left a widow, has no provision out of her husband's property, and the provision made for her out of her own is insufficient to support her in her rank of life. The court, however, will see that the widow gets what she contracted for in lieu of dower. *Herons, In re*, Fl. & K. 330.

Equity makes no distinction between the right of dower and other rights. The dictum in *Power* v. *Shiel* (1 Moll. 296), considered. *Ib.*

After-acquired Lands.]—An ante-nuptial settlement recited that the intended wife was entitled to certain choses in action, and that the intended husband being then in trade, it was considered more beneficial for the parties that he should not for the present make any settlement of any part of his property. The choses in action were then conveyed to a trustee in trust to pay the interest, &c., arising from them to the husband for life, and after his death to assign them to the wife if she should survive, but if not to assign them to him ; but in case he should secure to her, at any time thereafter, an annuity of 250*l.* during her life, then in trust to assign the choses in action to him, "such annuity to be taken by the wife in lieu and bar of dower, and thirds or claim to any share of his personal estate under the Statute of Distributions." The husband, subsequently to the marriage, acquired, by purchase, the lands of T. in fee farm, and died without having secured to the wife the annuity of 250*l.* :—Held, that she was entitled to dower out of the lands of T. *Robinson* v. *Wilson*, 13 Ir. Eq. R. 168.

Lands, the property of A., held under leases for lives renewable for ever, and long terms for years, were, upon the marriage of A. with B., conveyed to trustees, upon trust to pay the yearly rents, issues, and profits to A. for his life, so long as he should continue solvent and able to support and maintain B., and no longer ; and from and after his death, or his becoming insolvent, failing in his trade, or being unable to support the said B., then to pay the said rents and profits to B., for her life, for her own sole and separate use, &c. :—Held, that this settlement did not bar B.'s right to dower out of fee simple estates acquired by A. subsequently to his marriage. *Fyan* v. *Henry*, 2 Dr. & Wal. 556.

—— **Copyhold Subsequently Purchased.**] — Covenant by deed before marriage to settle on his wife, if she survive, part of the real estate for her jointure, and in full recompense of all dower or thirds which she can any way claim, &c., out of any lands, &c., of which he is or shall be seised, of freehold or inheritance, she is thereby barred from claiming as her freebench copyhold purchased afterwards. *Walker* v. *Walker*, 1 Ves. 54.

Provision out of Moiety.] — By marriage articles the intended husband covenanted that in case he should die in the lifetime of his intended wife without issue by her, she should be entitled to one-half of what property real or personal he should die seised or possessed of ; and that in preference to any creditor of his, or to any deed or will which he might make or execute in his lifetime contrary to the true intent and meaning of the articles. There was no issue of the marriage, and the husband died, leaving his wife surviving. She is not entitled, in addition to the moiety of her husband's real and personal estate given to her by the articles, to dower out of the other moiety of his real estates of inheritance. *Hamilton* v. *Jackson*, 2 Jo. & Lat. 295 ; 8 Ir. Eq. R. 195.

Husband's Mother Surviving Wife.]—By the settlement made on the marriage of a female infant, an estate was settled on the husband's mother for life, remainder to the husband for life, remainder to the wife for life, with remainder in bar of dower ; the settlement will not bind the wife in regard the mother might (which she did) survive the husband. *Caruthers* v. *Caruthers*, 4 Bro. C. C. 500.

Acceptance of Future Contingent Provision.] —A future contingent provision accepted by an adult female upon her marriage in lieu of dower is in equity a valid bar to dower. *Herons, In re*, Fl. & K. 330.

Contingency not Estimable.]—The bankrupt, previously to his marriage, entered into a bond, that in case his wife should survive him, and should, within two months after his death, at the costs and charges of his heirs or devisees, release her dower, his heirs or executors should, within three months after his death, pay to her 2,000*l.* The wife survived the bankrupt, but did not within two months after his death release her dower, although she was always ready and willing to do so :—Held, that the bond was **not** provable, either under the first or the last **part** of s. 56, of the 6 Geo. 4, c. 16, inasmuch as the contingency had not happened, and no value could be set upon it. *Davies, Ex parte*, 1 Deac. 115.

Wife bound to see to Husband's Title.]—Where an adult female before marriage agrees to accept in lieu of dower a rent charge, she is bound to see that the grantor has title to the lands charged therewith; and therefore, a purchaser of other lands belonging to grantor, which might otherwise have been liable in case of failure of such security, is not entitled to see by title deeds that grantor has title to such charged lands. *Simpson* v. *Gutteridge*, 1 Madd. 609.

Statute of Distributions — Share under, no Satisfaction.]—Settlement previous to marriage of the wife's fortune on herself, with a covenant by the husband, in consideration of the marriage, &c., and for making some provision for the wife and her issue, to pay within three months after his death, 6,000*l.* to the trustees in trust, if the wife should survive him, and there being no issue (which was the case), to pay 1,500*l.* to the wife, her executors, &c., and to pay the interest of the remaining 4,500*l.* to her for life; she is entitled to dower, and her share under the Statute of Distributions is not a satisfaction or performance of covenant. *Couch* v. *Stratton*, 4 Ves. 391.

Settlement During Wife's Infancy.]—Dower barred by settlement, previous to marriage, but during the infancy of the wife, of stock and leasehold property partly the husband's, partly the wife's. *Williams* v. *Chitty*, 3 Ves. 545.

Precarious provision — Custom of London.]—A provision previous to the marriage of a female infant in bar of dower, thirds, and all claim upon the real and personal estate of the husband, if precarious and uncertain, as that the personal estate shall go according to the custom of London, does not bar her. *Smith* v. *Smith*, 5 Ves. 189.

Unsatisfied Bond.]—By a settlement made on the marriage of an adult female, it was declared that, in consideration of the intended marriage and for providing a competent jointure and provision of maintenance for the wife and issue of the marriage, the father of the husband had paid him 3,000*l.*, and that the husband had given a bond for the payment of 2,000*l.* six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. During the coverture, the husband bought certain lands, which he subsequently sold to a purchaser from whose devisees the defendant purchased, with notice of the settlement: the husband died without satisfying the bond. On a bill by the wife for dower out of the lands so sold:—Held, that her right was barred by the settlement, and that she had no lien or right to resort to the lands for the satisfaction of the amount due on the bond. *Dyke* v. *Rendall*, 2 De G. M. & G. 209; 21 L. J., Ch. 905; 16 Jur. 939.

Undisposed-of Estate.]—Provision by settlement in lieu, &c., of all dower or thirds, which wife might otherwise be entitled to of real or personal estate:—Held, to bar her interest in what was not disposed of by will of husband. *Druce* v. *Denison*, 6 Ves. 385.

Provision by marriage settlement not held a purchase of all the property of wife, unless that is expressed or clearly imported. *Ib.*

Annuity or Jointure Guaranteed.]—By a marriage settlement, 400*l.*, the wife's fortune, was given to the husband, and some terminable interest was conveyed by his father to trustees to pay the wife, if she survived, an annuity or jointure of 40*l.*; and the husband covenanted that if these properties should fail or be deficient, all the real and personal estate he should die seised of, &c., should be vested in the trustees to raise 400*l.*, or buy an annuity of 40*l.* for the wife:—Held, sufficient to bar her right to dower. *Killen* v. *Campbell*, 10 Ir. Eq. R. 461.

Wife a Feme Covert when joining in Settlement.]—The husband, previously to the marriage, gave a bond to the wife's mother, conditioned for the settlement of land to the wife for life in bar of dower, and after her decease to the uses of the marriage (which settlement was liberal and reasonable in regard to the wife's fortune); and after the marriage, but during a period of disagreement and separation, the settlement was executed accordingly, the wife being made a party: this shall preclude the wife from her legal claim of dower, and it is no objection that the wife was no party to the bond, or was a feme covert at the time when she joined in the execution of the settlement; and as the bond was good for the issue of the marriage, so it must be for the wife, for it cannot be set aside as to one party, and deemed good as to the other. *Estcourt* v. *Estcourt*, 1 Cox, 20.

Intention should be Expressed.]—Dower is not barred by settlement, unless so expressed therein. *Charles* v. *Andrews*, 9 Mod. 152.

Compensation by Creditors.]—Where settlement was made on a wife after marriage, in bar of dower, &c., and by wife's waiving it the land would go to heir, to prejudice of creditors, she was decreed to have the estate for life, according to the settlement, but that she should assign it over in trust for the creditors, who should convey to her a third for dower. *Mills* v. *Eden*, 10 Mod. 487.

Bar Limited to Settled Property.]—By a marriage settlement, part of the husband's real estates and of the lady's fortune was vested in trustees, upon trust to pay the rents and interest of the lands, tenements, hereditaments, and premises, stocks, funds, and securities to the husband for life; and, after his death, to pay the wife, for her life, an annuity, to be in full for her jointure, and lieu, bar, and full satisfaction of and for her dower and thirds at common law, which she could or otherwise might have or claim out of, &c., "the said lands, tenements, hereditaments, and premises, stocks, funds, and securities whereof or whereunto" the husband, at any time during the said intended coverture, should be seised or entitled for any estate of inheritance to which dower or thirds is incident; and subject thereto, and in the event which happened, viz. there being an only child of the marriage, to 7,000*l.* for such child, in trust for the husband absolutely:—Held, that the settlement barred the wife of dower and her distributive share of the real and personal estate comprised in the settlement, but not of dower or of her distributive share out of or in the other real and personal estate of the husband. *Sambourne* v. *Barry*, 6 Ir. R. Eq. 28.

Contingent Provision for Intended Wife and Issue.]—In an ante-nuptial settlement

any provision for the intended wife in the event of her surviving her husband, will bar her dower, if such intention be expressed or appear clearly from the construction of the deed. But provisions for the wife to her separate use for life, for the maintenance of herself and her children, in the event of the husband failing in his credit or becoming a bankrupt or insolvent, and inter alia a proviso that the trustees should, whenever they might think fit or expedient, that is to say—in the event of the husband becoming embarrassed in his circumstances, or there should arise some good and sufficient reason therefor, so as to render a sale consistent with, and in aid of, the trusts of the settlement, and provision for the wife and the issue of the marriage, realise out of the property of the husband a bond for 1,000*l*., executed to them, and invest the proceeds for the wife to her separate use for life, and after her death for the issue of the marriage, provided that the amount of the bond should not be levied after the husband's death without the consent in writing of the wife:—Held, not a bar to the wife's right to dower. *O'Rorke* v. *O'Rorke*, 17 L. R., Ir. 153.

Share under Statute of Distributions Barred.]—A marriage settlement made provision for the wife out of real and personal estate, and declared that such provision was in lieu of dower or thirds:—Held, that the widow was not only barred of her dower, but took no interest in her intestate husband's estate under the statute of distributions. *Thompson* v. *Watts*, 2 Johns. & H. 291; 31 L. J., Ch. 445; 8 Jur. (N.S.) 760; 6 L. T. 817; 10 W. R. 485.

Custom of London — Infancy of Wife.]—The widow of a freeman of London is barred of her customary part by an ante-nuptial settlement, whereby the parents of the husband and wife make a provision for her, after the death of her husband, of which she takes the benefit. *Hutchinson* v. *Newark*, 17 Beav. 393.

The same rule applies though the wife be an infant on the marriage, and the husband becomes a freeman afterwards. *Ib.*

"Thirds," Meaning of.]—The word "thirds" is a general expression which may signify, according to the intent and scope of the instrument in which it is used, the interest of a widow in any property, personal or real, of her deceased husband in case of his intestacy. *Sambourne* v. *Barry*, Ir. R. 6 Eq. 28.

Copyholds — Intention to Bar Freebench not so readily Presumed.]—Semble, an intention to bar freebench, which attaches only on copyholds of which a husband dies seised, will not be so readily inferred from an ante-nuptial provision as under the old law an intention to bar dower. *Willis* v. *Willis*, 34 Beav. 340; 34 L. J., Ch. 313; 13 W. R. 77.

A., by a settlement on his marriage with B., in order to make some provision for B., in case she should survive him, settled a copyhold estate upon himself for life, with remainder to B. for life:—Held, that B.'s right to freebench out of other copyholds, of which A. died seised and intestate, was not barred by the settlement. *Ib.*

h. Jointure.

Statutory Provision.]—By the Statute of Uses (27 Hen. VIII. c. 10), ss. 6—9, if a competent provision is made for a man's wife by way of jointure, to take effect in possession immediately upon his death, the wife is not to be entitled to claim dower. See *Vernon's Case*, 4 Co. Rep. 1, a.

Jointure No Bar at Common Law.]—Though at law a jointure upon a woman of full age would not bar her of her dower, yet the statute of 27 Hen. 8, c. 10, makes it a bar. *Harvey* v. *Ashley*, 3 Atk. 612.

Acceptance of Substituted Provision.]—The principle that the wife cannot have both dower and what is given in lieu of dower being acknowledged at law as well as in equity, the only question in such cases must be whether the provision alleged to have been given in satisfaction of dower was so given or not: if the provision results from contract the question will be simply whether that was part of the contract. *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444. And see *Dyke* v. *Rendall*, 2 De G. M. & G. 209.

Agreement by Tenant in tail for Jointure on Possession.]—Marriage articles were executed by a tenant in tail in remainder and his intended wife, whereby he agreed to execute, when he should become entitled in possession, a legal post-nuptial settlement to secure her a jointure of a specified amount. He subsequently became entitled in possession, but died without executing any such settlement:—Held, that the articles were in equity a bar to the wife's right of dower. *Pennefather* v. *Pennefather*, Ir. R. 6 Eq. 171.

Wife Accepting Covenant to Pay Jointure.]—Adult female before marriage agreeing to accept a covenant by the husband, that his heirs, executors, or administrators shall pay the wife an annuity for her life, which if paid would be an equitable jointure, and she being an executing party to the instrument, purchaser of lands which would be liable to dower, if no jointure, is bound to see that there is an available fund, or in default, by failure of assets, unless he protects himself by a fine, he is liable to make it good; and plaintiff having purchased real estate of defendant's husband, who had acquired it during coverture, the widow was held, the security having failed, not to be barred of dower out of the land which was purchased and aliened by her husband at the time when equity would restrain her action of dower. Adult female cannot contract on marriage to relinquish dower, without compensation, and although she may accept of an adequate jointure, both at law and in equity equally, it must be available, accordingly, an injunction to restrain the widow from proceeding at law to enforce her dower was refused, Lord Chancellor declaring he had sought a principle to protect the purchaser, the widow admitting that she would have levied a fine if asked, but could not go further than to limit it pro tanto. Equity may dispense with the form, but cannot with the substantial requisite of a solid satisfaction of the provision made for the surviving wife, which, out of regard to her peculiar circumstances, is carried beyond the analogy to any general rule touching the disposition of contingent interests. Even at law, although the wife has accepted a jointure in lieu of dower, the right to dower is not extinguished, but exists to give effect to that provision, and it would be illusory to adjudicate as upon an equitable jointure, when in fact no provision

was actually received. *Power* v. *Sheil*, 1 Moll. 296.

Purchaser of Dower Lands—Negligence.]—An injunction to restrain a widow from proceeding at law to enforce her dower out of lands of inheritance purchased from her husband during marriage refused, the purchaser having "through negligence neither insisted on having a fine, nor used common diligence to ascertain and preserve evidence that a jointure had been settled on her; but the widow having, in her answer to the original bill, admitted that her husband, previous to marriage, had executed an instrument settling an annuity of 150*l.* on her, in case she survived him, together with a collateral bond, but of which she knew not the contents, restrained from proceeding to execute her writ of dower till after she had answered the amended bill." She is not, as a condition connected with the order, entitled to a receiver, which would be an equitable execution; neither is she entitled to her costs at law. *S. C.*, Beat. 48.

Wife No Party.]—A jointure settled on a wife by articles previous to marriage, but to which she was no party, will not bar her dower. *Daly* v. *Lynch*, 3 Bro. P. C. 478.

Eviction of Wife.]—Wife evicted of jointure is, by statute 27 Hen. 8, c. 10, s. 7, entitled to dower only pro tanto. *Corbett* v. *Corbett*, 1 Sim. & S. 612; 2 L. J. (o.s.) Ch. 108. Affirmed, 5 Russ. 254; 7 L. J. (o.s.) Ch. 9.

A Bar to Share under Statute of Distributions.]—Jointure being made in bar of dower, or any claim or right by common law, or custom of the city, containing the words "any law, custom, or usage notwithstanding," debars the wife of her share under the statute of distributions. *Glover* v. *Bates*, 1 Atk. 439.

Incumbrances.] — A., on his marriage with C., being equitable tenant in tail of certain lands, conveyed, by deed of 1804, these lands to B., as an indemnity against incumbrances on other lands purchased by B. from A.; the legal fee subsequently descended upon A., on the death of his father. C. then, in 1813, joined in a deed, by which A. conveyed the estates to the use of himself, his heirs, and assignees habendum free from dower, and A. and C. levied a fine to the uses of the deed; and A., by the same deed, charged certain lands held pur autre vie, with an annuity of 200*l.* a year for C. by way of jointure. A. died; the lands charged with the jointure were not more than sufficient to pay the prior incumbrances. C. filed a bill claiming dower against all persons interested in the lands, except bonâ fide purchasers for value subsequent to 1813:—Held, that the bill should be dismissed with costs as against B., but that the account prayed for should be decreed against the heir of said parties claiming as volunteers under A.; but the bill would have been dismissed against them also, if previously to the levying of the fine there had been an actual conveyance of the legal fee simple for the indemnity purposes, and that the court would have no jurisdiction to relieve against the fine. *Lloyd* v. *Lloyd*, 2 Con. & L. 592; 4 Dr. & War. 354.

Semble, on the legal fee descending on A., C. became dowable out of the lands. *Ib.*

Lands not Comprised in Power to Jointure.]—A husband having power to jointure the wife, executes that power by will, and dies seised of estates over which the power did not extend; though the testator did not express an intention that the wife should take the jointure in bar of dower, yet she shall not take both jointure and dower, but shall make election. *Fust* v. *Fust*, Romilly's Notes of Cases, 90.

Infant.] — Widow held barred of dower in equity, by rent charge granted in trust for her by way of jointure by marriage settlement, to which her father was party, although she was infant at the time of marriage, and rent charge failed by defect of husband's title, and was afterwards confirmed by deeds and recovery during coverture, which, though they proved a valid confirmation, might have been defeated if there had been a son of the marriage. *Corbett* v. *Corbett*, 1 Sim. & S. 612; 2 L. J. (o.s.) Ch. 108. Affirmed, 5 Russ. 254; 7 L. J. (o.s.) Ch. 9.

Grant of rent charge out of particular lands to an infant in consideration of marriage, for her jointure, though grantor be afterwards evicted, being in equity a general agreement to grant rent charge of that amount out of some lands, will bind infant if her parent or guardian assent to it. *S. C.*, 1 Sim. & S. 621.

—— **Stat. 27 Hen. 8, c. 10.**]—Though, at law, a jointure upon a woman of full age would not bar her of her dower, yet the stat. of 27 Hen. 8, c. 10, makes it a bar, and a jointure will bind an infant and preclude her from dower, even though the jointure be very inadequate. *Harvey* v. *Ashley*, 3 Atk. 612. Doubted by Lord Northington, see *Caruthers* v. *Caruthers*, 4 Bro. C. C. 499, 507.

—— **Rules as to Jointures.**] — The following points were ruled, per Northington, Ch., in this case: 1st, that the statute of 27 Hen. 8, which introduces jointures, extends to adult women only, infants not being particularly named, and, therefore, that notwithstanding a jointure on an infant, she may waive the jointure and elect to take dower; secondly, that a covenant by the husband that his heirs, executors or administrators shall pay to the wife an annuity for her life in full for her jointure, and in bar of dower, without expressing that it be charged on any particular lands, or be secured out of lands generally, is not a good equitable jointure within the statute; thirdly, that a woman being an infant cannot, by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty in case of his dying intestate. *Drury* v. *Drury*, 2 Eden, 39. Reversed on appeal by the house of lords. *S. C.*, nom. *Buckingham* (*Earl*) v. *Drury*, 3 Bro. P. C. 492; 2 Eden, 60; where Lord Hardwicke reviewed the authorities. Lord Thurlow, however (as was observed by Eldon, Ch., in *Milner* v. *Harewood* (*Lord*), 18 Ves. 275), said great doubts had been entertained as to the propriety of the decision of the lords, and expressed himself strongly in favour of Lord Northington's opinion. The result of the subsequent authorities (which are collected, 2 Eden, 75), however, is that an infant cannot be bound by any article entered into during the minority as to her own real state, which nothing but her own act when of age can fetter or affect. 2 Bridg. 86. See also *Drury* v. *Drury*, 4 Bro. C. C. 505, n.

—— **Election on Coming of Age.**]—A provision is made for a wife in articles before marriage (which marriage took place in her infancy), and declared to be a full satisfaction of dower, or any claim or right by common law, custom of the city, or any other usage, law, or custom notwithstanding. The wife survived the husband, and accepted of the terms mentioned in the articles. Declared that at her husband's death she had her election, which she made by accepting the satisfaction for her dower. *Glover* v. *Bates*, 1 Atk. 439.

i. Terms.

Satisfied Term.] — Subsequent incumbrancer cannot protect himself by a satisfied term against a prior incumbrance, unless in some sense got in either by an assignment, or making the trustee a party to the instrument, or taking possession of the deed creating the term, nor if he has notice before he pay his money; distinction upon that as to the dowress upon no principle, but established by practice. *Maundrell* v. *Maundrell*, 7 Ves. 567; 10 Ves. 271.

—— **When not Available against Dowress.**]—At law all terms are considered terms in gross, and therefore, without regard to purpose, prevent dowress from any legal benefit from recovery in dower, as she recovers with stay of execution during the term: but equity regards the purpose for which the term is created and subsists; and if only for the benefit of the owner of the inheritance it is considered part of inheritance, not absolutely merged, but so attendant as to accompany it, and every right and interest growing out of it by operation or agreement; not to be used, therefore, against the owner of the whole or any part of the inheritance; every description of ownership having a use in the term commensurate with the interest in the inheritance; when dower arises, therefore, the term in a proportion is as much attendant upon that interest as during the husband's life upon the inheritance, and protects it against either heir or purchaser. *S. C.*, 7 Ves. 577. See also *S. C.* on appeal, 10 Ves. 246.

Purchase for value, without notice, is not a defence to a suit instituted to enforce a mere legal right, such as dower. *Corry* v. *Cremorne*, 12 Ir. Ch. R. 136.

A purchaser, in 1840, obtained possession of a deed, creating an attendant term, but did not procure an assignment of the term:—Held, that he could not rely on this term as a bar to a claim for dower. *Ib.*

Ascertaining Lands.]—Where a widow claims dower merely upon a legal title, but cannot ascertain the lands, equity will assist her to find them out, and, if her title to it is established, will give her the profits from the time her title accrued. If a dowress comes into equity to have a term removed which is established, equity will decree her an account of the rents and profits from the time her title accrued; secus, if the term had been out of the way, and she had no need to come into equity. *Dormer* v. *Fortescue*, 3 Atk. 130.

Term Protecting Purchaser.] — Defendant purchased a real estate of plaintiff's husband, and, the estate being in mortgage for a term, it was paid off out of purchase-money, and the term assigned to a trustee for the purchaser to attend the inheritance. Several years after husband's death, she brought her bill against defendant for an account of profits, and to be paid her dower. Sir T. Abney decreed dower, but Lord Chancellor reversed decree, and dismissed bill without costs. *Hill* v. *Adams*, 2 Atk. 208.

Since the case of *Radnor* v. *Vandebendy* (Show. P. C. 69), it has been a settled rule, that if purchaser have taken a term precedent to the right of dower, be it a satisfied one or money for it, it is a bar to the wife's dower; but if the mortgage had subsisted at the husband's death, the wife might have redeemed, and been entitled to dower; or if he had paid it off, and taken an assignment of the term to attend the inheritance, and died seised, the wife would have been endowed. *Ib.* And see *Bodmin* v. *Vandebendy*, 1 Vern. 356.

Heir or Devisee.] — A dowress shall have the benefit of a trust term against an heir or devisee, but not against a purchaser. *Banks* v. *Sutton*, 2 P. W. 707.

A dowress shall have the trust of a satisfied term removed against the heir-at-law. *Dudley* v. *Dudley*, Pre. Ch. 241.

Trust Terms.]—Dower allowed though there was a trust term subsisting. *Williams (Lady)* v. *Wray*, 1 P. W. 137; Pre. Ch. 151; 2 Vern. 378.

Whether a dowress shall be relieved in equity against a term for years. *S. C.*, 2 Vern. 680.

A husband was seised in fee, subject to a trust term to secure life annuities, and to pay him half the surplus rents:—Held, that his widow was entitled to have her dower set out at once. *Sheaf* v. *Cave*, 24 Beav. 259.

Aid of Equity in Removing Trust Term.]—A court of equity will not assist a dowress, who has had judgment at law with a cesset executio, in removing a trust term. *Brown* v. *Gibbs*, Pre. Ch. 97.

Mortgagee.]—Husband seised in fee, mortgages for years, and marries; the mortgagee never enters; the wife on the death of her husband shall be endowed. *Hamilton* v. *Mohun*, 1 P. W. 121.

A dowress may redeem a term against a mortgagee, and remove it out of the way against an heir. *Swannock* v. *Lyford*, Ambl. 7.

Wife not entitled to dower against a purchaser of the inheritance who has got an assignment of a term, originally made previous to her right of dower. *Ib.*

Mortgagee may protect himself against a claim of dower by taking an assignment of an old mortgage, term prior to the right to dower. *Wynn* v. *Williams*, 5 Ves. 130.

Outstanding Term.]—A person being seised of an estate of inheritance, subject to a term outstanding for a purpose still unsatisfied, married in 1796. In 1805 he mortgaged his estate, and died in 1829:—Held, that his widow having obtained a judgment in dower, is relievable in equity against the outstanding term, and shall have her dower, subject to one-third of the charges affecting the term. *Wilkins* v. *Lynch*, Hayes, 98.

Where a bankrupt himself by taking an assignment of a mortgage term, prior to his

wife's title of dower, could not have protected his estate against it, there his assignees shall not, for they stand in his place. *Squire* v. *Compton*, 9 Vin. Abr. 227 pl. 60.

Bankruptcy of Husband.]—An attendant term having become vested in the wife of the owner of the inheritance, as the administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for specific performance of the agreement, pending which suit the husband dies:—Held, that the widow was not entitled to dower; that she was bound to assign the term to the purchaser, and that he was bound to accept the title. *Mole* v. *Smith*, Jac. 490. *And see* 1 Jac. & Walk. 665.

Satisfied Terms Act, 1845.]—A., being the owner of leaseholds for a term of ninety-nine years, mortgaged the property to B. for the term, less five days, and also to G. and R. for the term, less three days. He also demised to M. for the term, less ten days, in trust for G. and R. He then acquired the fee subject to the mortgages. B.'s mortgage was paid off to his executors, who assigned the term upon which it was secured to a trustee for G. and R. Then A. became bankrupt, and he and his assigns, in consideration of a release by G. and R. of their mortgage debt, by a deed to which A.'s wife was named a party, but which she refused to execute, granted the fee of the premises to them. They sold the estate, and A. died. His widow then filed a bill against the purchaser to enforce her right to dower out of the premises. Bacon, V.-C., held that upon the release of G. and R. of the mortgage debt, the mortgage terms became satisfied, and were extinguished by the Satisfied Terms Act, 8 & 9 Vict. c. 112, s. 2, and thereby the inchoate right of the widow to dower was let in. But on appeal this decision was reversed, and it was held that the term was not satisfied within the meaning of the act. *Anderson* v. *Pignet*, 42 L. J., Ch. 310; L. R. 8 Ch. 180; 27 L. T. 740. Reversing 19 W. R. 807.

A term does not become satisfied within the act unless the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person. *Ib.*

3. Arrears.

Limitation of Time.]—No limitation in equity to arrears of dower any more than at law, without special ground. Account therefore decreed from husband's death (twelve years). *Oliver* v. *Richardson*, 9 Ves. 222. And see *White* v. *Parnther*, 1 Knapp, 179.

3 & 4 Will. 4, c. 27, applies to a bill filed thirty-one years after the death of a tenant in tail in possession, by his widow and her present husband, praying for a declaration that they were entitled to dower out of the hereditaments which the former husband was, during his marriage with her, seised for an estate of inheritance, dismissed, with costs, on the ground that dower is an interest in land, and that proceedings to recover it must be commenced within twenty years after the right to it accrues, by virtue of the 3 & 4 Will. 4, c. 27. *Marshall* v. *Smith*, 34 L. J., Ch. 189; 10 Jur. (N.S.) 1174; 11 L. T. 443; 13 W. R. 198.

Both the 3 & 4 Will. 4, c. 27, and the general doctrines of the court as to lapse of time apply to a right to dower. *Ib.*

A bill filed by a widow to raise the arrears of her jointure, charged upon certain lands by settlement. Defendant, by his answer, denied the husband's power to jointure, as he had at the time of the settlement only an estate tail, which had not subsequently been barred. An amended bill was then filed, praying for dower in case plaintiff was not considered entitled to jointure. Defendant neither answered amended bill nor appeared at the hearing, and the court decreed plaintiff entitled to dower, and directed an account of the arrears:—Held, that the amended bill was a continuation of the original suit, and that in taking the account the defendant could not set up in the office the 3 & 4 Will. 4, c. 27, s. 40, limiting the recovery of arrears of dower to a period of six years, although the amended bill was not filed until after the act came into operation (31st December, 1833), the original bill having been filed previously thereto. *Smith* v. *Walsh*, 1 Ir. Eq. R. 167.

Bill for dower. The defendants in possession denied the title of the widow, alleging that her husband had not been seised of an estate of inheritance in the premises; that allegation being founded on information as to the time of his death, which was believed to be correct, but afterwards found to be erroneous: decree for dower, and arrears for six years before the filing of the bill, but without costs. *Bamford* v. *Bamford*, 5 Hare, 203.

Account of.]—To sustain bill for account there must be mutual demands. The case of dower stands on its own specialities; so the case of a steward, &c. *Dinwiddie* v. *Bailey*, 6 Ves. 141.

Question, whether widow is entitled to arrears of dower from the death of her husband, or only from her claim, cannot be decided on a writ of dower. Account would be decreed upon a bill on a mere right of entry, if the defendant admitted the title and receipt of the rents and profits. *Mundy* v. *Mundy*, 2 Ves. J. 128.

—— **Future Profits.**]—Court, in taking general accounts, making an allowance to widow for arrears of dower, will not put her to a fresh suit for future profits, but will decree them. *Graham* v. *Graham*, 1 Ves. 262.

—— **Ascertaining Lands.**]—Where a widow claims dower merely upon a legal title, but cannot ascertain the lands, equity will assist her to find them out; and, if her title to it is established, will give her the profits from the time her title accrued. If a dowress comes into equity to have a term removed, which is satisfied, equity will decree her an account of the rents and profits from the time her title accrued. Secus, if the term had been out of the way, and she had no need to come into equity. *Dormer* v. *Fortescue*, 3 Atk. 130. And see *Curtis* v. *Curtis*, 2 Bro. C. C. 620; *Wild* v. *Wills*, Dick. 3. S. P., *Megott* v. *Megott*, id. 794.

Mesne Profits.]—Bill for mesne profits by a woman who recovered in dower dismissed; for, where the husband dies seised, there shall be no mesne profits until demand, per Statute of Merton. *Delver* v. *Hunter*, Bunb. 57.

Interest.]—The court will not give interest on the arrears of an annuity, secured by a bond which had been taken in satisfaction of dower. *Tew* v. *Winterton* (*Earl*), 3 Bro. C. C. 489. *And see* 1 Ves. J. 451. S. P., *Knight* v. *Maclean*, 3 Bro. C. C. 496.

Death of Widow.]—The claim to dower is extinct on the death of the widow. *White* v. *Parnther*, 1 Knapp, 179.

4. DOWRESS' RIGHT AGAINST OTHER CLAIMS.

Intestate's Estate—Widow's Charge—Priority.]—The proportionate part of the widow's charge for 500*l.* to be borne by the real estate of an intestate under the Intestate's Estates Act, 1890, has priority over her right to dower. *Charrière, In re, Duret* v. *Charrière*, 65 L. J., Ch. 460; [1896] 1 Ch. 912; 74 L. T. 650; 44 W. R. 539.

Right to Redeem Mortgage.]—A dowress has a right to redeem a mortgage, and hold over till satisfied. *Palmes* v. *Danby*, Pre. Ch. 137.

Legacy in Substitution—No Abatement.]—W. gives, by will, his wife an annuity of 100*l.* for life, and 500*l.*, which, together with the annuity, he declares to be in full for her dower, or thirds, out of his real and personal estate; on deficiency of assets:—Held, the wife should not abate in proportion with the other legatees. *Davenhill* v. *Fletcher*, Ambl. 244. See also *Heath* v. *Dendy*, 1 Russ. 543; 5 L. J. (O.S.) Ch. 59.

—— **Priority over other Legatees.**]—A legacy to a widow in lieu of dower or thirds, at common law or by custom, has no priority over other legacies, where the testator leaves no real estate. *Acey* v. *Simpson*, 5 Beav. 35.

A widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower. *Roper* v. *Roper*, 3 Ch. D. 714; 35 L. T. 155; 24 W. R. 1013.

A widow dowable out of her husband's lands having elected to take an annuity given by the will in lieu of dower, the testator's estate being insufficient to pay the legacies in full:—Held, entitled to priority over the other legatees. *Stalschmidt* v. *Lett*, 1 Sm. & G. 421.

Sequestration.]—After a decree for a personal duty, a sequestration issues, and then the defendant marries and dies; if the sequestration shall take place of the wife's dower. Quære. *Burdett* v. *Rockley*, 1 Vern. 118.

Assignment—Right to Dower—Whether passed.]—An assignment of "all and singular the legacies, debts, moneys, estate, and effects whatsoever and wheresoever, and of what nature or kind soever, of or to which J. H. in right of his wife or otherwise was possessed," will not pass a claim of the assignor's wife to dower out of the estates of her former husband. *Brown* v. *Meredith*, 2 Keen, 527; 6 L. J., Ch. 361.

Assignees in Bankruptcy.]—Dower established against assignees under a joint commission of bankruptcy upon estates purchased with the partnership fund, but conveyed to one partner under a specific agreement that the estates should be his, and he should be debtor for the money. *Smith* v. *Smith*, 5 Ves. 189.

Mortgagee of Husband.]—Under the 3 & 4 Will. 4, c. 105, a widow has no right, as against the heir-at-law of her deceased husband, to be indemnified in respect of a mortgage created by the deceased. *Jones* v. *Jones*, 4 Kay & J. 361.

Therefore, where in a case of that description the mortgaged property had been sold by order of the court, in a suit for administration of an intestate's estate:—Held, as between his widow and his heir, that the right of the widow to dower was limited to one-third of the income of the clear surplus of the proceeds of the sale, after deducting what was due upon the mortgage. *Ib.*

Creditors' Rights prevail over, under 3 & 4 Will. 4, c. 104.]—By the 3 and 4 Will. 4, c. 104, freeholds and copyholds of a deceased are assets for the payments of his debts, and by the 3 & 4 Will. 4, c. 105, s. 5, all debts to which the land of a deceased are subject, are "valid and effectual as against the right of his widow, to dower":—Held, nevertheless, that the widow's right to dower or freebench has still priority over mere creditors of a deceased. *Spyer* v. *Hyatt*, 20 Beav. 621; 1 Jur. (N.S.) 315; 3 W. R. 294.

Emblements.]—Dower is an excrescence or continuance of the husband's estate, which jointure is not; therefore a dowress shall have emblements, but not a jointress. *Fisher* v. *Forbes*, 9 Vin. 373 pl. 82.

5. PROCEEDINGS FOR RECOVERY.

Dower may be demanded by another person on behalf of the widow; and a demand in the presence of witnesses is not necessary. *Watson* v. *Watson*, 10 C. B. 3; 20 L. J., C. P. 25.

Husband must have Died Seised.]—To entitle a widow to damages in dower, it must be alleged and proved that the husband died seised of an estate of inheritance. *Jones* v. *Jones*, 2 Tyr. 531; 2 C. & J. 601.

Ascertaining Lands.]—Where a widow claims dower merely upon a legal title, but cannot ascertain the lands, equity will assist her to find them out, and if her title to it is established, will give her the profits from the time her title accrued. If a dowress comes into equity to have a term removed which is satisfied, equity will decree her an account of rents and profits from the time her title accrued; secus, if the term had been out of the way, and she had no need to come into equity. *Dormer* v. *Fortescue*, 3 Atk. 130.

A widow filed a bill for dower against alienees of her husband. In order to make out her title to dower, she was obliged to give in evidence a deed by which the estate had been conveyed to the person from whom her husband claimed. This deed contained a recital, that the legal estate was outstanding in trustees. She also gave in evidence certain orders of the court of chancery, to show that such recital was mistaken:—Held, that she was entitled to a reference to ascertain the lands of which she was dowable. *Kernaghan* v. *M'Nally*, 11 Ir. Ch. R. 52.

—— **Number of Acres Claimed need not be Specified.**]—In a writ and count in dower, the exact number of acres of land in respect of which dower is demanded is not material; in order therefore to sustain a plea alleging that the tenements mentioned in the count were subject to an outstanding term, it is sufficient for the tenant to show that all the lands held by him in the parishes named in the count are subject to the term. *Garrard* v. *Tuck*, 8 C. B. 231; 18 L. J., C. P. 338; 13 Jur. 871.

Separate Account — Incumbrances.]—A separate report directed of what was due to a dowress, without entangling her in a general account of incumbrances. *Eccleston* v. *Berkeley*, Ridgw. 253.

Remedy at Law or Equity.]—A. dies seised of land, which descend upon B. and C. in coparcenary. B., before receipt of rent, or partition made, dies; his widow brings a bill to have dower assigned, suggesting that C. had all the title-deeds; upon demurrer, resolved, that this court will relieve in such case. The demurrer overruled. *Moor* v. *Black*, Forrest, 126.

Demurrer to bill for dower overruled, though it stated no impediment to succeeding at law. *Mundy* v. *Mundy*, 4 Bro. C. C. 294. *And see* 2 Ves. J. 122; and *Wallis* v. *Everard*, 3 Ch. Rep. 161.

Inspection of Husband's Conveyance to Purchaser.]—A demandant in dower is not entitled to inspection of the deed under which the property out of which she claims to be endowed was conveyed away by her husband, as against a bonâ fide purchaser for value without notice of the marriage, the balance of authorities being assumed to be in favour of the position that a bill for discovery in equity could not be sustained in such a case. *Gomm* v. *Parrott*, 3 C. B. (N.S.) 47; 26 L. J., C. P. 279; 3 Jur. (N.S.) 1150; 5 W. R. 882.

Wife Living in Adultery.]—A plea in bar to a writ of dower unde nihil habet alleging that the wife, during her coverture, voluntarily left her husband, and without his consent lived away from him in adultery with C., is sufficient, without alleging that she lived with C. willingly, and that she had been convicted of adultery. *Hetherington* v. *Graham*, 3 M. & P. 399; 6 Bing. 139; 7 L. J. (O.S.) C. P. 253; 31 R. R. 361.

Lapse of Time.]—A widow's right to sue in equity for dower will be barred, where she has not for upwards of thirty years taken any proceedings, either at law or in equity, to have it assigned to her. *Marshall* v. *Smith*, 34 L. J., Ch. 189; 10 Jur. (N.S.) 1174; 11 L. T. 443; 13 W. R. 198.

6. Costs.

No Costs.]—No costs to plaintiff in a writ of dower. *Mundy* v. *Mundy*, 4 Bro. C. C. 294; 2 Ves. J. 128.

Though in an ordinary suit for dower no costs will be allowed, yet where a defendant set up an assignment which he failed to prove, and went into evidence as to improvements made by him in the property after the plaintiff became entitled to dower, he was ordered to pay so much of the costs of the suit as were occasioned by his entering into such evidence, and setting up the assignment. *Stormont* v. *Wickens*, 13 L. T. 533.

Title not admitted.]—Where a dower suit was not occasioned by any difficulty as to the assignment or mode of payment of the dower, but solely by the defendant not having admitted the title till he put in his answer to her bill, she was allowed her costs up to the hearing. *Harris* v. *Harris*, 7 L. T. 411; 11 W. R. 62.

Vexatious Resistance.]—Though by analogy to rule of law, costs do not follow decree of dower merely, yet where there is a vexatious resistance they are given. *Worgan* v. *Ryder*, 1 Ves. & B. 20. S. P. *Lucas* v. *Calcraft*, 1 Bro. C. C. 134; Dick. 594.

Costs Allowed.]—Costs allowed to a widow, in a suit for dower, her right thereto being contested by the party to whom the estate has been sold by the heir-at-law. *Fry* v. *Noble*, 20 Beav. 598; 24 L. J., Ch. 591; 1 Jur. (N.S.) 767; 3 W. R. 599. Affirmed. 25 L. J., Ch. 144; 2 Jur. (N.S.) 144; 4 W. R. 145.

Lapse of Time.]—Where the widow's right to sue for her dower was barred by lapse of time, her bill was dismissed with costs. *Marshall* v. *Smith*, 34 L. J., Ch. 189; 10 Jur. (N.S.) 1174; 11 L. T. 443; 13 W. R. 198.

VIII. PIN-MONEY.

1. In General.

Must be used for Dress.]—There is annexed to wife's pin-money an implied duty of applying it towards her personal dress, decoration, and ornament. *Jodrell* v. *Jodrell*, 9 Beav. 45; 15 L. J., Ch. 17; 9 Jur. 1022.

Disposal of as Separate Estate.]—A wife may dispose of pin-money as separate estate. *Herbert* v. *Herbert*, *Milles* v. *Wikes*, 1 Eq. Abr. 66.

Subject to Property Tax.]—Pin-money was subject to property-tax, though not to deduction for alimony, as it is clear of maintenance. *Ball* v. *Coutts*, 1 Ves. & B. 292.

Suit for Alimony.]—In a suit for alimony, separate maintenance or pin-money is not a good plea. *Colmer* v. *Colmer*, Mos. 121.

Settlement by Way of.]—In settlements where the husband and wife are living together, and the case is not one of contempt, it is not the course to settle any part on the wife to her separate use by way of pin-money, unless the property be a large one; such a provision refused where the sum to be settled was under 1,400*l*. *Harpur* v. *Ball*, 8 Ir. Eq. R. 404; 2 Jo. & Lat. 599.

2. Arrears.

No Account beyond a Year.]—No account of arrears of pin-money beyond a year. *Aston* v. *Aston*, 1 Ves. 267.

Account of wife's pin-money, never carried back beyond the year. *Peacock* v. *Monk*, 2 Ves. 190. And see *Townshend* v. *Windham*, 2 Ves. 1; and *Howard* v. *Digby*, 5 Sim. 330; 8 Bli. (N.S.) 224; 2 Cl. & F. 634.

Recovery of Arrears where assigned for Value.]

—The rule that after the wife's death no arrears of pin-money are recoverable does not apply where either the wife has parted with her right to the personal enjoyment of the pin-money, or the husband has been deprived of the enjoyment of the estate on which the pin-money is charged. Assignees for value are therefore entitled to resort to arrears of pin-money. *Tuffnell* v. *O'Donoghue*, [1897] 1 Ir. R. 360.

Wife accepting Less.]—A. had 300*l.* per annum pin-money; the husband, for several years before his death, paid her 200*l.* only, but promised her she should have the whole at last. Declared, that, if the wife accepts less, or lets her husband receive what she ought to receive to her separate use, it implies a consent in her to submit to such a method. But where the pin-money is paid to her eo nomine, her agreement with the husband relating to her separate estate, amounts not to a new agreement, and his promising she should have it at last is an undertaking to pay the arrears. *Ridout* v. *Lewis*, 1 Atk. 269; 2 Atk. 104.

Where the wife for several years acquiesced in her husband's receipt of her pin-money, and there was no evidence to sustain a contract or promise to pay it, or of continued claim of it:—Held, that the master had properly allowed only one year's amount. *Thrupp* v. *Harman*, 3 Myl. & K. 513.

Husband finding Clothes.]—Where pin-money is secured to the wife, and the husband finds her in clothes and necessaries, this is a bar as to any arrears of pin-money incurred during such time. *Fowler* v. *Fowler*, 3 P. W. 355. And see *Arthur* v. *Arthur*, 11 Ir. Eq. R. 511; *Foss* v. *Foss*, 15 Ir. Ch. R. 215.

Husband, on marriage settlement, settled 100*l.* per annum pin-money, in trust for wife for her separate use, which becomes in arrear, and then the husband, by will, gives the wife a legacy of 500*l.*; after which there is a futher arrear of the pin-money, and then the husband dies. This legacy, being greater than the debt, decreed even in the case of the wife to be a satisfaction of the arrears of pin-money due before the making of the will. *Ib.*

Annual sum secured for the wife's pin-money, for her apparel and expenses; if they cohabit together and the husband maintain her, the arrears of pin-money are not recoverable. *Thomas* v. *Bennet*, 2 P. W. 341.

Arrears charged on Trust Estate.]—Term raised to pay 200*l.* per annum pin-money to the wife, with covenants from the husband for payment of it. A year's arrear at the husband's death held such a debt as should be charged on his trust estate, settled for payment of his debts. *Offley* v. *Offley*, Pre. Ch. 26. And see *Warwick* (*Countess*) v. *Edwards*, 1 Eq. Abr. 140; *Cornwall* v. *Mountague* (*Earl*), id. 66.

Presumption of Release.]—A receiver was obtained by a married woman over her husband's estate for the arrears of an annuity settled to her separate use. By an order made with her consent, the receiver was discharged, without prejudice to her proceeding as she might be advised for the arrear then declared to be due, or the accruing gales, and the husband went into possession. A creditor, subsequent to the consent order, obtained an order for a receiver and the wife reappointed the receiver in her cause:—Held, that the presumption of release, or payment of arrears of pin-money, did not arise, and that the wife was entitled to the arrears due at the date of the consent order, and the subsequent gales. *Edgeworth* v. *Edgeworth*, 16 Ir. Ch. R. 348.

Principles of the court as to the arrears of pin-money. *Ib.*

IX. PARAPHERNALIA.

Jewels.]—Old family jewels do not constitute paraphernalia. *Jervoise* v. *Jervoise*, 17 Beav. 566; 23 L. J., Ch. 703; 2 W. R. 9.

Pearl ornaments presented to a married woman by a third party held to be part of her paraphernalia. *Ib.*

So likewise brilliant bracelets bought by the husband and given to the wife, though worn with the family jewels, constitute part of her paraphernalia. *Ib.*

A husband who was entitled to family jewels and diamonds bequeathed to his wife all "his" jewels for life, and afterwards as heirlooms:—Held, that this bequest did not include pearl ornaments presented to her, or brilliant bracelets bought by the husband and given to the wife, and worn with the family jewels, so as to put the wife to her election. *Ib.*

Diamonds given by the husband's father to his son's wife on marriage are a gift to her separate use, and she is entitled to them. So is a gift by a stranger to the wife. So are trinkets given to her by her husband: but where given expressly to be worn as ornaments they are to be deemed as paraphernalia, and the husband may alien them, though, if considered as a gift, the wife may dispose of them contrary to the husband's intention. *Graham* v. *Londonderry* (*Lord*), 3 Atk. 393.

Pledge by Husband.]—If a husband pledges his wife's paraphernalia, and leaves a sufficient personal estate, it shall be liable to redeem the pledge. In the present case Lady D.'s diamond necklace was sold, and an account of the value was decreed to her. *Ib.*

Gifts of Jewellery by Husband to Wife.]—Gifts of jewellery made by husband to wife on occasions such as Christmas-day or on her birthdays, or in order to settle differences that had arisen between them, are not paraphernalia, unless it can be shown that the husband intended to impress the character of paraphernalia upon them. The Married Women's Property Act, 1882, does not affect a gift of paraphernalia. *Vansittart, In re, Brown, Ex parte* ([1893] 1 Q. B. 181), distinguished. *Tasker* v. *Tasker*, 64 L. J., P. 36; [1895] P. 1; 11 R. 619; 71 L. T. 779; 43 W. R. 255.

Disposal by Will by Husband.]—Wife was entitled, as her paraphernalia, to jewels, which the husband had disposed of by will to his executor, and of which the wife was possessed in the husband's lifetime, bought partly with her own and partly with his money. *Northey* v. *Northey*, 2 Atk. 77; 9 Mod. 270.

A wife, with respect to paraphernalia, has been considered as a creditor, and having a lien upon real estate. *Ib.*

And the value of the jewels makes no alteration. *Ib.*

A wife has been admitted creditor to the value of paraphernalia, upon a trust estate for payment of debts. *Ib.*

Possession by Husband.]—The husband's possession of jewels makes no alteration where the wife has worn them as ornaments whenever she was dressed. *Ib.*

The wife is not barred of her paraphernalia by a devise of the use of all household goods, furniture, plate, jewels, linen, &c., for life. *Marshall* v. *Blew*, 2 Atk. 217.

Such a bequest entitles her to use the goods anywhere, or even to let them out to hire. *Ib.*

Husband devises wife's jewels to wife for life, remainder to his son; the wife makes no election or claim to have the jewels as her paraphernalia, her administrator cannot make this claim. *Clarges* v. *Albemarle*, 2 Vern. 247; Nel. Ch. 174.

Jewels bought out of Pin-money.]—Jewels and chamber-plate bought out of pin-money allowed the wife as her paraphernalia. *Offley* v. *Offley*, Pre. Ch. 26.

Agreement in Bar of.]—A woman, on her marriage, agrees to have no part of her husband's personal property but what he should give her by will. This bars her of her paraphernalia. *Cholmely* v. *Cholmely*, 2 Vern. 83.

Husband's Debts, Liability to.]—Where husband's personal estate is not sufficient to pay his debts, wife cannot set up any claim to jewels, rings, pictures, dressing plate, and other trinkets given her before marriage. *Ridout* v. *Plymouth* (*Earl*), 2 Atk. 104.

Where a man's real and personal estate are charged by his will with the payment of his debts, and afterwards turn out insufficient, his wife's jewels and paraphernalia should be sold towards making good the deficiency. *Parker* v. *Harvey*, 4 Bro. P. C. 609; 14 Vin. Abr. 458.

One dies, indebted by covenant more than all his personal assets can pay, and leaving real assets sufficient, the widow shall have her paraphernalia, in regard the creditor does not suffer thereby, there being real assets for him. *Tipping* v. *Tipping*, 1 P. W. 729.

Where the wife's paraphernalia will be liable to the husband's debts. *Willson* v. *Pack*, Pre. Ch. 295.

Wife not entitled to paraphernalia when husband dies indebted. The court will, however, let her in on other funds, if any. *Townshend* v. *Windham*, 2 Ves. 1.

Charge on Real Estate—Priority.]—A real estate charged with payment of debts, in aid of the personal estate, shall be applied before the widow's paraphernalia. *Boyntun* v. *Boyntun*, 1 Cox, 106.

Jewels of the wife, though given by husband's will to her for life, shall not be sold for payment of husband's debts, charged on a real estate in aid of personalty. *Boynton* v. *Parkhurst*, 1 Bro. C. C. 576.

Next-of-Kin.]—Where a lady was possessed of jewels and ornaments of the person before her marriage, and after her marriage they were in all writings spoken of by her husband as hers, and were deposited with bankers, with whom she, with his consent, kept a separate account, and after her lunacy, the husband made his will, giving her the use of his plate, furniture, linen, jewels, and household effects, including the jewels and effects "which belonged to her before her marriage," and which he "had assumed by marital right" during her life, upon the death of the lunatic, who survived her husband, the court held that the next-of-kin of the husband were entitled to such of the articles as did not consist of paraphernalia as their property, but as to such as formed paraphernalia, the next-of-kin of the wife were entitled to elect whether they would take them or the benefits given by the will. *Hewson, In re*, 23 L. J., Ch. 256—L.JJ.

Exhaustion of Personal Estate.] — Where the personal estate has been exhausted to pay specialty creditors, the widow shall stand in their place for her paraphernalia, upon the real assets of the heir; yet, though paraphernalia shall be applied to satisfy simple contracts, it shall not go to satisfy legacies. *Snelson* v. *Corbet*, 3 Atk. 369. So where there is a trust estate charged with the payment of debts. *Incledon* v. *Northcote*, 3 Atk. 438.

Wife barred by Ante-nuptial Agreement.]—A wife who, by articles before marriage, is by express words barred of everything she could claim out of her husband's personal estate, by the common law, custom of London, or otherwise, has no right to paraphernalia. *Read* v. *Snell*, 2 Atk. 642.

X. GRANTS AND GIFTS TO AND BETWEEN HUSBAND AND WIFE.

1. To Husband and Wife.

Unity of Person.] — A. purchases copyhold estate, and takes the surrender to himself and his wife and daughter, and their heirs. The husband and wife (as one person) take a moiety by entireties, and the daughter the other moiety. *Back* v. *Andrew*, 2 Vern. 120; Pre. Ch. 1.

Bequest of the income of a fund "equally between my brother, W. S., and his wife Jane, and my sisters, M. M. and S. S., during their lives and the life of the survivor of them"—Held, that W. S. and wife took two-fourths, and not one-third. *Marchant* v. *Cragg*, 31 Beav. 398.

Legacies given to A., B. and C., and the wife of C., equally to be divided amongst them. C. and his wife shall have but one-third. *Bricker* v. *Whatley*, 1 Vern. 233.

Bequest to Captain A., his wife and children. There were two children:—Held, that each child took one-third absolutely, and the husband and wife one-third between them. *Gordon* v. *Whieldon*, 11 Beav. 170; 18 L. J., Ch. 5; 12 Jur. 988.

A bequest of the sum of 700*l.* unto and amongst J. C. and C. his wife, and W. L., in equal shares and proportions:—Held, to give one moiety to J. C. and C. his wife, and the other moiety to W. L., although the will, in another part of it, gave three legacies of 200*l.* each to each of them, J. C., C. his wife, and to L. *Wylde's Estate, In re*, 2 De G. M. & G. 724; 22 L. J., Ch. 87; 16 Jur. 1029; 1 W. R. 9.

Bequest to A., his wife and children. There were three children:—Held (inter alia), that A. and his wife together were only entitled to one-

fourth share. *Atcheson* v. *Atcheson*, 11 Beav. 485. See *Dias* v. *De Livera*, 5 App. Cas. 135, 136.

—— **Married Women's Property Act, 1882.**]—The rule of construction whereby, under a gift to a husband and wife and a third person, the husband and wife take only one moiety between them, has not been altered by the Married Women's Property Act, 1882. A testator by his will made in 1887, directed that a share of his residuary estate should be divided between his "sister M. B., D. B., her husband, and H. B., her step-daughter, in equal parts." M. B. and D. B. were married previously to the commencement of the Married Women's Property Act, 1882:—Held, that M. B. and D. B. each took one-fourth, and H. B. one-half of the share, the one-fourth of M. B. being her separate property according to the act. *Jupp, In re, Jupp* v. *Buckwell*, 57 L. J., Ch. 774; 39 Ch. D. 148; 59 L. T. 129; 36 W. R. 712.

A testatrix, by her will, dated in 1880, gave her residuary personal estate "to C. J. M., and J. H. and E. his wife," to and for their own use and benefit absolutely, and appointed C. J. M., and J. H. and E. H. his wife, her executors. The testatrix died in 1883, after the commencement of the Married Women's Property Act, 1882. J. H. and E. H. were married in 1864:—Held, that as the will was made before the Married Women's Property Act came into operation, it must be construed in accordance with the law at that time, and that the three residuary legatees were entitled to the personal estate as joint tenants, C. J. M. taking one moiety, and J. H. and E. H., his wife, taking the other moiety between them, J. H. in his own right, and his wife for her separate use. *March, In re, Mander* v. *Harris*, 54 L. J., Ch. 143; 27 Ch. D. 166; 51 L. T. 380; 32 W. R. 241—C. A.

How the court would have construed the gift if the will had been made after the Married Women's Property Act, 1882, came into operation, quære. *Ib.*

Gift Construed as Separate.]—The testatrix gave the residue of her real and personal estate equally between her brother, her sister, and her "nephew W., and E. his wife" (E. being the niece of the testatrix):—Held, that the husband and wife took one share each, and not merely one share between them. *Warrington* v. *Warrington*, 2 Hare, 54; 6 Jur. 872.

A testator gave his residue to A. and B. his wife, C. the wife of X., D. the wife of Y., E., F. and G. his wife:—Held, that the residue was divisible into sevenths, A. and B. his wife, and F. and G. his wife, taking separately. *Warrington* v. *Warrington* (2 Hare, 54) followed. *Jupp, In re* (39 Ch. D. 148), commented on. *Dixon, In re, Byram* v. *Tull*, 42 Ch. D. 306; 61 L. T. 718; 38 W. R. 91.

—— **Nephews and Nieces—Class—Shares.**]—Testator gave to S. and his wife, whom he called his nephew and niece, memorial rings. He also gave to each of certain other "nephews and nieces," naming them, a legacy of nineteen guineas. He gave his residuary estate in trust for all and every his nephews and nieces living at his death, to be equally divided between them, "including my nephews and nieces to whom I have given legacies as aforesaid." S. and some of the others named were nephews and nieces of the testator's wife. The wife of S. was not the niece of the testator or of his wife. The court, holding on the construction of the will that S. and his wife took as nephew and niece in the gift to the class, held, further, that they took each a share. *Gue, In re, Smith* v. *Gue*, 61 L. J., Ch. 510; 40 W. R. 553. Affirmed, 67 L. T. 823—C. A.

2. By Husband to Wife and Wife to Husband.

a. By Husband to Wife.

Gift must be clear and irrevocable.]—A gift may be made by a husband to his wife, which, though bad in law, will be supported in equity. Though the property does not pass at law, yet, in equity a husband, being the legal owner, may become a trustee for his wife, and if by clear and irrevocable acts he has made himself a trustee, the gift to his wife will be conclusive. *Mews* v. *Mews*, 15 Beav. 529.

To constitute a gift between husband and wife there must either be a clear irrevocable gift to a trustee for the wife or some clear and distinct act of the husband, by which he divested himself of his property and engaged to hold it as a trustee for the separate use of his wife. If a man were to deposit money with bankers directing them to hold it for his wife, that would probably be sufficient. *Ib.*

A farmer's wife, with his knowledge and sanction, deposited the produce of the surplus butter, eggs, and poultry with a firm in her own name, and he called it "her money." On his death-bed he gave his executor directions to remove the money, and do the best he could with it for his wife:—Held, that the evidence was not sufficient to establish a gift between them, and that the husband had neither made the firm nor himself trustees for his wife. *Ib.*

—— **Must be evidenced beyond Suspicion.**]—A gift by a husband to his wife, either as a donatio mortis causâ, or as a donatio inter vivos to her separate use, must be established by evidence beyond suspicion; a claim of that nature negatived. A defendant by her answer having claimed a gift from her husband as an absolute donatio inter vivos to her separate use, whether evidence can be received to establish it as a donatio mortis causâ, quære. *Walter* v. *Hodge*, 2 Swanst. 92; 1 Wils. 445. And see *McLean* v. *Longlands*, 5 Ves. 71.

In order to constitute a valid gift from husband to wife, there must be some clear and distinct act by which the husband divests himself of the property, and engages to hold it as trustee for the separate use of his wife. It is not necessary that he should deliver the property to a trustee for his wife; but to establish the fact of the gift, the testimony of the wife must be corroborated by clear and independent evidence. *Grant* v. *Grant*, 34 Beav. 623; 34 L. J., Ch. 641; 11 Jur. (N.S.) 787; 13 L. T. 721; 13 W. R. 1057.

Presumption rebutted.]—The dividends of stock purchased during coverture in the name of the wife out of funds placed at her disposal for family purposes by her husband, then an aged person, were paid into a bank to her account, and by her applied for domestic expenses. The wife dying in the husband's life ime, in a suit to administer the husband's estate:—Held, that the presumption that the stock was a gift to the wife

arising from the purchase being made in her name, was rebutted by the mode of dealing with the dividends. *Hoyes* v. *Kidersley*, 2 Sm. & G. 195.

Gift to Trustee for Wife's separate Use, good.]—If a gift by a husband to his wife be made to a trustee for her separate use, in possession, it will be good, semble. *Coomes* v. *Elling*, 3 Atk. 676.

Assignment operating by Way of Declaration of Trust.]—A husband by a deed-poll recited as follows: "Whereas I am beneficially possessed of the ground-rents hereby intended to be settled," and continued as follows: "I do hereby settle, assign, transfer, and set over unto my wife as though she were a single woman" several leasehold houses and the ground-rents thereof. The deed was voluntary:—Held, that this deed was not void as being an intended assignment from husband to wife, but operated as a declaration of trust. *Baddeley* v. *Baddeley*, 9 Ch. D. 113; 38 L. T. 906.

A husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England of a leasehold dwelling house, "to hold the same unto" the wife, "her executors, administrators, and assigns, as her separate estate." No trustees were appointed, the husband and wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife:—Held, that the deed of assignment operated as a valid declaration of trust in favour of the wife. *Fox* v. *Hawkes*, 49 L. J., Ch. 579; 13 Ch. D. 822; 42 L. T. 622; 28 W. R. 656.

The wife, having parted with possession of the deeds (all but the assignment) to an agent, in order to raise a sum or 200*l.* upon them for the wife, and having asked for a return of the deeds without success, the agent, by forging the name of the husband to a mortgage deed and other instruments, raised a sum of 1,200*l.*, which he appropriated to his own use:—Held, that there was no negligence on the part of the wife so as to bar her title to relief against the mortgagees. *Ib.*

A husband, by three letters written and signed by him and handed to his wife, gave her furniture and other articles for her sole and absolute use. He afterwards made his will, bequeathing certain legacies and making other dispositions of his property, and giving the residue of it to trustees in trust for his wife for life with remainder to six nieces absolutely. The furniture and other articles were at the time of the husband's death in the house which had been occupied by him and his wife, and the whole had been used by them in the ordinary way:—Held, that there was no declaration of trust, but that the furniture, &c., formed part of the husband's estate. *Baddeley* v. *Baddeley* (9 Ch. D. 113) and *Fox* v. *Hawkes* (13 Ch. D. 822) observed upon, and *Milroy* v. *Lord* (4 De G. F. & J. 264) followed. *Breton's Estate, In re, Breton* v. *Woollren*, 50 L. J., Ch. 369; 17 Ch. D. 416; 44 L. T. 337; 29 W. R. 777.

Imperfect Voluntary Gift.]—A., being sued in fee executed a deed-poll, whereby he voluntarily granted the estate to his wife as her sole and absolute property for ever:—Held, that this was an imperfect voluntary gift; that the relation of trustee and cestui que trust had not thereby been created, and that a court of equity would not interfere to assist either party. *Price* v. *Price*, 14 Beav. 598. Affirmed, 1 De G. M. & G. 308; 21 L. J., Ch. 53.

Grant by Husband to Wife of whole Estate.]—A man cannot make a grant to his wife in his lifetime, nor will equity suffer her to have the whole of her husband's estate whilst he is living; for it is not in nature of a provision, neither will such a grant revoke the husband's will giving everything away from her. *Beard* v. *Beard*, Atk. 72.

Ante-nuptial Parol Agreement.]—By a parol ante-nuptial agreement in 1879, it was agreed that the intended wife should retain 1,400*l.* as her separate property. The money was paid into a bank in her maiden name, and for two years after the marriage, she received the interest with her husband's acquiescence, and she afterwards drew out the principal. The money was claimed by the trustee in liquidation of the husband:—Held, that it was unnecessary to decide whether s. 4 of the Statute of Frauds, or the doctrine of part performance, applied to the case, because the transaction amounted to a gift by the husband to the wife of the money, which thus became her separate property, and therefore the husband was a trustee for the wife, and his trustee in liquidation was not entitled to the money. *Whitehead, In re, Booth, Ex parte*, 54 L. J., Q. B. 240; 14 Q. B. D. 419; 52 L. T. 597; 33 W. R. 471; 49 J. P. 405—C. A.

Paying off Mortgage.]—Previously to a marriage then in contemplation, the intended husband, by his agent, paid off two equitable mortgage debts of the intended wife, secured by a deposit of title deeds belonging to her. He did this apparently to save the expense of a legal mortgage, which would otherwise have been required by the mortgagees. The title deeds still remained in the custody of the mortgagees. The marriage was solemnised; there was no settlement, or agreement for a settlement. There was no issue of the marriage; the husband predeceased the wife, intestate. His widow took out administration to him:—Held, that the husband did not intend to make a gift to the wife of the money which he had paid for her, and that the debt still existed on the security of the equitable mortgage in favour of the personal estate of the deceased husband. *Gooch* v. *Gooch*, 15 Jur. 1166.

Profits of Eggs and Butter.]—A husband voluntarily after marriage permits the wife for her separate use to make profit of all butter, eggs, &c., beyond what is used in the family, out of which the wife saves 100*l.*, which the husband borrows and dies; the court will allow of this agreement to encourage the wife's frugality, and the wife shall come in as a creditor for this 100*l.*, especially where there is no deficiency of assets. *Slanning* v. *Style*, 3 P. W. 337.

So where the husband agreed that the wife should take two guineas of every tenant that renewed a lease with the husband beyond the fine which the husband received; this was allowed to be the wife's separate money. *Ib.* *See* col. 1027.

Parol Agreement before Marriage — Possession.]—Although a parol agreement, before mar-

riage, that particular chattels of the wife shall be possessed by her for her separate use, is not binding upon the husband ; yet if the agreement be acted upon by the chattels being placed under the dominion of the trustees and treated as separate property, the agreement may be made effectual. *Simmons* v. *Simmons*, 6 Hare, 352 ; 12 Jur. 8.

To a bill by a husband claiming in his marital right against his wife and the trustees of their marriage settlement part of the furniture of a house which was let furnished at an entire rent, the whole of which had, from the time of the marriage, been received by the wife for her separate use, and seeking to have the rent apportioned. The answer of the wife set up a parol agreement by the husband, made before the marriage, that the wife should possess the furniture in question for her separate use, although it was not included in the marriage settlement :—Held, that the plaintiff had no equity to sustain a suit nor an account of an apportioned part of the past rents ; that the plaintiff had no equity to sustain a suit for the apportionment of the rent of the house and furniture, in respect of his alleged interest in the latter, unless it appeared that he was by some reason precluded from bringing his action at law to recover the furniture which he claimed ; and that the plaintiff not having shown that he had no remedy at law, the bill must be dismissed. *Ib.*

Legacy—Gift by Husband.]—A legacy to a married woman was paid by cheque for 995*l.* drawn to the order of husband and wife. They indorsed it to husband's bankers, and with the husband's consent ; and in his presence the manager of the bank opened an account of 800*l.*, part of the 995*l.* in the wife's sole name. The wife afterwards drew cheques from time to time on this account in her sole name, and part was invested in bonds ; afterwards her husband requested her to charge this account with payment of his overdrawn balance with the bankers, which she refused to do :—Held, that even if the legacy had been reduced into possession there had been a gift of the 800*l.* by the husband to the wife. *Parker* v. *Lechmere*, 12 Ch. D. 256.

Conditional Gift—Fulfilment of Condition.]—A testator promised his wife a piano, on condition that she would learn to play it ; the condition was fulfilled :—Held, that this was a valid gift from the husband to the wife. *Whittaker* v. *Whittaker*, *Whittaker*, *In re*, 51 L. J., Ch. 737 ; 21 Ch. D. 657 ; 46 L. T. 802 ; 30 W. R. 787.

b. By Wife to Husband.

Evidence.]—Gift by wife to husband of her separate estate is not to be inferred without clear evidence, nor on the other hand against the husband a gift to her separate use. *Rich* v. *Cockell*, 9 Ves. 369 ; 7 R. R. 227.

—— **Law of Scotland.**]—By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband ; with this difference, that by Scotch law she has the privilege of revoking the donation, even after her husband's death, and reclaiming the subject of her gift in so far as it had not been consumed. The same circumstances which are in England held to imply donations between husband and wife are sufficient to sustain a similar inference in Scotland. *Edward* v. *Cheyne*, 13 App. Cas. 385—H. L. (Sc.)

Separate Estate—Shares—Receipt by Husband—Presumption of Gift.]—A testator, who died in 1860, bequeathed a portion of the residue of his personal estate to his daughter, a married woman, for her separate use. Shares in certain companies were allotted to her in respect of this bequest, which shares were transferred by the executor of the will into the name of her husband. In 1862 a deed of release was given to the executor, which was executed both by the husband and the wife. The testator's daughter and her husband lived together on affectionate terms until 1884, when the husband died, having by his will bequeathed to his wife a legacy, and given her a life interest in all his property. During the whole of the time from 1860 to 1884 the husband received the dividends on the shares. He kept very careful books of account, from which it appeared that he did not pay the dividends to his wife, although he did pay to her the dividends of certain other property, which also belonged to her for her separate use. Before 1862 the shares were always referred to in the books as having originally belonged to the wife, but this mode of reference was discontinued after that date. The wife died in 1884, a few days after her husband, and the question, was, whether the shares, which still remained in specie, formed part of her estate or of that of her husband :—Held, that the mere transfer of the shares into the name of the husband was not per se evidence of a gift thereof to him ; that the burden lay upon those who represented him to show that the wife had given him the shares, which burden they had not discharged ; and that, therefore, the shares must be treated as forming part of the wife's estate. *Curtis, In re*, *Hawes* v. *Curtis*, 52 L. T. 244.

3. By Wife to Stranger.

A wife, though living apart from her husband, cannot lawfully dispose by gift (even accompanied by actual delivery of possession) of chattels acquired by her during the coverture. But, in an action by the donee against a wrongdoer, for the conversion of chattels so given, it is not competent to him to set up the title of the husband. *Bourne* v. *Fosbrooke*, 18 C. B. (N.S.) 515 ; 34 L. J., C. P. 164 ; 11 Jur. (N.S.) 202 ; 13 W. R. 497.

4. Advancement.

To whom Doctrine applies.]—This presumption will arise where a purchase is made in the name of a wife, a legitimate child, or a grandchild whose father is dead, and also upon a purchase in the name of an illegitimate child. *Soar* v. *Foster*, 4 K. & J. 152 ; 4 Jur. (N.S.) 406 ; 6 W. R. 265.

Chase.]—A. purchases a walk in a chase, and takes the patent to himself and to his wife, and J. S., during their lives and the life of the survivor. The wife decreed the benefit of the patent during her life, but after her death J. S. to be a trustee for the executor. *Kingdon* v. *Bridges*, 2 Vern. 67.

Mortgage and Bonds.]—Husband lends out money in the names of himself and his wife,

upon mortgages and bonds ; the wife is entitled to this by survivorship, if there are assets sufficient without this to pay debts. *Christ's Hosp.* v. *Budgin*, 2 Vern. 683.

Bankruptcy of Husband.]—Purchase in joint names of husband and wife by trader, afterwards a bankrupt, is void against creditors. *Glaister* v. *Hewer*, 9 Ves. 12 ; 8 Ves. 195 ; 11 Ves. 377.

Money in Funds—Will.]—A husband transferred money in the funds into the joint names of himself and wife, for the purpose of making a provision for her ; and by his will he bequeathed to his wife a life interest in "all his property that he was in possession of" :—Held, that the stock did not pass. *Low* v. *Carter*, 1 Beav. 426.

Death before Completion.]—A. directed his bankers to invest money in the joint names of himself and wife. The bankers purchased by their brokers the day before, but the transfer was not made till the day after the death of A. :—Held, that the wife was entitled to the stock by survivorship. *Vance* v. *Vance*, 1 Beav. 605.

Purchase after Will.]—A husband transferred 4 per cent. and 5 per cent. stock, the whole of his funded property, into the joint names of himself and his wife. By his will he gave interest of all his funded property upon trust to his wife for life, and after her decease upon trust to pay legacies which took most of the 4 per cent. stock. He afterwards made some further purchases of 5 per cent. stock in the joint names of himself and his wife, and died leaving no other funded property :—Held, first, that all the stock standing in the joint names, whether transferred before or after the will, became, by survivorship, the absolute property of the wife ; secondly, that the will did not put the wife to her election. *Dummer* v. *Pitcher*, 2 Myl. & K. 262 ; Coop. t. Brough. 257. Affirming 5 Sim. 35.

Promissory Note—Debt.] — A. holding a promissory note from B. for a debt, directed B. to transfer it to A. and his wife, expressing an intention to benefit his wife, and he cancelled the note and took a fresh one to him and his wife :—Held, that the debt belonged to the wife. *Gosling* v. *Gosling*, 3 Drew. 335.

Power of Attorney to Wife.]—Money was invested in the funds in the joint names of husband and wife, and the wife, by power of attorney from the husband, sold out a portion, and with his knowledge kept it in her own custody till his death :—Held, that the portion which remained in the joint names survived to the wife, but the other portion, which was sold out by her, formed part of his personal estate. *Gadbury, In re*, 32 L. J., Ch. 780 ; 11 W. R. 895.

Purchase-money not Paid.]—M. contracted to purchase freeholds in the names of himself and wife, and died before the whole of the purchase-money was paid or a conveyance executed :—Held, that the contract was in the nature of advancement to the wife ; and that the doctrine of advancement applied to the unpaid purchase-money, and upon payment the vendors would become trustees for the widow. *Drew* v. *Martin*, 2 H. & M. 130 ; 33 L. J., Ch. 367 ; 10 Jur. (N.S.) 356 ; 3 N. R. 637 ; 10 L. T. 291 ; 12 W. R. 547.

A purchase by way of advancement is not within the 27 Eliz. c. 4. *Ib.*

Banking Accounts.]—A man for years lodged money in two banks on deposit receipts, some of which were in his own name, and others in the joint names of himself and of his wife, and he frequently changed deposits already made in his own name into their joint names :—Held, that the joint lodgments were advancements for the wife, who survived. *Talbot* v. *Cody*, Ir. R. 10 Eq. 138.

Receipts in the joint names of husband and wife at law and in equity considered. *Ib.*

A husband transferred his banking account into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or by his wife. All cheques were drawn by the wife at the direction of her husband, and the proceeds were applied in payment of household and other expenses :—Held, that the transfer of the account was not intended to be a provision for the wife, but merely a mode of conveniently managing her husband's affairs ; and consequently that she was not entitled. *Marshall* v. *Crutwell*, 44 L. J., Ch. 504 ; L. R. 20 Eq. 328.

Debentures and Stock.]—A husband transferred railway debentures into the names of himself and his wife and a stranger, one of the three trustees of his marriage settlement. He also transferred railway stock into the names of himself and his wife and two strangers, both trustees of the settlement :—Held, that the two investments were advancements for the benefit of the wife ; and the strangers in each case were trustees for her. *Eykyn, In re*, 6 Ch. D. 115 ; 37 L. T. 261.

Marriage with Wife's Sister.]—Purchase of stock in the names of the purchaser and his deceased wife's sister, whom (in form) he had married :—Held, not to raise a presumption that it was an advancement for her. *Soar* v. *Foster*, 4 K. & J. 152 ; 4 Jur. (N.S.) 406 ; 6 W. R. 265.

See also INFANT.

XI. ACTIONS BY AND AGAINST HUSBAND AND WIFE.

1. ACTIONS GENERALLY.

a. Parties to Sue and be Sued.

See now Rules of Court, 1883, Ord. IX. r. 3 ; Ord. XVIII. r. 4.

Mortgage of Wife's Property.] — A woman had freehold and leasehold property devised to her separate use, and she being desirous of building and repairing some cottages upon part of it, and her husband wanting to pay off a debt, it was arranged, under the advice of their solicitor, that a loan of 550*l.* should be raised by the mortgage of her property, and the deposit of two policies of the husband of 500*l.* each on the life of the husband and wife respectively. The mortgage was executed by the husband and wife, and the husband covenanted for the repayment of the loan. The money was to be advanced by instalments, and a joint authority, signed by husband and wife, was given to the solicitor to receive the first instalment from the mortgagees. He received it, and paid the husband's debt, but he claimed to retain the balance for a debt due to him from the husband. An action was then brought by the husband and wife for the balance :—Held, that, on the facts, the joint action could be maintained. *Jones* v. *Cuthbertson*, 42 L. J.,

Q. B. 221; L. R. 8 Q. B. 504; 28 L. T. 673; 21 W. R. 919—Ex. Ch.

Action for Injuries—Prior Marriage of Wife.]—After judgment for husband and wife in an action for injuries to the wife, the defendant cannot assign for error in fact, that the female before her marriage with the male plaintiff had married A., who was then alive, as this was matter which the defendant might and ought to have pleaded to the action. *Metropolitan Ry.* v. *Wilson*, 40 L. J., C. P. 208; L. R. 6 C. P. 376; 24 L. T. 550; 19 W. R. 775.

Cognovit Interest of Wife.]—A declaration by husband and wife stated, that by agreement between them and the defendant reciting that L. had been arrested at their suit, that the defendant had become bail to the sheriff, that the bail had been forfeited, and that L. had given a cognovit for the debt and costs—it was agreed between the plaintiffs and the defendant, and the defendant promised, in consideration that the plaintiffs would not enter up judgment, or sue out execution against L. until a certain day, that he would render L. on that day, or, in default, pay the debt and costs. Averment, that the plaintiffs had not entered up judgment or sued out execution against L. before the day. Breach, that the defendant did not render L. on the day or pay the debt and costs:—Held, on motion in arrest of judgment, after verdict for the plaintiffs, first, that, as the agreement was stated to be with the plaintiffs, the promise must be taken after verdict to have been made to them. Secondly, that it sufficiently appeared that the wife had a joint interest, because the recital in the agreement of a cognovit by L. to the plaintiffs was an admission by the defendant of such joint interest. Thirdly, that, though the agreement by the wife was void, it might be rejected as surplusage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment, or sue out execution until a given day. *Nurse* v. *Wills*, 4 B. & Ad. 739; 1 N. & M. 765. *S. C.*, *Wills* v. *Nurse*, 1 A. & E. 65—Ex. Ch.

For Injury to Wife's Property dum sola.]—An action for an injury done to the property of the wife dum sola must be brought by the husband and wife; but if such an action is brought by the wife alone, the defendant must plead the coverture in abatement, and not in bar. *Milner* v. *Milnes*, 3 Term Rep. 627.

By Wife Trading Separately.]—A feme covert cannot, as a feme sole, maintain an action for breaking and entering her house and seizing goods in her possession, by pleading, in answer to a plea of coverture, that her husband (a lawful subject) having deserted her and gone abroad, she was living separate, and traded, and contracted as a sole trader and single woman, and as such was lawfully possessed of the house and goods. *Boggett* v. *Frier*, 11 East, 301. *See* cols. 1027, 1115.

—— **In the City of London.**]—A feme covert cannot sue, without her husband, as a sole trader by the custom of London. *Caudell* v. *Shaw*, 4 Term Rep. 361. And see *Clayton* v. *Adams*, 6 Term Rep. 605.

When Husband an Alien Enemy.]—A feme covert cannot sue alone on a contract made with her before or after marriage, though her husband is an alien enemy. *De Wahl* v. *Braune*, 1 H. & N. 178; 25 L. J., Ex. 343.

As to Goods assigned to Wife dum sola.]—In trover by husband and wife for goods assigned to the wife before marriage:—Held, that the husband might sue alone, or the husband and wife might join. *Ayling* v. *Whicher*, 1 N. & P. 416; 6 A. & E. 259; W. W. & D. 154; 6 L. J., K. B. 134; 1 Jur. 54.

Interest or Contract of Wife or of Husband, or of Both.]—Wherever the suit will survive to the wife, she must be joined as a party. *Dunstan* v. *Burweld*, 1 Wils. 224.

The wife can only join with the husband in bringing an action where she is the meritorious cause of action. *Rose* v. *Bowler*, 1 H. Bl. 108.

Husband and wife may sue jointly a railway company for dividends on stock of the company purchased by the wife out of her own earnings, and of which stock she is the registered owner in the books of the company; and if the wife sues alone, the non-joinder of the husband is only a plea in abatement. *Dalton* v. *Midland Ry.*, 13 C. B. 474; 1 C. L. R. 102; 22 L. J., C. P. 177; 17 Jur. 719; 1 W. R. 308.

Death of Husband—Summons by Wife—Election.]—In a suit in which husband and wife were co-plaintiffs, and the husband died before decree, and the wife, with knowledge of the death of the husband, took out a summons subsequent to the decree to vary it, defendant being, at the date of the summons, ignorant of the death of the husband:—Held, that the widow had elected to continue the suit. *Mills* v. *Barlow*, 1 N. R. 412.

b. Husband Suing Alone.

Generally.]—A husband and wife cannot join in assumpsit without stating the interest of the wife. *Bidgood* v. *Way*, 2 W. Bl. 1236.

Lands were demised to A. and B. his wife, for twenty-one years. A. afterwards granted a lease of them to C. for nine years:—Held, in an action by A. alone for an injury to his reversionary interest, that the allegation that the reversion belonged to him was well supported, and that the wife need not be joined in the action; but that, even if she ought, the objection should have been taken by a plea in abatement. *Wallis* v. *Harrison*, 5 M. & W. 142; 7 D. P. C. 395; 2 H. & H. 65; 8 L. J., Ex. 188.

Husband and wife declared for double rent, for not giving up possession of premises held by the defendant, as tenant, to them. They also brought an action for double value, the declaration in which stated that the plaintiffs were seised in their demesne as of freehold, in right of the female plaintiff, during her life, of a messuage held by the defendant, as tenant to the plaintiffs, for a year certain, the reversion belonging to them in right of the female plaintiff. It then alleged a demand and refusal to give up possession. The cause having been referred, the arbitrator found, that the defendant became tenant to the husband of the premises, and occupied as tenant to him for one year. The contract for this tenancy was by parol, and was made expressly with the husband alone in his own right, and the wife was no party thereto:—Held, that the wife was improperly joined in

both actions, and that, as to the latter they could not sue as reversioners, the reversion not being in the two, but in the husband alone; neither could the averment of the tenancy, nor the words "to the plaintiffs," be rejected from the declaration. *Harcourt* v. *Wyman*, 3 Ex. 817; 18 L. J., Ex. 453.

By a marriage settlement leaseholds of the wife were assigned upon trust to pay or permit the wife to receive the rents and annual profits during her life, for her separate use. During the coverture the wife received some of the rents from the trustee, and deposited a portion with the defendant, and then died:—Held, that an action for money lent would lie by the husband in his own right to recover the money deposited. *Bird* v. *Pegrum*, 13 C. B. 639; 22 L. J., C. P. 166; 17 Jur. 577; 1 W. R. 352.

A declaration by husband and wife stated that the defendant was the maker and seller of lamps called "The Holliday lamp," and thereupon the husband bought of him one of those lamps, to be used by his wife and himself in his shop, and that the defendant then fraudulently warranted that the lamp was reasonably fit and proper for that purpose, whereas the lamp was dangerous and unsafe, by reason whereof, when the wife attempted to use the lamp, it exploded and injured her. At the trial it appeared that the accident arose from the defective construction of the lamp, but there was no proof that the defendant knew of the defect, and the jury found that he was not guilty of any fraudulent or deceitful representation:—Held, that the action could not be maintained by the wife, there being no misfeasance towards her independently of the contract, which was with the husband alone. *Longmeid* v. *Holliday*, 6 Ex. 671; 20 L. J., Ex. 430.

In an action by a husband for breach of a contract with him to carry his wife on a journey within a reasonable time, averring special damage to him; if he fails to prove the special damage, he can recover no more than nominal damages, though the wife had suffered great personal inconvenience from the breach of contract. *Collier* v. *Dublin, Wicklow and Wexford Ry.*, Ir. R. 8 C. L. 21.

A wife can only be made a party to a suit instituted by her husband in respect of her separate estate; and the husband, by making her a party, in fact admits it to be her separate estate. *Earl* v. *Ferris*, 19 Beav. 67; 24 L. J., Ch. 20; 1 Jur. (N.S.) 5; 8 Eq. R. 57; 3 W. R. 36.

—— **In Replevin.**]—A declaration in replevin by S. and his wife, without showing any cause for joining the wife, is bad on demurrer. *Serres* v. *Dodd*, 2 Bos. & P. (N.R.) 405.

—— **For Harbouring Wife.**]—If a wife by ill-treatment and fear of bodily injury is forced to quit her husband's house, any person may safely receive her, and not be subject to an action at the husband's suit. *Berthon* v. *Cartwright*, 2 Esp. 480.

So, if the wife is kept by the defendant from a principle of humanity, to secure her from the ill-treatment of her husband, an action will not lie even after notice. *Philp* v. *Squire*, Peake, 82; 3 R. R. 659.

—— **For Injuries to Wife.**]—A husband as administrator to his deceased wife, declared that the defendant was in the occupation of a brewery and an office, and a passage leading thereto from the public street used by the defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street; yet he wrongfully and negligently permitted a trap-door in the floor of the passage to be and remain open without being properly guarded and lighted, and the wife, who had been to the office as a customer of the defendant, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being and remaining open and not properly guarded and lighted, whereby she was killed:—Held, that the husband's right to sue as administrator, under 9 & 10 Vict. c. 93, sufficiently appeared, without express allegation of pecuniary damage. *Chapman* v. *Rothwell*, El. Bl. & El. 168; 27 L. J., Q. B. 315; 4 Jur. (N.S.) 1180.

Held, also, that the duty of the defendant and breach sufficiently appeared. *Ib.*

In an action for negligence, whereby the wife was killed, the husband is not entitled to any damages for the loss of her society, or for his mental sufferings on her account, after the moment of her death. *Baker* v. *Bolton*, 1 Camp. 493; 10 R. R. 734.

In trespass, the plaintiff may give in evidence a consequential injury to his wife, not as a substantial ground of action, but to show how violent the defendant's conduct was. *Huxley* v. *Bery*, 1 Stark. 98.

By Husband's Assignees.]—Assignees of a bankrupt cannot, in their names alone, maintain an action on a chose in action (e.g. a promissory note) made to the wife of the bankrupt before her marriage. *Sherrington* v. *Yates*, 1 D. & L. 1032; 12 M. & W. 855; 13 L. J., Ex. 249—Ex. Ch.

When a right of action of a bankrupt or of an insolvent is of such a nature that if vested in the bankrupt or insolvent it would pass to his assignees, the interest of the bankrupt or insolvent in such right of action passes to his assignees, and a right of action for the conversion, before the marriage, of the wife's goods falls within this rule. *Richbell* v. *Alexander*, 10 C. B. (N.S.) 324; 30 L. J., C. P. 268.

An action brought to enforce such a right must be brought in the names of the wife and of the assignees, who are necessary parties; and an action by husband and wife must fail. *Ib.*

c. Wife suing without Husband.

i. *Before Married Women's Property Act*, 1882.

a. When Permitted.

When Husband is a Convict.]—A married woman, whose husband has been transported for seven years, may maintain an action as a feme sole, on the ground of the husband having abjured the realm, even though the term of transportation has expired. *Carrol* v. *Blencow*, 4 Esp. 27.

When Husband is Abroad.]—A replication to a plea of coverture, that the plaintiff's husband had been abroad for seven years, and was not known by the plaintiff to be living within that time, is bad. *Lake* v. *Ruffle*, 6 N. & M. 684; 2 H. & W. 203.

When Money is admitted to be Due to Wife alone.]—Where trustees for the separate use of the wife admitted that they held a sum of

money to her separate use, but refused to pay it over without her separate receipt:—Held, that an action would not lie by husband and wife for the sum so admitted to be due to her. *Bond* v. *Nurse*, 10 Q. B. 244; 16 L. J., Q. B. 196; 11 Jur. 655.

Tort committed before Married Women's Property Act, 1882.]—A married woman married before 1st January, 1882, may bring and maintain an action in her own name alone after the commencement of the Married Women's Property Act, 1882, for torts committed against her property before the act came into operation; and since its coming into operation the previous leave of the court or a judge is no longer necessary. *James* v. *Barraud*, 49 L. T. 300; 31 W. R. 786.

Petition for Appointment of New Trustees.]—The presentation by a married woman of a petition for the appointment of new trustees of a fund in which she is interested in reversion is a "suing" within the meaning of s. 1, sub-s. 2, of the Married Women's Property Act, 1882, and her husband need accordingly not be made a co-petitioner. *Outwin's Trusts, In re*, 48 L. T. 410; 31 W. R. 374.

b. Security for Costs.

Rule as to.] — The rule as to giving security for costs before a married woman can be allowed to sue separately under Ord. XVI. r. 8, is the same as in the ordinary case of giving security for costs by an appellant, and therefore she is to give such security if she has no available means to pay the costs if she loses, but not where she has such means. *Brown* v. *North*, 51 L. J., Q. B. 365; 9 Q. B. D. 52; 46 L. T. 361; 30 W. R. 531—C. A.

A married woman in receipt of a separate income of 1,500*l.* per annum was not required to give security for costs on obtaining leave to defend separately under r. 8 of Ord. XVI. *Noel* v. *Noel*, 13 Ch. D. 510.

c. Next Friend.

When Necessary—Suit as to Separate Estate—Husband Defendant.]—Since the Judicature Acts, as before, a wife suing to recover separate estate ought to sue by a next friend, making her husband a defendant. *Roberts* v. *Evans*, 47 L. J., Ch. 469; 7 Ch. D. 830; 38 L. T. 99; 26 W. R. 280. *Richards* v. *Millett*, 9 L. T. 13; 11 W. R. 1035. And see *Griffith* v. *Hood*, 2 Ves. 452; *Sigel* v. *Phelps*, 7 Sim. 239; *Prince* v. *Howard*, 14 Beav. 28.

—— **Petition for Access.**]—A married woman may petition, under the 2 & 3 Vict. c. 54, for access to her children without her next friend. *Groom, In re*, 7 Hare, 38. And see *Hakewill, In re*, 1 Eq. R. 11.

—— **Petition for Payment out.**] — A petition by a married woman for payment out of court of her separate estate is a remedy for the pretection of such property within the meaning of 33 & 34 Vict. c. 93, s. 11, and she can present her petition without appearing by a next friend, as if the property in question belonged to her as an unmarried woman. *Fisher's Trusts, In re*, 45 L. T. 504; 30 W. R. 56.

—— **Appeal.**] — A married woman is not entitled to present a petition of appeal without a next friend, although another person joins in the petition, and the suit relates to her separate estate. *Picard* v. *Hine*, L. R. 5 Ch. 274. And see *S. C.*, 18 W. R. 754; *Elliott* v. *Ince*, 7 De G. M. & G. 475; 26 L. J., Ch. 821; 3 Jur. (N.S.) 597; 5 W. R. 465.

—— **Deserted Wife.**] — A single woman married a Frenchman, and was deserted by him, and he being a minor, and having married without the consent of his parents, they alleged that the marriage was void. An application by the woman for leave to file a bill without a next friend refused. *Caldicott* v. *Baker*, 13 W. R. 449.

—— **Petition for Taxation of Bill of Costs.**]—In every case where a married woman seeks to tax a solicitor's bill, for business in respect of her separate estate, she must apply by her next friend. *Waugh, In re*, 15 Beav. 508; 21 L. J., Ch. 567.

The next friend will be liable for the costs of the order and taxation, but not for the amount of the bill. *Ib.*

A married woman having obtained an order to tax without the intervention of a next friend, was ordered to give security, and in default the order was to be discharged. *Ib.*

—— **Suit as to Execution of Power.**]—In a suit relating to the execution of a power vested in a married woman:—Held, that the wife ought to sue by her next friend. *Hope* v. *Fox*, 1 John. & H. 456; 30 L. J., Ch. 272; 7 Jur. (N.S.) 186; 9 W. R. 360.

Fitness of — Defendant acting as.] — A defendant cannot act as next friend of a plaintiff feme covert. *Payne* v. *Little*, 13 Beav. 141.

It is not a valid objection to a next friend of a married woman that they are co-defendants. *Elliott* v. *Ince*, 7 De G. M. & G. 475; 26 L. J., Ch. 821; 3 Jur. (N.S.) 597; 5 W. R. 465.

—— **Must be Substantial Person.**]—A married woman may sue alone in formâ pauperis, but if she sues by a next friend, he must be a substantial person and capable of answering the costs of the suit. If not, the defendants may obtain an order to stay proceedings in the suit until the plaintiff appoints some substantial person her next friend. *Hind* v. *Whitmore*, 2 Kay & J. 458; 25 L. J., Ch. 394; 4 W. R. 379.

The same rule does not hold in an infant's suit, because an infant does not choose his own next friend, and also because the court readily entertains a suit on behalf of an infant, and will, of its own accord, stay the proceedings in such a suit if not for the infant's benefit. *Ib.*

And see *Sweeney* v. *Hall*, Sau. & Sch. 662; 1 Ir. Eq. R. 22.

—— **Suit In formâ pauperis.**]—A feme covert being allowed to sue by her next friend, in formâ pauperis, the court would not require that such a party shall be of sufficient substance to answer the costs. *Dowden* v. *Hook*, 3 Beav. 399; 14 L. J., Ch. 383; 9 Jur. 544. Questioning *Pennington* v. *Alvin*, 1 Sim. & S. 264; 1 L. J. (O.S.) Ch. 202.

Death of.] — Prochein ami of feme plaintiff being dead, she was ordered to appoint new one in two months, or bill dismissed with costs out of fund in court. *Barlee* v. *Barlee*, 1 Sim. & S. 100.

Insolvency—Stay of Proceedings.]—If the next friend of a married woman be insolvent, the court will stay the proceedings until the next friend be changed or she shall give security for costs. *M'Keon* v. *Walsh*, 1 Ir. Ch. R. 608.

And see *Wilton* v. *Hill*, 2 De G. M. & G. 807; and *D'Oechsner* v. *Scott*, 24 Beav. 239.

And see *McCann* v. *Borradaile*, 37 L. J., Ch. 124; 17 L. T. 298; 16 W. R. 175; *Drinan* v. *Mannix*, 3 Dr. & War. 154; 2 Con. & L. 87; 5 Ir. Eq. R. 190; *Pennington* v. *Pennington*, 1 L. J. (O.S.) Ch. 71; and *Pennington* v. *Alvin*, 1 Sim. & S. 264; 1 L. J. (O.S.) Ch. 202.

—— **Suspicion of not Enough.**]—To disqualify a person from being a next friend to a married woman it is not sufficient that his insolvency be suspected; there must be either admitted insolvency, or an irresistible inference of it. The court will not, for the purpose of deciding whether a person is a proper next friend, admit of a number of affidavits to show whether or not he is solvent. *Elliott* v. *Ince*, 7 De G. M. & G. 475; 26 L. J., Ch. 821; 3 Jur. (N.S.) 597; 5 W. R. 465.

—— **Onus of Proof on Defendant.**]—The onus is on a defendant, who seeks to have a next friend removed on the ground of insolvency, to make out a clear case. *Giacometti* v. *Prodgers*, 28 L. T. 294; 21 W. R. 282.

—— **Objection Cannot be Taken at Hearing.**]—An objection to the solvency of the next friend of a married woman cannot be taken at the hearing. *Monday* v. *Waghorn*, 21 L. J., Ch. 353; 16 Jur. 737.

—— **Security for Costs.**]—The next friend of a married woman plaintiff must be a person who is capable of giving security for costs. *Hind* v. *Whitmore*, 25 L. J., Ch. 394; 4 W. R. 379. And see *Stevens* v. *Williams*, 1 Sim. (N.S.) 545; 21 L. J., Ch. 57.

The court will not order the next friend of a married woman to give security for costs, unless upon a distinct allegation that he is believed to be insolvent, or unable to answer the costs of the suit; a mere statement of belief that he is in poor circumstances is not sufficient. *Beach* v. *Sleddon*, 39 L. J., Ch. 123. And see *Smith* v. *Etches*, 1 Hem. & M. 711; 9 L. T. 757; 12 W. R. 368; and *Schjott* v. *Schjott*, 51 L. J., Ch. 368; 19 Ch. D. 94; 45 L. T. 333; 30 W. R. 329.

A married woman who had brought an administration action by her next friend, in which an order had been made directing certain inquiries, was an evidence that her next friend was a person of no means directed to give security for costs. *Thompson, In re, Stevens* v. *Thompson*, 57 L. J., Ch. 748; 38 Ch. D. 317; 59 L. T. 427—C. A.

—— **Poverty.**]—The poverty of the next friend of an infant will be no ground for the defendant's requiring security for costs. *Drinan* v. *Mannix*, 2 Con. & L. 87; 3 Dr. & W. 154; 5 Ir. Eq. R. 162, 190.

But the poverty of a next friend is a ground for requiring security for costs to be given, where the same person is next friend both of a feme covert and infants who are co-plaintiffs. *Ib.*

—— **Form of Order.**]—The form of the order in such a case is, that the proceedings be stayed, until the next friend of the feme covert be changed, or security for costs be given. *Ib.* And see *Jones* v. *Fawcett*, 2 Ph. 278; 16 L. J., Ch. 497; 11 Jur. 529.

—— **Female Co-plaintiff.**]—A female co-plaintiff upon being appointed next friend to her mother and brothers and sisters must give security for costs. *Balguy* v. *Broadhurst*, 2 Eq. R. 1270; 2 W. R. 680.

—— **Second Action—New Next Friend—Costs not paid.**]—An action was brought by a married woman by her next friend, and an order was made that the next friend should give security for costs on the ground of poverty. That order not having been complied with the action was dismissed with costs. Afterwards the plaintiff by a different next friend brought another action for the same purpose:—Held, that the second action ought to be stayed till the costs of the first action were paid. *Hind* v. *Whitmore* (2 Kay & J. 458) not followed. *Payne, In re, Randle* v. *Payne*, 52 L. J., Ch. 544; 23 Ch. D. 288; 48 L. T. 194; 31 W. R. 509. And see *Bligh* v. *Tredgett*, 5 De G. & Sm. 74; 21 L. J., Ch. 204; 15 Jur. 1101.

Change of.]—An application by a married woman, plaintiff, for leave to change her next friend, is in the discretion of the court, and will not be granted if there be reason to believe that the defendant's security for costs will be thereby prejudiced. *Jones* v. *Fawcett*, 2 Ph. 278; 16 L. J., Ch. 497; 11 Jur. 529.

And see *Lander* v. *Parr*, 16 L. J., Ch. 269; 11 Jur. 271; and *Crace* v. *Crace*, 3 W. R. 146.

Security for Costs.]—If the next friend of a married woman is changed during the suit, he must not only give his own security for the costs incurred, but find a security to join him in such amount as the master in his discretion shall fix. *Payne* v. *Little*, 22 L. J., Ch. 1037. And see *S. C.*, 1 W. R. 238; and *Waugh, In re*, 15 Beav. 508; 21 L. J., Ch. 567; *Payne* v. *Little*, 14 Beav. 652; 21 L. J., Ch. 718; *Ring* v. *Nettles*, Fl. & K. 51; 3 Ir. Eq. R. 53; and *Lawley* v. *Halpen*, Bunb. 310.

New Next Friend — Liability for Costs.]—A bill was filed by a married woman purporting to sue in respect of her separate estate; and the next friend having died, a new next friend was appointed without his knowledge. An order having been made dismissing the bill for want of prosecution with costs, to be paid by the new next friend:—Held, on a motion by the new next friend to vary the order by charging the costs on the plaintiff's solicitor, that the order was right, and the next friend was liable. *Bligh* v. *Tredgett*, 5 De G. & Sm. 74; 21 L. J., Ch. 204; 15 Jur. 1101.

A next friend, substituted for one who had previously died, is liable for all the costs, from the commencement of the suit, and not only for such as have been incurred during the time his name has been on the record. *Ib.*

Semble, a next friend, appointed without his own knowledge, is liable, as between himself and the defendants, to all the costs of the suit, and has a remedy against the solicitor who appointed him. *Ib.*

A married woman by her next friend filed a

petition for appointment of new trustees, and the petition was supported by an affidavit, which contained charges of gross misconduct on the part of her husband. The court made the next friend pay the costs incurred by the allegations of misconduct on the part of the husband. *Wills, In re*, 9 L. T. 570 ; 12 W. R. 97.

And see *Glanvill, In re, Ellis* v. *Johnson*, 55 L. J., Ch. 325 ; 31 Ch. D. 532 ; 54 L. T. 411 ; 34 W. R. 309 ; 50 J. P. 662—C. A.

When a next friend of a married woman institutes, without her consent, a useless suit, he will be ordered to pay the costs. *Kenrick* v. *Wood*, 39 L. J., Ch. 92 ; L. R. 9 Eq. 333 ; 19 W. R. 57.

—— **Security may be ordered at any time.**]—Under rules of S. C., r. 8 of Ord. XVI., the court has a judical discretion to direct security for costs to be given at any time. *Martano* v. *Mann*, 49 L. J., Ch. 510 ; 14 Ch. D. 419—C. A.

—— **Writ issued by—Lay next Friend acting as Solicitor.**]—A writ issued by the next friend of a married woman on her behalf without the employment of a solicitor will be, together with all subsequent proceedings, set aside, with costs against the person issuing such writ. *Swann* v. *Swann*, 43 L. T. 530. And see *Kenrick* v. *Wood*, 39 L. J., Ch. 92 ; L. R. 9 Eq. 333 ; 19 W. R. 57.

Authority.]—The authority given by a married woman to her next friend to commence an action cannot be filed. *Rogers* v. *Horn*, 26 W. R. 432.

A next friend must be prepared when challenged to show his authority. *Schjott* v. *Schjott*, 51 L. J., Ch. 368 ; 19 Ch. D. 94 ; 45 L. T. 333 ; 30 W. R. 329—C. A.

—— **Action Brought without Husband's Authority.**]—An action having been brought by a married woman as executrix in which her husband was made a co-plaintiff, the court refused to order the proceedings to be stayed altogether, but ordered they should be stayed until security was given to the husband by the attorney against the costs of the action, the affidavits showing that the husband and wife were living separate, and that the action was brought without his sanction and against his will. *Proctor* v. *Brotherton*, 9 Ex. 486 ; 2 C. L. R. 496 ; 23 L. J., Ex. 116 ; 2 W. R. 195.

Where an action is brought (without the authority of the husband) in the name of husband and wife, for an assault upon the latter, the husband will be entitled to stay the proceedings until he receives an indemnity against costs. *Harrison* v. *Almond*, 4 D. P. C. 321 ; 1 H. & W. 519.

So where husband and wife lived separate, and an action was brought by the wife for a debt due to herself in the name of the husband and wife, without his authority, the court ordered proceedings to be stayed until an indemnity was given to the husband. *Morgan* v. *Thomas*, 2 C. & M. 388 ; 2 D. P. C. 332 ; 3 L. J., Ex. 90.

An action having been brought by a wife of a lunatic (not so declared by commission) in his name, for the recovery of a debt, the defendant paid the money into court. The court made absolute a rule for payment of the money out to the wife. *Gliddon* v. *Trebble*, 9 C. B. (N.S.) 367 ; 30 L. J., C. P. 160.

Unmarried Woman representing herself to be a Feme Covert.]—A man and woman had been married and were cohabiting together. Goods which had belonged to the woman before the marriage were seized and sold under an execution against the man. The woman afterwards discovered that the marriage was void :—Held, that she might recover in trover against the sheriff the full value of the goods, though exceeding the price for which they were sold. *Glaspool* v. *Young*, 4 M. & Ry. 533 ; 9 B. & C. 696 ; 7 L. J. (O.S.) K. B. 305.

The plaintiff hired a house of the defendant, representing herself at the time to be a feme covert, and, upon the faith of the like representations, she obtained goods from various tradesmen :—Held, that her assertions that she was a feme covert estopped her from suing as a feme sole in respect of a trespass committed by the defendant under colour of a distress for rent. *Langford* v. *Foot*, 2 M. & Scott, 349.

Action by Wife's Representative.]—In an action by the administratrix of a wife it appeared that the defendant had written letters to the wife promising to hold at her disposal a sum of money which he had received from a third person. The husband did not interfere either to allow her to have the control of the money or to prevent her from dealing with it. He survived her, and then died :—Held, that the gift of money was a chose in action conferred on the wife with which the husband did not during coverture interfere, and therefore the action was properly brought by the representative of the wife. *Fleet* v. *Perrins*, 9 B. & S. 575 ; 37 L. J., Q. B. 233 ; L. R. 3 Q. B. 536 ; 19 L. T. 147. Affirmed, 9 B. & S. 575 ; 38 L. J., Q. B. 257 ; L. R. 4 Q. B. 500 ; 20 L. T. 814 ; 17 W. R. 862—Ex. Ch.

Under Married Women's Property Act, 1870.]—Since the Judicature Acts, as before, a wife suing to recover separate estate ought to sue by a next friend, making her husband a defendant. *Roberts* v. *Evans*, 47 L. J., Ch. 469 ; 7 Ch. D. 830 ; 38 L. T. 99 ; 26 W. R. 280.

In an action of this kind the husband was made a co-plaintiff. The defendant by his statement of defence objected that the husband ought to have been a defendant. The statement of claim was afterwards amended for another purpose, but no alteration was made as to the parties. At the trial the court ordered the husband to be made a defendant, and, in giving judgment for the wife, deprived her of the costs of the pleadings subsequently to the time when the defendant took the objection. *Ib.*

The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), enables a married woman to maintain an action in her own name to recover damages against her bankers for dishonouring cheques drawn by her in the course of a trade which she carries on separately from her husband, or for not duly presenting or not giving due notice of dishonour of a bill of exchange acquired by her in such trade, and intrusted to them by her for presentment, it being a remedy "for the protection and security" of her separate property, within s. 11. *Summers* v. *City Bank*, 43 L. J., C. P. 261 ; L. R. 9 C. P. 580 ; 31 L. T. 268.

A feme covert can sue her husband in respect of money lent to him out of her separate estate. The plaintiff lent to her husband 1,000*l.*, out of money left by will to her sole and separate use, upon the security of his promissory note :—Held, that she was entitled to recover. *Horrell* v.

Horrell, 46 J. P. 295. See also *Woodward* v. *Woodward*, 3 De G. J. & S. 672.

In a suit by married women as to their separate estates, leave given after answer to amend by striking out their husbands as co-plaintiffs, and making them defendants. The amendment is not within the fiftieth General Order. *Greer* v. *Greer*, 8 Ir. Eq. R. 32.

Petition for Payment out of Court—Next Friend Unnecessary.]—A petition by a married woman for payment out of court of her separate estate is a remedy for the protection of such property within the meaning of 33 & 34 Vict. c. 93, s. 11, and she can present her petition without appearing by a next friend, as if the property in question belonged to her as an unmarried woman. *Fisher's Trusts, In re*, 45 L. T. 504; 30 W. R. 56.

Right to bring Action of Trespass.]—Under the Married Women's Property Act, 1870, a married woman can maintain an action in her own name against a wrongdoer for her expulsion from a beerhouse, in which she carried on business apart from her husband, and for loss of profits, stock-in-trade and fixtures, which she had purchased with her separate earnings, it being a remedy for the protection of her property within the meaning of s. 11. *Moore* v. *Robinson*, 48 L. J., Q. B. 156; 40 L. T. 99; 27 W. R. 312.

Action by Husband.]—A., a feme sole, entitled to the profits of an estate vested in trustees for her separate use, conveyed them to B., a married woman, for her separate use, without the interposition of a trustee. A. married, and the trustees, without notice of the conveyance to B., paid the profits to A. B.'s husband cannot maintain an action against A.'s husband for the money as money received to his use. *Davison* v. *Atkinson*, 5 Term Rep. 434.

Sufficient Separate Estate presumed.] — A married woman suing as a member of a firm must be assumed to have (unless the contrary be shown), sufficient separate estate to justify her in maintaining an action. *Eddowes* v. *Argentine Loan Co.*, 63 L. T. 364—C. A.

Execution—Marriage before Final Judgment.] —A feme sole, who marries before final judgment, may sue out execution, without making her husband a party to the record, the marriage being only matter of plea in abatement. *Walker* v. *Golling*, 2 D. (N.S.) 776; 11 M. & W. 78; 12 L. J., Ex. 185.

ii. *Since Married Women's Property Act*, 1882.

Statute.]—By 45 & 46 Vict. c. 75, s. 1, sub-s. 2, *a married woman shall be capable, in respect of her separate property, of suing either in contract or in tort or otherwise in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or be made a party to any action or other legal proceeding brought by her.*

And by s. 12, *every woman, whether married before or after this act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.*

Suing as Feme Sole—Security for Costs.]—A married woman being empowered by s. 1, sub-s. 2, of the Married Women's Property Act, 1882, to sue as a feme sole, may sue without her husband or a next friend, and cannot be ordered to give security for the costs of the action, even though she have at the time of the action no separate estate. *Isaac, In re, Jacob* v. *Isaac*, 54 L. J., Ch. 1136; 30 Ch. D. 418; 53 L. T. 478; 33 W. R. 845.

And see *Severance* v. *Civil Service Supply Association*, 48 L. T. 485, and *Threlfall* v. *Wilson*, 8 P. D. 18; 48 L. T. 238; 31 W. R. 508; 47 J. P. 279. *See* col. 1303.

Suing Alone—Tort committed before 1882.]—A married woman is entitled under the Married Women's Property Act, 1882, s. 1, sub-s. 2, to bring an action in respect of a tort committed upon her during coverture before the commencement of the act, without joining her husband as plaintiff. *Weldon* v. *Winslow*, 53 L. J., Q. B. 528; 13 Q. B. D. 784; 51 L. T. 643; 33 W. R. 219—C. A.

The Married Women's Property Act, 1882, does not enable a married woman to bring an action for an assault committed upon her during coverture before the passing of the act without joining her husband. *Weldon* v. *Riviere*, 53 L. J., Q. B. 448.

—— **Tort when barred by Statute of Limitations.**]—The right of a married woman whose husband is alive to bring an action in her own name, dates from the commencement of the Married Women's Property Act, 1882 (January 1, 1883). For that purpose she is a feme discovert within the Statute of Limitations (21 Jac. 1, c. 16), and she may within the statutable limits from that date bring an action for a cause which accrued many years previously to that date while she was a married woman. *Weldon* v. *Neal*, 51 L. T. 289; 32 W. R. 828.

The effect of the Married Women's Property Act, 1882, is to make a married woman discovert from the date of the passing of the act in respect of torts committed against her during coverture, and she is entitled to bring an action in respect of a tort committed during coverture and before 1882, which would otherwise be barred by 21 Jac. 1, c. 16, s. 3; for that statute begins to run only from the date of the passing of the act of 1882. *Lowe* v. *Fox*, 54 L. J., Q. B. 561; 15 Q. B. D. 667; 53 L. T. 886; 34 W. R. 144; 50 J. P. 244—C. A.

—— **House Settled to Separate Use.**]—When a husband, by a post-nuptial deed, has settled a house and business to the separate use of his wife, to be managed by her for the benefit of herself as if a feme sole, he can be restrained from in any way interfering with the business, and even from entering the house. *Wood* v. *Wood*, 19 W. R. 1049.

Husband Claiming Right — Interim Injunction.]—On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, and the husband and wife continued to reside in the house. Differences arose between them, they ceased to cohabit, and the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to and to use the house when and as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. In an action by the wife against the trustees and her husband, claiming administration of the trusts of the settlement and an injunction to restrain the husband from entering the house:—Held, that, under the circumstances, the wife was entitled to an interim injunction. *Symonds* v. *Hallett*, 53 L. J., Ch. 60; 24 Ch. D. 346; 49 L. T. 380; 32 W. R. 103—C. A. And see *Wood* v. *Wood*, 19 W. R. 1049.

House in Sole Occupation of Wife as her Separate Property — Trespass.]—A married woman in the sole occupation of a house, bought by her out of her own earnings, since the Married Women's Property Act, 1870, can now, after the Married Women's Property Act, 1882, sue alone, without her husband, in an action for trespass, a person who has entered such house against her will, though he did no injury to the house, and entered it with the authority of her husband, but for a purpose unconnected with the husband's desire to live with his wife:—Quære, if the husband himself has a right to enter such house. *Weldon* v. *De Bathe*, 54 L. J., Q. B. 113; 14 Q. B. D. 339; 53 L. T. 520; 33 W. R. 328—C. A.

Application for Injunction—Undertaking as to Damages.]—Where an interlocutory injunction is granted upon the application of a married woman, her sole undertaking as to damages is sufficient. A married woman living and carrying on business apart from her husband brought her action for specific performance of an alleged agreement to grant a lease, and moved for an interlocutory injunction to restrain the defendant from dealing with the property. The defendant alleged that the plaintiff had not sufficient separate property to satisfy her present liabilities, and that her undertaking in damages would be illusory, and asked for the undertaking of some responsible person:—Held, that since a married woman was for the purpose of suing in the same position as a feme sole, no distinction could be made between her and a male plaintiff; and that, therefore, her sole undertaking for damages was sufficient. *Pike* v. *Cave*, 62 L. J., Ch. 937; 68 L. T. 650.

An application was made on behalf of a married woman for an injunction restraining the Bank of England, until further order, from permitting the transfer of a sum of new three per cent. annuities, standing in the names of the executors of a testator, and to which the married woman claimed to be beneficially entitled. An injunction was granted for a fortnight on the usual undertaking of the married woman to be answerable in damages. The registrar refused to draw up the order on the sole undertaking of the married woman as to damages:—Held, that the sole undertaking of the married woman must be accepted. *Prynne, In re*, 53 L. T. 465. See also *Hunt* v. *Hunt*, 54 L. J., Ch. 289.

d. Actions against Wife.

Statute.]—By 45 & 46 Vict. c. 75, s. 1, sub-s. 2, *a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her.*

And see R. S. C., 1883, Ord. XVI., r. 16.

Married Woman as Executrix or Trustee.]—By 45 & 46 Vict. c. 75, s. 18, *a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.*

Appearance.]—In an action against husband and wife for a debt incurred by the wife dum sola, the court refused at the instance of the husband, to set aside an appearance entered for both, it appearing that the wife had given instructions to the attorney. *Williams* v. *Smith*, 1 D. P. C. 632.

Pleading—Statement of Claim—No Appearance entered.]—Where a married woman is defendant in an action on a contract, and has made default in the delivery of a defence, the statement of claim must contain an allegation that the defendant has separate estate; otherwise the court will refuse to make an order against the defendant on the statement of claim under Ord. XXVII. r. 11, of the Rules of 1883, *Tetley* v *Griffith*, 57 L. T. 673; 36 W. R. 96. *But see now* the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1.

Money Paid by Husband for Wife after Marriage.]—Before the coming into operation of the Married Women's Property Act, 1882, a husband in a court of equity might make his wife a defendant to a suit respecting her separate estate, and might obtain a decree against her for breach of any contract, whereby she had intended to bind the same, and that statute has not deprived a husband of any right or remedy, to which, if it had not been passed, he would have been entitled as against his wife in respect of her separate estate; and therefore it is now competent to a husband to maintain an action against his wife, and to charge her separate estate for

money lent by him to her after their marriage, and for money paid by him for her after their marriage at her request made before or after their marriage. *Butler* v. *Butler*, 55 L. J., Q. B. 55; 16 Q. B. D. 374; 54 L. T. 591; 34 W. R. 132—C. A.

Action by Executors against Legatee for Indemnity.]—A married woman became entitled to the residue of a testator's estate for her separate use. A part of the residue consisted of certain shares not fully paid-up. The certificates for the shares were handed to her by the executors, but no transfer was executed. A call was afterwards made on the shares, which the married woman refused to pay. The executors commenced an action against the married woman for an indemnity:—Held, that they were entitled thereto; that the words "or otherwise" in s. 1, sub-s. 2, of the Married Women's Property Act, 1882, gave the executors the right to sue her in respect of her separate estate. The object and effect of s. 1 of the Married Women's Property Act, 1882, is to enable a married woman to be sued on any cause of action on which a man can be sued, subject to the fact that her power to contract is limited, and the remedy against her is confined to her separate estate. *Kershaw, In re, Whittaker* v. *Kershaw*, 60 L. J., Ch. 9; 45 Ch. D. 320; 63 L. T. 203; 39 W. R. 23—C. A.

Joint and Several Promissory Note.]—A woman, married since the passing of the Married Women's Property Act, 1870, joined her husband in signing a joint and several promissory note for money lent to him. The husband became bankrupt:—Held, that her separate estate was liable for the amount due on the note, and that it was not necessary to make any trustees for the wife parties to the action. *Davies* v. *Jenkins*, 6 Ch. D. 728; 26 W. R. 260.

Liability for Tort after Marriage.]—The plaintiff may sue the wife alone or the husband and wife jointly for wrongs committed by her after marriage. *Seroka* v. *Kattenburg*, 55 L. J., Q. B. 375; 17 Q. B. D. 177; 54 L. T. 649; 34 W. R. 542.

Third Party—Married Woman—Judgment against—Refusing to state Defence.]—Judgment may be ordered, under Ord. XVI., r. 52, against a third party who has appeared after a third party notice has been served on him, if the third party, on the hearing of an application for directions, declines to state any defence, and if the judge is not satisfied that there is any question proper to be tried. Such judgment may be ordered against a married woman as a feme sole declaring her separate estate liable, although the liability was incurred prior to the passing of the Married Women's Property Act, 1882. *Gloucestershire Banking Co.* v. *Phillips*, 53 L. J., Q. B. 493; 12 Q. B. D. 533; 50 L. T. 360; 32 W. R. 522.

Order XIV.—Payment into Court—Right of Plaintiff to Money.]—In an action against a married woman who had separate estate not subject to a restraint on alienation, she was ordered to pay the sum claimed into court as a condition to defending the action. At the trial the plaintiff obtained judgment for the amount paid in:—Held, that the plaintiff was entitled to an immediate order for payment out of court, and that no inquiry could be ordered as to whether the defendant had any and what separate estate available for execution. *Bird* v. *Barstow*, 61 L. J., Q. B. 1; [1892] 1 Q. B. 94; 65 L. T. 656; 40 W. R. 71; 56 J. P. 196—C. A.

—— **Delay in Entering Judgment.**] — The plaintiff obtained leave, under Ord. XIV., to enter final judgment for a debt against a married woman possessed of separate estate with a restraint on anticipation. He delayed entering judgment for three months, when he knew that arrears had just become due, and then entered judgment and obtained an order for a receiver:—Held, that an order for a receiver ought not to be made under such circumstances. *Colyer* v. *Isaacs*, 77 L. T. 198—C. A.

—— **Judgment under—Evidence of Separate Estate.**] — In an action against husband and wife to recover a debt of the wife contracted before marriage, where the marriage has taken place after the coming into operation of the Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, but before the coming into operation of the Married Women's Property Act, 1882, judgment may be entered against the wife under Ord. XIV., r. 1, making the debt and costs payable out of her separate property, with a limitation as regards execution similar to that in the form settled in *Scott* v. *Morley* (20 Q. B. D. 120), without proof of the existence of separate estate at the date of the judgment. *Downe* v. *Fletcher*, 21 Q. B. D. 11; 59 L. T. 180; 36 W. R. 694; 52 J. P. 375.

Form of Judgment.] — The proper form of judgment against a married woman under s. 1, sub-s. 2 of the Married Women's Property Act, 1882, settled by the court. *Scott* v. *Morley*, 57 L. J., Q. B. 43; 20 Q. B. D. 120; 57 L. T. 919; 36 W. R. 67; 4 Morrell, 286; 52 J. P. 230—C. A.

When judgment was recovered against a married woman, an order was made, on the application of the plaintiff, that the judgment debtor should pay the amount due upon the judgment by instalments out of her separate estate not subject to restraint against anticipation; or which, being so subject, was nevertheless liable to execution under s. 19 of the Married Women's Property Act, 1882. *Johnstone* v. *Browne*, 18 L. R. Ir. 428.

When judgment is obtained against a married woman, execution is limited to such separate estate as she is not restrained from anticipating; unless such restraint exists under any settlement or agreement for a settlement of her own property, made or entered into by herself. *Bursill* v. *Tanner*, 13 Q. B. D. 691; 50 L. T. 589; 32 W. R. 827. See also *Gloucestershire Banking Co.* v. *Phillips*, 53 L. J., Q. B. 493; 12 Q. B. D. 533; 50 L. T. 360; 32 W. R. 522.

The plaintiff sued the defendant, a widow, as maker of a promissory note during the lifetime of her husband. The defendant pleaded that at the making of the note she was not entitled to separate property, and that she did not afterwards become possessed of or entitled to any property which she could charge, alien or dispose of; that the only separate estate she possessed or was entitled to at the date of the note, and afterwards during coverture, was

separate estate subject to a restraint on anticipation; and that there were not, at the date of the alleged contract, or subsequently, arrears thereof due:—Held, on demurrer, a valid defence to the action. The principle of *Pike* v. *Fitzgibbon* (17 Ch. D. 454) has not been altered by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). *Myles* v. *Burton*, 14 L. R. Ir. 258.

At the trial of an action, brought against husband and wife to recover the amount of a bill of exchange indorsed by the wife to the plaintiff, it appeared that the wife, when she indorsed the bill, was a married woman possessed of a life interest in certain property settled to her separate use, without any restraint upon anticipation, and that after writ issued, but before trial, her life interest was, by deed, resettled upon her for her separate use without power of anticipation. Judgment having been entered for the plaintiff for the amount claimed, with a direction to the master to inquire as to the wife's separate estate and report to the court, and also with an injunction restraining the defendants from dealing with the separate estate until the debt was paid or the money paid into court:—Held, on appeal, that this judgment was wrong, that the proper order to make was one declaring that the plaintiff entitled to be paid the amount of the debt out of the estate (if any) to which the wife might be entitled for her separate use without restraint on her power of dealing therewith; judgment to be entered for the husband; and (the plaintiff having failed to show that the wife at the time of the trial was entitled to any separate estate with power of dealing therewith) no further order to be made, except that the judgment was to be without prejudice to such proceedings as the plaintiff might be advised to take in order to set aside the deed of resettlement. *Barber* v. *Gregson*, 49 L. J., Ex. 731; 43 L. T. 428—C. A.

See also *Pike* v. *Fitzgibbon*, 50 L. J., Ch. 394; 17 Ch. D. 454; 44 L. T. 562; 29 W. R. 551—C. A. *McQueen* v. *Turner*, 30 W. R. 80. *Gallagher* v. *Nugent*, 8 L. R. Ir. 353. *Durrant* v. *Ricketts*, 51 L. J., Q. B. 425; 8 Q. B. D. 177; 30 W. R. 428. *Collett* v. *Dickinson*, 11 Ch. D. 687; 40 L. T. 394.

Restraint on Anticipation — Duration of Restraint—Arrears of Income.]—The restraint on anticipation of a married woman's separate income ceases to attach to such income as soon as it becomes due and payable to her under the trusts of the instrument under which she is entitled. *Hood Barrs* v. *Catheart*, 63 L. J., Q. B. 602; [1894] 2 Q. B. 567; and *Pillers* v. *Edwards* (71 L. T. 788) overruled. *Hood Barrs* v. *Heriot* 65 L. J., Q. B. 352; [1896] A. C. 174; 74 L. T. 353; 44 W. R. 481; 60 J. P. 612—H. L. (E.)

Rents accruing after judgment of property subject to a restraint on anticipation cannot be taken in execution under a writ of sequestration, or by means of a receiver. *Hood Barrs* v. *Catheart* (supra) followed. *Lumley, In re, Hood Barrs* v. *Catheart*, 63 L. J., Ch. 897; [1894] 3 Ch. 135; 7 R. 400; 71 L. T. 7; 42 W. R. 633—C. A.

—— **Execution Limited.**] — Where, upon motion to enter final judgment against a married woman, she denied by affidavit having separate estate, save property settled on her marriage, with a restraint on anticipation, the court, in allowing judgment to be entered, limited execution to such separate property as she was not restrained from anticipating, unless such restraint existed under a settlement or agreement for a settlement of her own property made or entered into by herself. Form of Order. *Nicholls* v. *Morgan*, 16 L. R. Ir. 409. *See now*, as to Costs, col. 1307

Writ of Sequestration—Form.]—The general form of a writ of sequestration against "the estate and effects" of a married woman without any express limitation therein to separate property of the wife not subject to a restraint on anticipation is correct; but the writ can only operate on her separate property which is not so subject. *Hyde* v. *Hyde*, 57 L. J., P. 89; 13 P. D. 166; 59 L. T. 529; 36 W. R. 708—C. A.

Inquiry as to Property.]—A charge given by a married woman upon her separate estate is sufficient evidence of the existence of separate estate to entitle a plaintiff, with whom she has contracted, to an inquiry. *London Alliance Discount Co.* v. *Kerr*, 1 Cab. & E. 5.

Receiver—In what Cases—Judicature Act, 1873, s. 25, sub-s. 8.]—M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor, incurred in a suit relating to her separate estate. After the taxing-master's certificate had been filed, an order was made on the application of the solicitor, directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the court, and appointing a person to receive it until the amount found due on taxation was paid:—Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *Peace and Waller, In re*, 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899—C. A.

—— **Who Appointed—Prior Charges.**]—In an action against a married woman alleged to be possessed of separate estate, no defence being delivered, the master, by his report, found that she was entitled to separate estate vested in trustees, and subject to certain charges. The report being confirmed, the plaintiff was appointed receiver, without security, of the residue of the income of the separate estate, after payment of the prior charges, the plaintiff undertaking to act without commission. *M'Garry* v. *White*, 16 L. R. Ir. 322.

Garnishee Proceedings.]—A judgment for a debt against a married woman enforceable only against property to her separate use which she is not restrained from anticipating, is a "judgment" within the meaning of Ord. XLV. r. 1, which entitles the judgment creditor to institute garnishee proceedings, and to attach a debt owing or accruing to such married woman. *Holtby* v. *Hodgson*, 59 L. J., Q. B. 46; 24 Q. B. D. 103; 62 L. T. 145; 38 W. R. 68—C. A.

Actions on Judgments against Wife.]—Action against husband and wife on a judgment recovered against the wife dum sola. On producing the record, it appeared that the original action was against the wife and others:—Held, no

variance, but, at the most, only a ground for a plea in abatement. *Cocks* v. *Brewer*, 2 D. (N.S.) 759; 11 M. & W. 51; 12 L. J. Ex. 225; 7 Jur. 218.

And see EXECUTION.

Order of Committal — Jurisdiction — Debtors Act, 1869, s. 5.]—Under s. 5 of the Debtors Act, 1869, there is no power to commit to prison a married woman for her default in paying a sum for which judgment has been recovered against her by virtue of s. 1, sub-s. 2, of the Married Women's Property Act, 1882. *Scott* v. *Morley*, 57 L. J., Q. B. 43; 20 Q. B. D. 120; 57 L. T. 919; 36 W. R. 67; 4 Morrell, 286; 52 J. P. 230—C. A.

Judgment for a debt and costs was recovered against a married woman, execution being, by the terms of the judgment, limited to her separate property not subject to any restraint upon anticipation, unless by reason of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint. Upon an application for an order of committal against her under s. 5 of the Debtors Act, 1869, the only evidence of her ability to pay was that since the date of the judgment she had received sufficient income of separate property subject to a restraint upon anticipation:—Held, that no order could be made against her upon that evidence, because s. 5 did not apply to the judgment. *Draycott* v. *Harrison*, 17 Q. B. D. 147; 34 W. R. 546.

An order under the Debtors Act, 1869, s. 5, may be made upon a married woman. *Dillon* v. *Cunningham*, 42 L. J., Ex. 11; L. R. 8 Ex. 23; 27 L. T. 830.

Upon a judgment summons issued under s. 5 of the Debtors Act, 1869, against a married woman who has only separate estate which she is restrained from anticipating, an order for payment cannot be made unless it is shown that, since the date of the judgment, she has received some of her separate income. If in the judgment execution is limited to separate estate which she is not restrained from anticipating, quære, whether s. 5 of the Debtors Act, 1869, applies at all. *Dillon* v. *Cunningham* (L. R. 8 Ex. 23) distinguished. *Meager* v. *Pellew*, 14 Q. B. D. 973; 53 L. T. 67; 33 W. R. 573—C. A.

An order, under the Debtors Act, for payment by instalments will not be made against a married woman whose only separate estate is subject to restraint on anticipation, even though, since the date of the judgment against her, she has received income of the separate estate. *Morgan* v. *Eyre*, 20 L. R. Ir. 541.

—— **No separate Estate.**] — A married woman without separate property cannot be imprisoned for non-payment of the costs of an action. *Walter, In re*, 55 J. P. 551.

Where to an action against husband and wife, on a judgment against the wife, they pleaded that she was covert when the action in which the judgment was recovered was commenced, and thence until the judgment, and that her husband was not a party to the judgment, or a defendant in the action:—Held, that the plea was bad, inasmuch as it contained matter which afforded ground for a writ of error, and could not be pleaded in bar to an action on the judgment. *Dick* v. *Tolhausen*, 4 H. & N. 695.

Section 141 of 15 & 16 Vict. c. 76 does not apply to the case of the marriage of a female defendant after judgment. *Morris* v. *Coates*, 3 W. R. 524.

If after interlocutory judgment against a feme upon a contract she marries; yet the plaintiff may proceed to judgment and execution against her, without joining the husband by scire facias, or now by suggestion or writ of revivor (*see* s. 141 of 15 & 16 Vict. c. 76), and a ca. sa. against her following the judgment is, at all events, regular, though the plaintiff had notice of the marriage before. *Cooper* v. *Hunchin*, 4 East, 521; 1 Smith, 282.

Ejectment against a feme sole who married before trial, and verdict and judgment against her by her original name:—Held, that it was regular to issue an habere facias possessionem and fi. fa. against her by the same name, though the fi. fa. was inoperative. *Doe* d. *Taggart* v. *Butcher*, 3 M. & S. 557.

Setting aside Judgments in Actions against Married Woman.]—Judgment by default in an action against a married woman is irregular. *Dobson* v. *Easton*, 2 F. & F. 371.

The court set aside a judgment signed against a married woman (sued as a feme sole), but without costs, there being some doubt whether she had not, when she contracted the debt, held herself out as being unmarried. *Wilson* v. *Hollings*, 11 C. B. (N.S.) 783; 3 F. & F. 96; 5 L. T. 643.

A writ of summons against a woman, sued as a feme sole, specially indorsed, may be set aside before appearance, on an affidavit that she was married when the cause of action accrued, and that she believed, and had no reason to doubt, that her husband was alive (abroad) when the writ issued. *Hiscock* v. *Hollings*, 3 F. & F. 95.

A husband and wife having signed a joint and several promissory note, a writ was issued against them both, and judgment was signed in 1880 against both for default of appearance. Certain summonses and orders were afterwards served on the wife. She always handed all documents so served on her to her husband until November, 1881, and her affidavit showed that until that date she was ignorant of the nature of the proceedings. In November, 1881, the husband filed a liquidation petition. In February, 1882, a summons for committal was served on the wife. She instructed solicitors and opposed the summons, but an order was made. She then moved to set aside the original judgment:—Held, that, as the judgment, being a personal judgment against a married woman, was irregular and wrong, and as the plaintiff had not been prejudiced or misled, it ought to be set aside, notwithstanding the delay. *Atwood* v. *Chichester* (3 Q. B. D. 722) followed. *Davis* v. *Ballenden*, 46 L. T. 797—C. A.

e. Actions against Husband or Wife.

Parties to be Sued Generally.]—In an action for double the yearly value, under 4 Geo. 2, c. 28, the plaintiff, after stating a demise to the defendant's wife, and her subsequent intermarriage with the defendant, alleged in the first count a notice to quit and demand of possession delivered to the defendant and his wife, and in the second count alleged a notice to quit and demand of possession delivered to the wife previous to her intermarriage with the defendant:—Held, that, to support the second count, the husband need

not be joined for conformity; and that, to sustain the action, it was not necessary to have given a notice to the husband subsequent to the intermarriage. *Lake* v. *Smith*, 1 Bos. & P. (N.R.) 174.

In an action against a husband for goods sold to the wife dum sola, it is not competent to the judge at nisi prius to amend the record by making the female a co-defendant. *Garrard* v. *Guibilei*, 13 C. B. (N.S.) 832; 31 L. J., C. P. 270; 8 Jur. (N.S.) 1077; 10 W. R. 565—Ex. Ch.

A feme covert, eloping from her husband, and incurring debt, cannot be sued alone. *Hatchett* v. *Baddeley*, 2 W. Bl. 1079.

A woman divorced à mensâ et thoro, and living apart from her husband upon a separate maintenance, is a feme covert, and cannot be sued as a feme sole. *Lewis* v. *Lee*, 5 D. & R. 98; 3 B. & C. 291; 3 L. J. (O.S.) K. B. 22.

A feme covert cannot contract and be sued as a feme sole, even though she is living apart from her husband, having a separate maintenance secured to her by deed. *Marshall* v. *Rutton*, 8 Term Rep. 545.

Husband and wife may be jointly sued in trespass for their joint act. *Vine* v. *Saunders*, 4 Bing. (N.C.) 96; 5 Scott, 359; 6 D. P. C. 233; 3 Hodges, 291; 7 L. J., C. P. 30; 2 Jur. 136.

The name of a defendant, who was also the next friend of the plaintiff, and whose wife was a defendant, was struck out, and liberty was given to the wife to defend separately. *Lewis* v. *Nobbs*, 47 L. J., Ch. 662; 8 Ch. D. 591; 26 W. R. 631.

When a wife is living apart from her husband she may, on an ex parte motion, obtain an order to defend separately. *English* v. *Chute*, Ir. R. 6 Eq. 338.

—— **When Wife is a Sole Trader in City of London.**]—A feme covert sole trader in the city of London is not liable to be sued as such in the courts at Westminster; and even in the city courts the husband should be joined for conformity. *Beard* v. *Webb*, 2 Bos. & P. 93.

—— **Where Husband is abroad or a Foreigner.**]—Though the husband is abroad, and has lived abroad many years, and the wife has been paid a weekly sum for her subsistence, and though she has appeared as a feme sole, and has contracted as such, if the husband is living at the time of the action, no action can be maintained against her. *M'Namara* v. *Fisher*, 3 Esp. 18.

Where the husband (a foreigner) resides abroad, and the wife trades and obtains credit in this country as a feme sole, she is liable for her own debts, but not unless she represents herself as a feme sole. *De Gaillon* v. *L'Aigle*, 1 Bos. & P. 357.

To a plea of coverture, the plaintiff replied that the defendant's husband lived and resided in parts beyond the seas, viz., in Ireland, and that the defendant lived in this kingdom separate and apart from her husband, as a single woman, and as such single woman promised, &c.:—Held, bad upon general demurrer, *Farrar* v. *Granard* (*Countess*), 1 Bos. & P. (N.R.) 80.

To a plea of coverture, the plaintiff replied that before the cause of action accrued the defendant's husband became bankrupt, absconded without appearing to his commission, and continued to reside in foreign parts; and that during all that time the defendant lived in this kingdom separate and apart from her husband, and carried on business as a sole trader; and that the plaintiff did not give credit to the husband, but dealt with the defendant as a feme sole; and that the defendant made the promises as such feme sole:—Held, that the replication was bad in substance, as it did not contain an averment that the promises were made during the absence of the husband. *Williamson* v. *Dawes*, 2 M. & Scott, 352; 9 Bing. 292; 2 L. J., C. P. 3.

An Englishman employed in the service of the British government, residing in a foreign country, and having lands there, upon the cessation of his employment, in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself:—Held, that the wife, not having represented herself as a feme sole, was not liable to be sued as such. *Marsh* v. *Hutchinson*, 2 Bos. & P. 226.

The wife of a person who resides in Ireland, herself living in England, and having a separate maintenance under articles of separation, may be sued after the death of her husband for a debt contracted by her in England during his lifetime. *Ringstead* v. *Lanesborough* (*Lady*), 3 Dougl. 197.

To an action for goods sold and delivered the defendant pleaded her coverture. The plaintiff replied, that the husband was an alien, and never was within this kingdom; that the causes of action accrued to the plaintiff, and the promise was made by the defendant, within the realm of England, while she lived separate and apart from her husband as a single woman, and that the plaintiff did not give any credit to the husband, but contracted with her as a feme sole, on her own credit and responsibility, and that she made the promise as such feme sole. Rejoinder, that the husband was not an alien, nor did the causes of action accrue to the plaintiff, nor was the promise made by her, while she lived separate and apart from her husband as a single woman; nor did the plaintiff contract with the defendant as a feme sole, and on her own credit and responsibility, nor did she make the promise in the declaration mentioned; on which issue was joined:—Held, that on this issue the plaintiff was bound to prove that the defendant represented herself to the plaintiff as a feme sole, or that he dealt with her, believing her to be such:—Held, also, that evidence of the defendant's dealings with other tradesmen, to whom it was alleged she had held herself out as a single woman, was not admissible, unless her representations to them were so made as to come to the plaintiff's knowledge. *Barden* v. *Keverberg*, 2 M. & W. 61; 2 Gale, 201; 6 L. J., Ex. 66.

To a plea of coverture, a replication that the husband was an alien, not a subject of this country by naturalisation or otherwise, and at the time of the contract residing in France; that the defendant lived in this kingdom separate from her husband, and that the plaintiff gave no credit to her husband, but contracted with her as a feme sole, is ill. *Stretton* v. *Busnach*, 4 M. & Scott, 678; 1 Bing. (N.C.) 139; 3 L. J., C. P. 224.

—— **Where Wife is an Alien.**]—A woman, by birth an alien, cannot be sued as a feme sole, if her husband has lived with her in this country, although he has left her here and entered into the service of a foreign state. *Kay* v. *De Pienne* (*Duchess*), 3 Camp. 123.

—— **Against Wife's Executors for Conversion.**

of Property of Lunatic Husband.]—An action was brought by the representative of a deceased husband against the representatives of his deceased wife, and the statement of claim stated that the wife during the lifetime of the husband (who was a lunatic, though not so found by inquisition) took possession of and sold certain of the husband's chattels and applied the proceeds of sale to her own use, and claimed to recover the proceeds from the wife's estate in the hands of her executors:—Held, on demurrer, that the action was sustainable. *Williams, In re, Williams* v. *Stratton*, 50 L. J., Ch. 495; 44 L. T. 600.

Parties to Action to Charge—Husband and Trustees.]—A husband must be joined with his wife as a defendant in an action to charge wages and earnings which are her separate property under the Married Women's Property Act, 1870. *Hancocks* v. *Lablache*, 47 L. J., C. P. 514; 3 C. P. D. 197; 38 L. T. 753; 26 W. R. 402. And see *Lillia* v. *Airey*, 1 Ves. J. 278.

A woman married after allowing judgment to go by default in the action, the court added the husband as the co-defendant, but upon the understanding that he was to be liable only to the extent of the assets of the wife which should come to his hands. *Torahan* v. *Lisgar*, 2 L. R. Ir. 428.

A wife, having a separate estate without power of anticipation, is not liable to be sued personally in respect of a debt contracted during her coverture; and in order that a creditor may obtain payment out of her personal estate, he must join as defendants her husband and the trustees of her settlement. *Atwood* v. *Chichester*, 47 L. J., Q. B. 300; 3 Q. B. D. 722; 38 L. T. 48; 26 W. R. 320.

The trustees are not necessary parties to the action. *Davies* v. *Jenkins*, 6 Ch. D. 728; 26 W. R. 260; and *Collett* v. *Dickinson*, 11 Ch. D. 687; 40 L. T. 394.

The court will not on a motion for judgment under Ord. XL. r. 11, or admissions of fact, make a declaration, charging the separate estate of a married woman with the amount of debts contracted by her with reference to such estate, in the absence of the trustee of such estate, unless the trustee cannot be found. *Collett* v. *Dickinson* (11 Ch. D. 687) distinguished. *Pike* v. *Fitz-Gibbon*, 41 L. T. 148; 28 W. R. 667.

An action may be brought to enforce a charge given upon property coming to a married woman under a will without the trustees of the will being made parties, and in such an action the charge upon the property may be declared as against the married woman. *Flower* v. *Buller*, 49 L. J., Ch. 784; 15 Ch. D. 665; 43 L. T. 311; 28 W. R. 948.

Where A. enters into such a written agreement with B. alone for the purpose of giving B. a security for the repayment of money which the recitals show to have been in fact advanced by C. and D. jointly with B., C. and D. are entitled to sue on the agreement either directly or through B. as trustee for them. *Ib.*

2. Procedure, Pleadings, and Practice.

a. Claim.

See now Rules of Supreme Court, 1883, Ord. XVIII. r. 4; Ord. IX. r. 3.

On Money Counts.]—A summons and plaint against husband and wife containing the ordinary money counts, and omitting to state whether any of the causes of action had accrued before or after their marriage, are bad. *Cuming* v. *Montgomery*, Ir. R. 6 C. L. 170.

A declaration by husband and wife on an account stated must show that the accounting was concerning matters in which the wife had an interest. *Johnson* v. *Lucas*, 1 El. & Bl. 659; 22 L. J., Q. B. 174; 17 Jur. 1066.

A count for money lent to the wife at the request of the husband is good. *Stephenson* v. *Hardy*, 3 Wils. 388.

But a declaration against husband and wife, on the common money counts, one alleging that the husband was indebted for money lent to the wife at her request, is bad on writ of error. *Stone* v. *Macnair*, 1 Moore, 126; 7 Taunt. 432; 4 Price, 48.

Other Cases.]—If a declaration against husband and wife, for a debt of the wife contracted before marriage, alleges a promise by her made after the marriage to pay the debt, it is bad. *Morris* v. *Norfolk*, 1 Taunt. 212.

In an action on a bond, conditioned for the payment of a separate maintenance to the obligor's wife, the declaration alleged that certain sums became due and owing from the defendant to the plaintiff; judgment was arrested, because the breach should have alleged the money to be due to the wife. *Lunn* v. *Payne*, 1 Marsh, 495; 6 Taunt. 140.

In trover against husband and wife, the declaration stated a conversion by both:—Held, sufficient after verdict. *Keyworth* v. *Hill*, 3 B. & Ald. 685.

In an action on a covenant by the husband of the tenant in fee, he must declare on a seisin in fee in himself and his wife, in right of his wife. *Polyblank* v. *Hawkins*, 1 Dougl. 329.

b. Defence.

Coverture.]—Coverture of the defendant is an issuable plea to an action on a contract. *Burch* v. *Leake*, 7 Man. & G. 377; 2 D. & L. 88; 8 Scott (N.R.) 66; 8 Jur. 474.

In an action on a promissory note, to which the defendant pleads her coverture only, she has the right to begin, although the plaintiff seeks to recover interest upon the note which is not made payable upon the face of the instrument. *Cannan* v. *Farmer*, 3 Ex. 698; 2 Car. & K. 746.

Under a plea of coverture, where it appeared that the defendant's husband went abroad twelve years before:—Held, that she was bound to prove that he was alive within seven years. *Hopewell* v. *De Pinna*, 2 Camp. 113.

To an action on a note a plea in bar, that, when the note was made the plaintiff was the wife of G., and that the consideration was G.'s money, advanced by the plaintiff without G.'s knowledge, and that the plaintiff received and held the note without G.'s authority, and never had any property in or right to the note, is an informal plea of coverture, and bad for not being pleaded in abatement. *Guyard* v. *Sutton*, 3 C. B. 153; 15 L. J., C. P. 225; 10 Jur. 459.

To an avowry for rent in arrear, the plaintiff pleaded in bar, that before and at the time of the demise, and when the rent became due, she was married to C.:—Held, that whether it was to be presumed that the coverture continued up

to the time when the distress was taken, or not, the plea was no answer to the avowry. *Clarke* v. *Davies*, 2 Marsh. 386; 7 Taunt. 72.

Action for goods sold. Plea, coverture; replication, that, at the time when the debt was contracted, the defendant was living apart from her husband, in a state of adultery; that the plaintiff, without knowledge of these circumstances, dealt with her as a feme sole, and that after her husband's death, in consideration of the premises, she promised:—Held, to be a departure from the declaration. *Meyor* v. *Haworth*, 8 A. & E. 467; 3 N. & P. 462; 1 W. W. & H. 456; 7 L. J., Q. B. 211; 2 Jur. 467.

On a plea in bar by a married woman of her coverture, and a verdict in her favour thereupon, she is entitled to costs. *Findley* v. *Farquharson*, 3 C. B. 347; 4 D. & L. 185; 15 L. J., C. P 262.

It is no defence to an ejectment that the defendant is the wife of one of the plaintiffs. *Doe* d. *Daley* v. *Daley*, 8 Q. B. 934; 15 L. J., Q. B. 295; 10 Jur. 691.

A statement by way of defence, that the plaintiff at the time of bringing the action was a married woman, is no defence, and may be demurred to. *Abouloff* v. *Oppenheimer*, 30 W. R. 429.

In an action for wrongfully discharging the plaintiff and his wife from the service of the defendant into which they had entered as dyers, the defendant pleaded in justification, that the wife of the plaintiff "obstinately refused to work for the defendant in the capacity agreed on":—Held bad, on general demurrer. *Jacquot* v. *Boura*, 7 D. P. C. 348; 3 Jur. 776.

—— **Indictment.**]—On an indictment for highway robbery with violence D. and his wife were found guilty, the jury finding as to the wife that she had acted under the compulsion of her husband:—Held, that as to the wife the verdict amounted to one of not guilty. *Reg.* v. *Dykes*, 15 Cox, C. C. 771.

Separate Defence—Special Leave.]—A married woman cannot appear or defend separately from her husband without first obtaining special leave under Rules of Court, 1875, r. 8 of Ord. XVI. An order for leave obtained upon a petition of course is irregular. *Noel* v. *Noel*, 13 Ch. D. 510; 28 W. R. 720.

Statute of Limitations—Promissory Note.]—A declaration against husband and wife, upon a joint and several promissory note made by the wife, before coverture, and A., alleged a promise by the wife, dum sola. The defendants pleaded the Statute of Limitations. The declaration was amended by inserting an allegation of a subsequent promise by the husband. The plaintiff proved a payment of interest within six years, made by the wife after marriage, with money sent by A., but without the privity or subsequent ratification of the husband:—Held, that such payment raised no promise, either by the husband or the wife, so as to take the case out of the statute of limitations; inasmuch as, the wife being incapable of making any promise in law, express or implied, payment by her or the other joint maker of the note, could create no promise on her part, and as such payment was not made by the husband, nor for any consideration affecting him, nor with his sanction, it raised no implied promise on his part. *Neve* v. *Hollands*, 18 Q. B. 262; 21 L. J., Q. B. 289; 16 Jur. 933.

If the payment had been by the husband, or with his sanction, the declaration, as amended, would have been bad in arrest of judgment, as the wife would then have been improperly joined in the action. *Ib.*

Action on a promissory note by payee against maker. Plea, the statute of limitations. Replication, that, when the cause of action accrued to the plaintiff, she was a feme covert, the wife of B., and so remained until his death, when she became discovert; and that the action was commenced within six years after his death. Rejoinder, that the note was payable to the order of the plaintiff; that after it was made, and before it became payable, B., then her husband, authorised her to indorse in her own name and deliver, and that she did by such authority indorse and deliver the note to F. for value by him paid; that when the note became due, it was in the hands of G., holder and indorsee thereof, and entitled to sue thereon, who then presented it for payment, and the note came into the plaintiff's possession from G. by delivery, he being such holder and indorsee and entitled to sue thereon:—Held ill; because, first, if it intended to allege that the note was satisfied when it came to the plaintiff's hands, and that she had no cause of action, it was a departure from the plea; and, secondly, because it was no answer to the replication, as it contained no denial of the death of B. within six years of the commencement of the suit. *Scarpellini* v. *Atcheson*, 7 Q. B. 864; 14 L. J., Q. B. 333; 9 Jur. 827.

Plea in Abatement.]—To a declaration for work and labour against several defendants, charging the promise to have been made by them generally, they pleaded in abatement the non-joinder of two others. The court refused to arrest the judgment, on the ground that one was a feme covert, sued jointly with her husband, and the declaration did not state that the promise was made by her before the marriage, the ambiguity in the declaration being aided by the plea. *France* v. *White*, 1 Scott (N.R.) 604; 1 Man. & G. 731; 9 L. J., C. P. 337; 4 Jur. 746.

To an action against a sheriff for the escape of a debtor taken in execution under a ca. sa. on a judgment, the defendant pleaded in bar, that at and from the time of the accruing of the debt on which the judgment was recovered, and until the time of the arrest and escape, and hitherto, the plaintiff was and is married to H. S., who is still living:—Held, bad, as being properly pleaded in abatement only. *Morgan* v. *Cubitt*, 3 Ex. 612; 6 D. & L. 444; 18 L. J., Ex. 288.

The coverture of the plaintiff cannot be pleaded in bar to an action on a covenant for an annuity granted to her during marriage, but is matter of abatement only. *Bendix* v. *Wakeman*, 1 D. & L. 450; 12 M. & W. 97; 13 L. J., Ex. 15.

—— **15 & 16 Vict. c. 76, s. 141.**]—If a plaintiff took a husband after suing out the writ, and before declaration, the defendant must have pleaded the coverture in abatement. *Morgan* v. *Painter*, 6 Term Rep. 265.

Counter-claim.]—To an action by executors for the purpose of charging a wife's separate estate with a debt to their testator contracted on the faith of such separate estate, the husband,

who had been made a defendant, and his wife raised a counter-claim for money belonging to the wife, not part of her separate estate, and for certain chattels in the possession of the testator at his death, which it was alleged were the property of the husband:—Held, that the claim to the chattels and money was a proper subject of counter-claim. *Hodson* v. *Mochi*, 47 L. J., Ch. 604; 8 Ch. D. 569; 38 L. T. 635; 26 W. R. 590.

Replication to Defence of Coverture.]—In an action against a married woman she pleaded coverture. The reply set out that, until after action brought, the plaintiff was not aware of the coverture; that the defendant obtained credit by representing herself to be entitled to an annuity; and that the plaintiff had since discovered that under a separation deed she was entitled to an annuity:—Held, that the reply did not raise a new ground of claim, or contain an allegation of fact inconsistent with the previous pleading, within Ord. XIX. r. 19. *Collett* v. *Dickinson*, 26 W. R. 403.

Costs.]—A wife being a defendant in a probate action, having separate estate with restraint on anticipation, may be condemned in costs, although her husband has been joined as a co-defendant. *Morris* v. *Freeman*, 47 L. J., P. 79; 3 P. D. 65; 39 L. T. 125; 27 W. R. 62. *See* col. 1303.

Costs Paid to Husband in prior Action against him.] — In an action in the queen's bench division against a husband and wife jointly for a debt contracted by the wife before marriage, costs of defence were recovered by the husband under the Married Women's Property Act (1870) Amendment Act, 1874 (37 & 38 Vict. c. 50), s. 3, and were paid to him by the plaintiff. In a subsequent action (commenced by the plaintiff in the chancery division for the purpose of enforcing the judgment obtained by him in the first action against the wife) the same costs were ordered to be repaid to the plaintiff out of the wife's separate estate. *London and Provincial Bank* v. *Bogle*, 47 L. J., Ch. 301; 7 Ch. D. 773; 37 L. T. 780; 26 W. R. 573.

Discovery—Affidavit of Documents—Husband and Wife.]—A husband and wife sued as co-plaintiffs in respect of an alleged breach of trust by the trustees of their marriage settlement. The wife had a life estate for her separate use, and sued without a next friend. An order was made that the plaintiffs should file an affidavit stating "whether they or either of them" had in the possession or power "of them or either of them," any documents relating to the matters in question. They filed an affidavit admitting the possession of various documents, which they scheduled, and going on to say, "We have not now, and never had in our possession, custody, or power, or in the possession, custody, or power of any other person or persons on our behalf, any deed, &c., other than and except the documents set forth in the said schedule":—Held, that the plaintiffs must be ordered to file a further and better affidavit, for that an affidavit relating only to documents in the joint custody of the husband and wife did not comply with the order, and that the order was right in requiring them to answer as to documents in the possession of either of them. *Fendall* v. *O'Connell*, 54 L. J., Ch. 756; 29 Ch. D. 899; 52 L. T. 553; 33 W. R. 619—C. A.

c. Other Points of Practice.

Joinder of Claims.]—*See* Rules of Supreme Court, 1883, Ord. XVIII. r. 4.

The 15 & 16 Vict. c. 76 (C. L. P. Act of 1852), s. 40, is permissive only, not imperative. *Brockbank* v. *Whitehaven Junction Ry.*, 7 H. & N. 834; 31 L. J., Ex. 349.

A count for breaking and entering the premises of the husband may be joined with a count by the husband and wife for assaulting and imprisoning the wife. *Morris* v. *Moore*, 19 C. B. (N.S.) 359.

Before 15 & 16 Vict. c. 76, s. 40, in an action by husband and wife for slanderous words, actionable in themselves, spoken of the wife, they could not recover for special damage the loss sustained by reason of a party having refused to employ the wife as a servant; the action lay only in the name of the husband. *Dengate* v. *Gardiner*, 4 M. & W. 5; 7 L. J., Ex. 201; 2 Jur. 470.

—— **For Injuries to Wife.**] — The claims which a husband may add in his own right are not limited to claims arising consequentially from the injury to the wife. *Hemstead* v. *Phœnix Gas Light and Coke Co.*, 3 H. & C. 745; 34 L. J., Ex. 108; 11 Jur. (N.S.) 626; 12 L. T. 313; 13 W. R. 662.

Two actions were brought for injuries caused by the negligent explosion of gas pipes. In the one action a husband and wife claimed damages for her personal injuries (the husband also claiming consequential damages); in the other, the husband claimed for injuries to his house, goods and fixtures, for loss of profits, and personal injuries; a judge's order having been made to consolidate these actions, the court refused to rescind it. *Ib.*

An action by a husband for an injury done to himself, may be consolidated with a separate action by him and wife for an injury done to the wife at the same time and place. *Morley* v. *Midland Ry.*, 3 F. & F. 961.

A declaration in an action by husband and wife alleged that the defendant, in the course of his business, professed to sell a chemical compound made of ingredients known only to him, and by him represented to be fit to be used for hair wash, without causing injury to a person using it, and to have been carefully compounded by him; that the wife thereupon bought of him a bottle of this hair wash to be used by her, as the defendant knew, and on the terms that it could be safely so used and had been carefully compounded. Breach, that the defendant so negligently and unskilfully conducted himself in preparing and selling the hair wash, that by reason thereof it was unfit to be used for washing the hair, whereby she, the wife, who had used it for that purpose, was injured:—Held, that the declaration disclosed a good cause of action. *George* v. *Skivington*, 39 L. J., Ex. 8; L. R. 5 Ex. 1; 21 L. T. 495; 18 W. R. 118.

Misjoinder of Claims.]—A misjoinder of action against husband and wife may be taken advantage of on general demurrer. *May* v. *House*, 2 Chit. 697.

A married woman administratrix filed a bill by her next friend against an accounting party to the estate of the intestate, making her husband a co-defendant:—Held, that the other defendant might have demurred; but as no objection was

made till the hearing, the court allowed the bill to be amended, making the husband and wife co-plaintiffs. *Burdick* v. *Garrick*, 39 L. J., Ch. 369 ; L. R. 5 Ch. 233 ; 18 W. R. 387.

Staying Proceedings.]—Where an action by a next friend on behalf of a married woman has been dismissed with costs for want of prosecution, a second action on her behalf by a new next friend, against the same defendants and brought with the same object, will be stayed until the defendants' costs of the first action have been paid. *Payne, In re, Randle* v. *Payne*, 52 L. J., Ch. 544 ; 23 Ch. D. 288 ; 48 L. T. 194 ; 31 W. R. 509—C. A.

—— **Until Husband made Co-plaintiff.**]—The plaintiff, who was a married woman, brought an action in her own name to inforce a judgment obtained in a foreign court. One ground of defence was that the judgment was obtained by the fraud of the plaintiff in collusion with her husband. The defendant took out a summons to stay all proceedings in the action until the husband was added as a plaintiff, and the judge at chambers refused to make an order :—Held, by Manisty, J., that the application ought not to be granted, the court not having power to deprive a married woman of her right to bring an action by her next friend, who need not be her husband ; and even if the court had power the defendant had come too late :—Held, by Stephen, J., that the defendant was entitled to the order under Ord. XVI. r. 8, the former practice in the court of chancery being to make the husband a co-plaintiff in such a case, even though the plaintiff brought the action by her next friend. *Abouloff* v. *Oppenheimer*, 52 L. J., Q. B. 309 ; 47 L. T. 702.

Liability to be taken in Execution.]—The cases on this subject are now omitted having regard to the Debtors Act, 1869.

Service.]—*See now* Rules of Supreme Court, 1883, Ord. IX. r. 3.

Relief Claimed against Separate Estate.]—Plaintiff seeking relief not only against husband but against wife's separate estate, must serve the wife. *Jones* v. *Harris*, 9 Ves. 486.

Where a suit relates to a wife's separate estate, she, as well as her husband, must be served with a copy of the bill. *Salmon* v. *Green*, 8 Beav. 457.

Where husband and wife are defendants, and the suit does not relate to separate estate, service of a copy of the bill on the husband alone, under the 23rd General Order of August, 1841, is good service. *Kent* v. *Jacobs*, 5 Beav. 48 ; 11 L. J. Ch. 380. And see *Bailey* v. *Threlfall*, 9 Jur. 202.

Service on wife of defendant at his house, sufficient. *Barlow* v. *Baker*, Cary, 54.

Service on the defendant's wife ordered to be deemed personal service on the defendant, and upon that service, ordered that he stand committed for breach of injunction. *Pulteney* v. *Shelton*, 5 Ves. 147.

On a claim for foreclosure, service of the writ of summons on the wife of a party interested in the equity of redemption, who was travelling in America, was ordered to be deemed good service on the husband under the stat. 4 & 5 Will. 4, c. 42, the wife being in the possession and receipt of the rents and profits of the mortgaged property. *Carwardine* v. *Wishlade*, 15 Jur. 913.

Service on husband or others of family, decreed good service on wife. *Clark* v. *Greenhill*, Dick. 91.

Subpœna.]—Service of subpœna on wife, good. *Pilgrime* v. *Read*, Cary, 78.

Service of subpœna on a husband, a prisoner for debt in the queen's prison :—Held, to be good service on the wife. *Holcombe* v. *Trotter*, 9 Jur. 637.

Service of a subpœna to appear and answer, upon the wife of the defendant, who was out of the jurisdiction, but who had given her a power of attorney to transfer certain funds (not in dispute), and who was supposed to have a special power to act in the suit, she having by her solicitor made an offer to compromise, ordered to be good service. *Bromley* v. *Bank of England*, 7 Jur. 120.

3. COSTS.

Next Friend—Liability for Costs.]—A next friend, as long as he remains upon the record as next friend, must be taken to be carrying on the proceedings on behalf of the plaintiff, and is liable for the costs of an appeal, even though the notice of appeal did not purport to be given by him. *Glanvill, In re, Ellis* v. *Johnson*, 55 L. J., Ch. 325 ; 31 Ch. D. 532 ; 54 L. T. 411 ; 34 W. R. 309 ; 50 J. P. 662—C. A. *See* col. 1279.

—— **None—Liability of Solicitor for Costs.**]—When motion is made on behalf of married woman, and no person is named in notice as her next friend, her solicitor will be responsible for costs if awarded against her. *Cox* v. *M'Namara*, 1 Hog. 78.

—— **Security for Costs.**]—A married woman by her next friend took out an originating summons for an administration of a testator's estate, upon which an order was made without prejudice to any application by the defendants as to security for costs. The defendants applied, and, on the ground that the next friend was not a person of substance, an order was made staying proceedings till the plaintiff had given security for costs. The plaintiff appealed on the ground that a married woman could not be ordered to find security for costs :—Held, that, although a married woman suing alone cannot be ordered to find security for costs on the ground of poverty, security had rightly been ordered in the present case, since the next friend alone was liable for them, and that the plaintiff after obtaining a judgment by her next friend was too late to claim to sue alone. *Thompson, In re, Stevens* v. *Thompson*, 57 L. J., Ch. 748 ; 38 Ch. D. 317 ; 59 L. T. 427—C. A. *See* cols. 1277, 1284.

—— **Scandalous and Irrelevant Allegations.**]—In an action by a wife against her husband for a rectification of the marriage settlement, an allegation in the statement of claim that the plaintiff had refused to live with the defendant because of his having committed a criminal assault upon a young girl was ordered to be struck out as being scandalous and irrelevant, and the costs of the application to strike out were ordered to be paid by the wife's next friend in the action. *Coyle* v. *Cumming*, 40 L. T. 455 ; 27 W. R. 529.

Action by Executrix and Husband—Liquidation.]—A married woman, before the Married

Women's Property Act, 1882, brought an action as executrix, and her husband was joined as co-plaintiff. While the action stood for trial the husband filed a petition for liquidation, and obtained his discharge. The action was subsequently dismissed with costs on default of appearance by the plaintiffs:—Held, that the husband was not exonerated by his discharge in the liquidation from his liability to have judgment given against him with costs, as the action was not rendered defective by his going into liquidation. *Vint* v. *Hudspeth*, 54 L. J., Ch. 844; 30 Ch. D. 24; 52 L. T. 744; 33 W. R. 738—C. A.

Husband and Wife Co-Plaintiffs or Co-Petitioners.]—In a proceeding in which a married woman and her husband are co-plaintiffs or co-petitioners, a sequestration cannot issue for costs against her separate estate. Semble, it is otherwise if she sues by her next friend. *Keogh* v. *Catheart*, 12 Ir. Eq. R. 215.

Security for Costs.]—The Married Women's Property Act, 1882, enables a married woman to bring an action in her own name without giving security for costs, and although the cause of action arose before the act came into operation. *Severance* v. *Civil Service Supply Association*, 48 L. T. 485.

A married woman, suing alone, and having no separate estate, will not be ordered to give security for costs. *Isaac, In re, Jacob* v. *Isaac*, 51 L. J., Ch. 1136; 30 Ch. D. 418; 53 L. T. 478; 33 W. R. 845—C. A.

Married women suing as plaintiffs without their husbands being joined:—Held, since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), not liable to give security for costs. *Threlfall* v. *Wilson*, 8 P. D. 18; 48 L. T. 238; 31 W. R. 508; 47 J. P. 279.

—— **Appeal.**]—Where a married woman, whose only separate property was subject to a restraint on anticipation, appealed without a next friend, she was ordered to give security for the costs of the appeal. *Kershaw, In re, Whittaker* v. *Kershaw*, 44 Ch. D. 296; 62 L. T. 776; 38 W. R. 497—C. A.

—— **Suing by Next Friend—Next Friend Insolvent.**]—A married woman who had brought an administration action by her next friend, in which an order had been made directing certain inquiries, was, on evidence that her next friend was a person of no means, directed to give security for costs. *Thompson, In re, Stevens* v. *Thompson*, 57 L. J., Ch. 748; 38 Ch. D. 317; 59 L. T. 427—C. A.

Separate Estate—Liability of—General principle.]—The separate property of a wife in the hands of the court is liable to the costs of a suit instituted by her touching that property. *Barlee* v. *Barlee*, 1 Hog. 100.

—— **Wife Living apart from Husband.**]—Where a married woman having separate estate, and living apart from her husband, employed a solicitor in various transactions, and promised by letters to pay him, but without referring to her separate estate; it was held that her separate estate was liable to the payment of the solicitor's bill of costs. Semble, that the separate estate of a feme covert is liable in equity to her general engagements, as well upon an implied undertaking as by a written obligation. *Murray* v. *Barlee*, 3 Myl. & K. 209; 3 L. J., Ch. 184. *And see* 4 Sim. 82; 9 L. J. (O.S) Ch. 87.

—— **"Party Chargeable"—Married Woman—Solicitors Act, 1843.**]—Where a married woman employs a solicitor, and makes her separate estate liable, she is, though not personally liable, a "party chargeable," within the meaning of s. 37, 6 & 7 Vict. c. 73. *Waugh* v. *Waddell*, 16 Beav. 521.

Pending a reference for the taxation of a solicitor's bill against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate. *Ib.*

—— **Separate Property not Involved—Wife Co-Plaintiff.**]—The separate property of a feme covert, who was a co-plaintiff, is not liable to pay the costs of bill which was dismissed, unless her separate property was the subject matter of the suit. *Hogan* v. *Morgan*, 1 Hog. 250.

The circumstance that the solicitor of a husband and wife has transacted business relating to the separate estate of the wife is not sufficient to make that estate directly liable for the amount of his bill of costs. *Callow* v. *Howle*, 1 De G. & Sm. 531; 17 L. J., Ch. 71; 11 Jur. 984.

A married woman, having separate estate, directed a solicitor, in writing, to take proceedings for her and her children in certain suits in chancery. The suits did not, however, in any way relate to her; she was no party thereto, but her children only were made parties by their next friend:—Held, that her separate estate was not liable for the costs. *Pugh, In re*, 17 Beav. 336; 23 L. J., Ch. 132.

—— **Settlement on Female Ward—Husband's Costs.**]—The husband's costs of making a settlement on a female ward, who had been married without consent, were allowed; he having no property, and there being no circumstances of aggravated misconduct on his part. *Anon.*, 4 Russ. 473; 28 R. R. 155.

—— **Suit by Married Woman by Next Friend.**]—On a bill filed by a married woman by her next friend part of it was dismissed with costs. The court ordered a sum of money, recovered in the suit by the married woman, to be applied in payment of such costs. *Leach* v. *Way*, 5 L. J. Ch. 100.

—— **Probate Action.**]—A wife being a defendant in a probate action, having separate estate with restraint on anticipation, may be condemned in costs although her husband has been joined as a co-defendant. *Morris* v. *Freeman*, 47 L. J., P. 79; 3 P. D. 65; 39 L. T. 125; 27 W. R. 62.

—— **Mortgages of Wife's Property—Order for Costs.**]—A deed had appointed a sum to a married woman, for her separate use. She and her husband had appeared in a proceeding in the court of chancery on a petition for the distribution of the fund subject to the power. The court decided against them, and made an order for the payment of costs. The money specially belonging to the wife was by her mortgaged. The mortgagees and the husband and wife appeared together on the petition, and an order for payment of costs was made against them:—Held, that this

was not an order against the wife's money as such, but against the money to which the mortgagees were entitled, and that the order as to costs was properly made. *Newton* v. *Ricketts*, 9 H. L. Cas. 262 ; 31 L. J., Ch. 247 ; 7 Jur. (N.S.) 952 ; 5 L. T. 62.

—— **Retainer to Act for part of Separate Property.**]—A retainer by a married woman to a solicitor to act in respect to one portion of her separate estate operates as a charge upon all property settled to her separate use, and is not confined to the particular property upon which the solicitor is called upon to act. *Bolden* v. *Nicholay*, 3 Jur. (N.S.) 884.

Ante-Nuptial Debt—Husband's Costs of Defence.]—In an action in the queen's bench division against a husband and wife jointly for a debt contracted by the wife before marriage, costs of defence were recovered by the husband under the Married Women's Property Act (1870) Amendment Act 1874 (37 & 38 Vict. c. 50), s. 3, and were paid to him by the plaintiff. In a subsequent action (commenced by the plaintiff in the chancery division for the purpose of enforcing the judgment obtained by him in the first action against the wife) the same costs were ordered to be repaid to the plaintiff out of the wife's separate estate. *London and Provincial Bank* v. *Bogle*, 47 L. J., Ch. 301 ; 7 Ch. D. 773 ; 37 L. T. 780 ; 26 W. R. 573.

Bill to Foreclose Mortgage.]—Bill to foreclose a mortgage vested in trustees for the separate use of a feme covert. The husband, who was made a defendant, is entitled to his costs out of the fund. *Dillon* v. *M'Carthy*, 3 Ir. Eq. R. 192.

Annuity vested in Trustee of Separation Deed —Charge on.]—An action was brought against a married woman for a debt contracted with a creditor who believed her to be a feme sole. She pleaded coverture, and the husband was then made a party. It was alleged that she had separate estate. At the trial it was declared that her separate estate was chargeable with payment of the debt and costs, and an inquiry was directed to ascertain of what her separate estate consisted and in whom it was vested. In answer to the inquiry the master certified that the separate property consisted of an annuity, secured by the covenant of the husband contained in a separation deed and vested in a trustee. On a summons by the plaintiff to show cause why he should not be at liberty to sign judgment, the trustee not being a party :—Held, that the court could only make an order declaring the debt (with interest) and the taxed costs of the plaintiff, to be a charge upon the annuity, but without prejudice to any claim by the trustee. *Collett* v. *Dickenson*, 11 Ch. D. 687 ; 40 L. T. 394.

Enforcing — Sequestration.] — Sequestration may be awarded against the separate estate of a married woman for costs given against her. *Keogh* v. *Cathcart*, 11 Ir. Eq. R. 280.

—— **Receiver.**]—Where a bill filed by a husband and wife to foreclose a mortgage, the separate property of the wife, was dismissed with costs, the court, upon petition under 3 & 4 Vict. c. 105, refused to appoint a receiver over certain other property, to which the wife was entitled to her sole and separate use. *Hackett* v. *Farrell* Fl. & K. 549.

—— **Summons for Taxation—Receiver.**]—M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor, incurred in a suit relating to her separate estate. After the taxing master's certificate had been filed, an order was made on the application of the solicitor, directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the court, and appointing a person to receive it until the amount found due on taxation :—Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *Peace and Waller, In re*, 24 Ch. D. 405 ; 31 W. R. 899.

—— **Committal for Non-Payment—No Separate Estate.**]—A married woman without separate property cannot be imprisoned for non-payment of the costs of an action. *Walter, In re*, 55 J. P. 551.

Restraint on Anticipation.] — The separate fund of a married woman protected against costs, on the ground, that, under the instrument through which she derived title, she was restrained from anticipation. *Moore* v. *Moore*, 1 Coll. 54 ; 13 L. J., Ch. 124 ; 8 Jur. 139. *But see now* col. 1307.

—— **Costs of Proceedings improperly Instituted — Retainer by Trustees.**] — A married woman who, under a will, was entitled to income for her separate use, with a restraint on anticipation, instituted (without a next friend) against the trustees proceedings, in the course of which she took out a summons which was refused :—Held, that the restraint on anticipation did not prevent the court from giving the trustees liberty to retain their costs of the proceedings out of the married woman's income. *Andrews, In re, Edwards* v. *Dewar*, 54 L. J., Ch. 1049 ; 30 Ch. D. 159 ; 53 L. T. 422 ; 34 W. R. 62. *See next case.*

A married woman by her next friend, having brought in 1882 an action for administration of a trust fund, to the income of which she was entitled for her separate use without power of anticipation, the court, on further consideration in 1884, held the action to have been unnecessary and improper, and the next friend was ordered to pay the defendants' costs. The defendants being unable to find the next friend, an order was made giving the trustees liberty to retain the costs out of the income of the trust fund already due and to become due to the married woman :—Held, on appeal, that no such order could be made, for that the court has no jurisdiction to disregard the restraint on anticipation on the ground that it appeared to the court to be just to do so ; and that no income which did not accrue due till after the action on which the claim against the separate estate depended, viz., the improper institution of the suit, could be attached to meet the costs. *Glanvill, In re, Ellis* v. *Johnson*, 55 L. J., Ch. 325 ; 31 Ch. D. 532 ; 54 L. T. 411 ; 34 W. R. 309 ; 50 J. P. 662—C. A.

Whether, if the plaintiff had been suing under the Married Women's Property Act, 1882, without a next friend, the order could have been supported, quære. *Andrews, In re* (30 Ch. D. 159) observed upon. *Ib.*

Married Women's Property Act, 1893.]—The Married Women's Property Act, 1893, s. 2, *gives the court jurisdiction in any action or proceeding instituted by a married woman or by a next friend on her behalf to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation.*

—— **"Proceeding Instituted" by—Appeal—Liability for Costs.**]—An appeal by a married woman from an order made in an action brought against her is not an "action or proceeding instituted" by her within the meaning of s. 2 of the Married Women's Property Act, 1893, so as to make her separate property, which is subject to a restraint on anticipation, answerable for the costs of such appeal. The only proceeding contemplated by the legislature is one which initiates litigation. *Hood Barrs* v. *Heriot*, 66 L. J., Q. B. 356; [1897] A. C. 177; 76 L. T. 299; 45 W. R. 507—H. L. (E.). And see *Paget* v. *Paget*, 67 L. J., Ch. 266; [1898] 1 Ch. 470—C. A.

—— **Counterclaim.**]—A counterclaim is a "proceeding instituted" by a married woman within the meaning of s. 2 of the Married Women's Property Act, 1893; she may, therefore, be ordered to pay the costs incurred thereby by the opposite party out of property which is subject to a restraint on anticipation. An order to pay costs out of separate estate subject to a restraint on anticipation may be made at a date subsequent to the judgment or order dismissing the action or proceeding instituted by a married woman. *Hood Barrs* v. *Cathcart*, 64 L. J., Q. B. 520; [1895] 1 Q. B. 873; 15 R. 331; 72 L. T. 427; 43 W. R. 560.

—— **Restraint on Anticipation — Pending Action.**]—The court can, under s. 2 of the Married Women's Property Act, 1893, remove a restraint on anticipation for the purpose of enabling a married woman to pay the costs in an action instituted by her, and in which she has failed, where such action was pending at the date of the passing of the act. *Godfrey, In re, Thorne, George* v. *Godfrey*, 63 L. J., Ch. 854; 13 R. 36; 71 L. T. 86, 568. Affirmed, 72 L. T. 8; 43 W. R. 244—C. A.

—— **Order made before Act of 1893—Power to Vary or make New Order.**]—Section 2 of the Married Women's Property Act, 1893, which enables the court in certain circumstances to order and enforce payment of costs out of property subject to a restraint on anticipation, does not give jurisdiction to alter or vary an order for payment of costs made before the act came into operation, or to make a new order for payment of the same costs. *Lumley, In re, Hood Barrs* v. *Cathcart*, 63 L. J., Ch. 897; [1894] 3 Ch. 135; 71 L. T. 7; 42 W. R. 633. And see *Lowry* v. *Derham*, [1895] 2 Ir. R. 123—C. A.

—— **Probate Action—Entrance of "Caveat"—Property Subject to Restraint on Anticipation.**]—An action for the probate of a will is commenced by the issue of the writ in the action, and not by the entering of a caveat in respect of the will, or the appearance of the caveator in answer to the warning of the caveat. Consequently, where a married woman enters a caveat in respect of a will, the result of which is that a probate action is brought to which she is made a defendant, the action is not instituted by her within the meaning of s. 2 of the Married Women's Property Act, 1893, so as to enable the court to order payment of the costs of the plaintiff out of property to which she is entitled subject to a restraint on anticipation. *Moran* v. *Place*, 65 L. J., P. 83; [1896] P. 214; 74 L. T. 661; 44 W. R. 593—C. A.

—— **Form of Order—Dismissed Action—Restraint on Anticipation.**]—When an action brought by a married woman since the Married Women's Property Act, 1893, is dismissed with costs, the form of order is the form in use before the act (*see* Seton, 5th edit. p. 749, form 1), with the addition of the words "with liberty to apply for payment out of any property which is subject to a restraint on anticipation." *Davies* v. *Treharris Brewery Co.*, 13 R. 219.

4. Ne Exeat Regno.

Proceedings between Husband and Wife.]—Ne exeat granted against husband in aid of proceeding instituted against him by wife in ecclesiastical court. *Smithson's Case*, 2 Vent. 345.

Ne exeat granted to prevent husband from avoiding payment of alimony. *Whitmore, Ex parte*, Dick. 143.

There is no instance of a ne exeat regno being granted, where it is not a mere equitable demand, except where a wife sued in the spiritual court for alimony, and the husband threatened to leave the kingdom, and to aid that court, and out of compassion to her, it was granted. *Anon.*, 2 Atk. 210.

Ne exeat regno will be granted in case of alimony decreed by spiritual court. *Pearne* v. *Lisle*, Ambl. 76.

Ne exeat granted in cases of alimony, but only for sums actually due, and costs. *Shaftoe* v. *Shaftoe*, 7 Ves. 171. S. P., *Dawson* v. *Dawson*, *id.* 173. S. P., *Oldham* v. *Oldham*, *id.* 410.

Upon a suit in ecclesiastical court by wife for alimony; quære, whether before the decree, court will not grant writ of ne exeat regno against her husband. *Coglar* v. *Coglar*, 1 Ves. J. 94.

The writ of ne exeat regno does not issue for alimony after a decree in the ecclesiastical court pending an appeal from that decree. *Street* v. *Street*, T. & R. 322.

The writ of ne exeat regno is not granted for interim alimony before a decree. *Id.* 323.

The writ of ne exeat regno is in the nature of equitable bail; therefore in the case of alimony marked only for the arrears actually due, and not carried further by analogy to the case of a judge holding to bail for uncertain damages upon a personal tort. *Haffey* v. *Haffey*, 14 Ves. 261.

Semble, the court will not interfere either to compel or to restrain the payment of alimony, as such, except so far as to grant a writ of ne exeat against the husband. *Vandergucht* v. *De Blaquiere*, 5 Myl. & C. 229; 8 Sim. 315; 7 L. J., Ch. 270; 2 Jur. 738; 3 *id.* 1116.

When the husband, in order to avoid a sentence of the ecclesiastical court for maintenance, is going out of the kingdom, this court on a bill filed by the wife will grant a ne exeat regno. *Head* v. *Head*, 3 Atk. 295.

E. M.

IDENTITY.

See EVIDENCE.

IDIOT.

See LUNATIC.

ILLEGALITY.

See BILLS OF EXCHANGE—CONTRACT—GAMING—INTERNATIONAL LAW.

ILLEGITIMATE CHILDREN.

Maintenance of.]—*See* INFANT.

Gifts to.]—*See* WILL.

Legitimacy.]—*See* HUSBAND AND WIFE.

Affiliation.]—*See* BASTARD.

IMPLIED COVENANT.

See COVENANT.

IMPLIED TRUST.

See TRUST.

IMPRISONMENT.

Of Debtors.]—*See* DEBTORS ACT.

Of Criminals.]—*See* PRISON—CRIMINAL LAW.

False Imprisonment.]—*See* MALICIOUS PROSECUTION.

IMPROVEMENT OF LAND.

See SETTLED LAND.

INADEQUACY OF CONSIDERATION.

See FRAUD—SPECIFIC PERFORMANCE.

INCLOSURE.

See COMMON.

INCOME TAX.

See REVENUE.

INCUMBENT.

See ECCLESIASTICAL LAW.

INDEMNITY.

Against Calls.]—*See* COMPANY.

To Trustees.]—*See* TRUST.

To Executors.]—*See* EXECUTOR AND ADMINISTRATOR.

Under Deeds.]—*See* DEED AND BOND.

Contract of.]—*See* PRINCIPAL AND SURETY.

INDIA.

1. *Administration and Government*, 1310.
2. *Jurisdiction—Courts*, 1313.
3. *Legal Decisions*, 1314.
4. *Applicability of English Laws*, 1321.
5. *Actions in England*, 1322.
6. *Civil and Military Service*, 1322.

1. ADMINISTRATION AND GOVERNMENT.

Effect of Annexation of Provinces.] — The plaintiffs, who represented certain creditors of the king of Oude in respect of a debt contracted in 1794, sued the secretary of state for India, claiming to be entitled to a charge upon the revenue of the territory of Oude:—Held, that as the debt was one which there were no means of enforcing against the king of Oude before the annexation in 1856, neither could it have been enforced after the annexation against the East India Company. *Doss* v. *Secretary of State for India*, L. R. 19 Eq. 509; 32 L. T. 294; 23 W. R. 773.

Held, also, that the annexation of Oude having been a sovereign act of state by the East India Company as trustees for the British government, that act could not be reviewed by any municipal court, and the bill was therefore not sustainable. *Ib.*

Held, also, that the plaintiffs being natives of India, the subject-matter being in India, and the defendant being capable of being sued in India, an English court of equity was not the proper tribunal to try the question between the parties. *Ib.*

Held, also, that the staleness of the demand, and the impracticability of giving effect to any declaration of right, were grounds for allowing the demurrer. *Ib.*

Cession and Annexation of Territory.—In 1834, when the East India Company conquered and annexed Coorg, and took the rajah prisoner,

he was the owner of two government promissory notes. Some time after the annexation the company took possession of the notes, and it detained the ex-rajah in India as a captive until 1852, when he was allowed to come to England for a short visit. During his residence in England he instituted a suit against the company to recover the amount of the notes, upon the ground, that they were his private property, and that they were not capable of seizure, and had not been confiscated as prize of war, being debts to which the public faith of the British government in India was pledged:—Held, that the notes belonged to the ex-rajah as part of the raj, and that the British government in India having taken possession of them in the exercise of its sovereign and political power, that was an act which was not subject to the control of the court. *Wadeer* v. *East India Company*, 30 L. J., Ch. 226; 7 Jur. (N.S.) 350; 9 W. R. 247.

The transfer of British territories from ordinary British jurisdiction to the supervision, laws and regulations of a political agency, by excluding such territories from the British regulations and codes theretofore in force therein, and from the jurisdiction of all British courts theretofore established therein, with a view to the substitution of a native jurisdiction under British supervision and control, cannot be made without a legislative act. *Damodhar Gordham* v. *Deoram Kanji*, 1 App. Cas. 332—P.C.

Such transfer of jurisdiction, even if valid, would not amount to a cession of British territory to a native state; nor would it deprive the crown of its territorial rights over the transferred districts, or the persons resident therein of their rights as British subjects. *Ib.*

East India Company.]—The East India Company was a corporation established partly for the purposes of trade, and partly for the purposes of government. *Gibson* v. *East India Co.*, 1 Arn. 493; 5 Bing. (N.C.) 262; 7 Scott, 74; 8 L. J., C. P. 193; 3 Jur. 56.

The East India Company, as representing the Indian Government, has a freehold in the bed of navigable rivers in India, and in the land between high and low-water mark. *Doe* d. *Seebkristo* v. *East India Co.*, 10 Moore P. C. 140.

While the 3 & 4 Will. 4, c. 85, for the regulation of the East India Company's charter, was in force, the capital stock of the company was not a government or parliamentary stock or fund, nor was it a foreign stock or fund. *Brown* v. *Brown*, 4 Kay & J. 704; 6 W. R. 613.

Bombay Civil Fund.]—By the original articles of the Bombay Civil Service Fund the widows of subscribers were entitled to pensions of 300*l.* a year, subject to a proviso for reduction in case they were possessed of private property exceeding the amount of 200*l.* a year. By subsequent resolutions it was provided that, on payment of a percentage by each subscriber, his widow should be entitled to an annuity of 300*l.* a year, irrespective of her private property. A subscriber quitted the service while the resolutions were in force, and died in a few years without ever having paid the percentage. His widow died many years afterwards. During her widowhood she had received an annuity under the original articles, but she had offered to pay the percentage, and had claimed an annuity under the resolutions:—Held, that she was not entitled to such annuity, but that she was entitled to an annuity under the original articles. *Edwards* v. *Warden*, 45 L. J., Ch. 713; 1 App. Cas. 281; 35 L. T. 174—H. L. (E.)

The widow's pension under the original articles had from a certain date been annually reduced by an improper calculation of the amount of her private fortune:—Held, that her administratrix was entitled to have the difference made up to her from the time when the reduction commenced, and that there was an expressed trust for the widow to which the statute of limitations was no bar. *Ib.*

Held, also, that this was not a case in which interest could be claimed on the arrears. *Ib.*

On an application to the court of appeal under the Bombay Civil Fund Act, 1882, to prescribe the manner of trial of a question alleged by the applicant to arise between him and the secretary of state for India as to the liability of the fund, the court will not enter into any inquiry as to the nature of the applicant's claim. Form of directions as to the manner in which the question shall be tried. *Bombay Civil Fund Act, In re*, 1882, *Pringle, Ex parte*, 39 Ch. D. 300 60 L. T. 81—C. A.

—— **Power of Court over Costs.**]—By the Bombay Civil Fund Act, 1882, jurisdiction was given to the court of appeal to determine questions arising between any subscriber to the Bombay Civil Fund and the secretary of state for India as to any liability of the fund, nothing being said as to costs. P. took proceedings to enforce a claim against the fund, which the court held to be not made out:—Held, that however the case might have stood if the question had been whether the court could give P. the costs of a successful claim, the court had inherent jurisdiction to order him to pay the costs of wrongly putting the court in motion, there being nothing in the act to show that the legislature intended the court not to have such jurisdiction. *Pringle* v. *Secretary of State for India*, 58 L. J., Ch. 815; 40 Ch. D. 288; 60 L. T. 796—C. A.

Madras Civil Annuity Fund.]—Under the regulations of the Madras Civil Service Annuity Fund the civil servants of the company were bound to contribute towards the fund each year 4 per cent. of their salaries; and no servant was entitled to an annuity who had not served twenty-five years, or who had not subscribed or made up by a payment in gross a sum equal to half the value of his annuity; the rules might be varied by the votes of a majority of the subscribers in special meeting assembled, if the variation received the sanction of the court of directors; if the subscriber had contributed more than the half value of his annuity, the excess was to be refunded to him. At a special meeting this last rule had been abrogated by a large majority of the subscribers, meeting and voting under considerable compulsion from the court of directors. U. at the time of the special meeting had paid sums in excess of the half value of his annuity, but he did not then accept the annuity, although offered, but continued to retain his office and pay his contributions, and ultimately he accepted, under protest, an offer of his annuity made to him seven years after the special meeting:—Held, that he was not entitled to a refund of the contributions made by him in excess since 1853. *Secretary of State for India* v. *Underwood*, 39 L. J., Ch. 569; L. R. 4 H. L. 580.

The regulations of the Madras Civil Service

Annuity Fund do not justify a refund to a subscriber of the amount of his subscriptions in excess of the prescribed amount; but the practice which has prevailed of granting such refunds, and the acquiescence of the East India Company in such practice may, in some cases, preclude them from disputing the right of a subscriber to insist on such refund. *East India Co.* v. *Robertson*, 12 Moore, P. C. 460; 7 Moore, Ind. App. 361; 7 W. R. 695—P. C.

Legislature—Powers of.]—The act No. XXII. of 1869 of the Indian legislature, which excludes the jurisdiction of the high court within certain specified districts, is not inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104), or with the charter of the high court, and is in its general scope within the legislative power of the governor-general in council. *Reg.* v. *Burah*, 3 App. Cas. 889—P. C.

Section 9 of that act, which confers upon the lieutenant-governor of Bengal the power to determine whether the act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power. *Ib.*

2. Jurisdiction—Courts.

Magistrates—Protection from Actions.]—21 Geo. 3, c. 70, s. 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English courts of a similar jurisdiction, and only gives them an exemption from liability when acting bonâ fide in cases in which they have mistakenly acted without jurisdiction. *Calder* v. *Halket*, 3 Moore, P. C. 28.

Admiralty.]—Observations on the admiralty jurisdiction of the high court in India. *The Brinhilda*, 45 L. T. 389—P. C.

Officers of Supreme Court.]—The supreme court at Calcutta has power, by the Charter of Justice of 1774 (14 Geo. 3), to remove or suspend officers of that court on account of misconduct, and this power of removal is not limited to acts done by such officer in his judicial character, but includes transactions distinct from those of his office. An officer of the court, being a shareholder and director of the Union Bank at Calcutta, was a party to deceptive statements contained in the half-yearly reports of the concern as to the state of the affairs of the bank, and also availed himself, in his character as director, to obtain credit to a considerable amount upon his personal security only, which, by the condition of the deed of co-partnership of the bank, amounted to a breach of trust. No charge or imputation with respect to his judicial functions was brought against him:—Held (affirming an order of the supreme court suspending such officer), that there were sufficient grounds for calling upon the court to protect the administration of justice, by suspending such officer for so misconducting himself. *Grant, In re*, 7 Moore, P. C. 141.

An order made by the judges of the supreme court of Madras, dismissing the master of that court from his office, for alleged official misconduct in the taxation of a bill of costs, reversed, upon appeal, by the judicial committee of the privy council. *Minchin, In re*, 6 Moore, P. C. 43.

3. Legal Decisions.

Bankruptcy and Insolvency.]—A vesting order, made upon the petition of a trading firm under the Indian Insolvency Act, 11 & 12 Vict. c. 21, vests in the official assignee the separate property of each partner as well as the joint estate of the firm. *Brown* v. *Carbery*, 16 C. B. (N.S.) 2; 9 L. T. 768.

In 1833 A. was discharged by the court for the relief of insolvent debtors at Calcutta from liability to arrest merely. By a subsequent act passed in 1834, the court was empowered to discharge "any person who now is, or shall hereafter become" an insolvent debtor from liability for his debts:—Held, that A. was, in 1834, an insolvent debtor within the second act, and that a supplementary order of the insolvent court made in 1836, under that act, was a complete discharge to A. from his debts. *Gordon, In re*, 28 Beav. 5; 29 L. J., Ch. 352. Affirmed on appeal, 1 De G., F. & J. 381; 6 Jur. (N.S.) 409; 2 L. T. 100; 8 W. R. 298.

A., being liable as a member of a company which had become defunct, and was being wound up, became insolvent, and was discharged under the Indian Insolvent Act, 11 & 12 Vict. c. 21. The order for winding up the company had been made previously to his insolvency, but his name had not been placed on the list of contributories until afterwards, and there was no mention of his liability in respect of the company in his schedule:—Held, that his liability as a contributory was barred by his discharge under the Indian Act, and that he was not liable as a contributory. *Parbury, Ex parte*, 3 De G., F. & J. 80; 30 L. J., Ch. 513; 7 Jur. (N.S.) 503; 4 L. T. 62; 9 W. R. 470.

Advocates and Solicitors.]—Two orders of the high court of the North-Western Provinces, the one being an order nisi calling on a barrister and advocate practising in that court, to show cause why he should not be suspended from the practice of his profession as an advocate of that court, and the other order declaring him guilty of gross professional misconduct, and suspending him from practice for five years; on appeal as to the rule on which the first order was made, discharged, and the second order reversed; the judicial committee being of opinion that, though he had been guilty of a grave irregularity, and deserving of censure, yet the facts proved did not amount to that mala praxis on which the high court, having regard to the position and functions of an advocate in the North-Western Provinces, could fairly found any proceeding of a penal character. *Newton* v. *Judges of the High Court, North-Western Provinces*, L. R. 4 P. C. 18; 8 Moore, P. C. (N.S.) 202.

The supreme court of judicature at Bombay has no power to admit persons as attorneys and solicitors to practice in the courts there, except such as are qualified in the manner pointed out by the Bombay Charter and Letters-patent of 1823, establishing the court, viz. those who have been admitted attorneys or solicitors in one of the courts at Westminister, or were practising in the Recorder's court at Bombay, at the time of the publication of that charter. *Morgan* v. *Leech*, 3 Moore, P. C. 368.

Common Carriers—Liability.]—The liability of a common carrier of goods for hire in India is governed by the English common law, and is

not affected by the provisions of the Indian Contract Act, 1872. *Irrawaddy Flotilla Co.* v. *Bugwandass*, 65 L. T. 595; 7 Asp., M. C. 129—P. C.

Champerty.]—C., as attorney and mooktear of M. and his wife, managed actions of ejectment and mesne profits against R., advanced moneys for that purpose, and for the subsistence of his clients, having stipulated that he should be repaid all advances with interest at 12 per cent., and should have a third part of the clear net profits of the suit, with a right to possession of the land recovered as security therefor. He was neither an original nor an added party to the suits, which, on appeal, were decreed in favour of M. and his wife by the high court in India, but were afterwards dismissed by the privy council with costs, which M. and his wife were utterly unable to pay. Pending that appeal, C. purchased the property in suit, and thereafter conducted the appeal in his own interest. In an action by R. against C. to recover the amount of the costs, it was averred, but not proved, that the actions were brought or instigated by C. maliciously and without probable cause; and, failing such proof, it was contended that the agreement and acts of C. amounted to champerty, or were otherwise illegal as being against public policy, and that R. had suffered special damage from them; that C. was the real actor therein, and had an interest in them, and was, therefore, responsible for the costs:—Held, that the English laws of maintenance and champerty are not of force as specific laws in India. *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, 2 App. Cas. 186—P. C.

Such agreement created no legal privity between R. and C. from which a promise can be implied on the part of R. to pay C. his costs of the former action, on which an action of contract can be founded; nor does it establish a legal wrong, for the former action was brought without improper motives, and upon reasonable cause. *Ib.*

Claims against Indian Government.]—When a British subject has a claim against the Indian Government, a petition of right is not the proper remedy. In such case he should proceed against the secretary of state in council of India under 21 & 22 Vict. c. 106. *Frith* v. *Reg.*, 41 L. J., Ex. 171; L. R. 7 Ex. 365; 26 L. T. 774; 21 W. R. 19.

The sovereign of Oude before the annexation of that kingdom to the British dominions, contracted a debt with the grandfather of the suppliant, who was legal representative. Such debt remaining unliquidated, he presented his petition of right:—Held, that he had pursued the wrong remedy, for that a petition of right is only applicable where the amount sought to be obtained can be charged upon funds in the hands of the commissioners of the Treasury, and not to a case where the amount is chargeable upon the Indian Government. *Ib.*

—— **After Annexation of Provinces.**]—See *Doss* v. *Secretary of State for India*, ante, col. 1310.

Interest.]—Neither by the English nor Hindoo law, unless there is a mercantile usage, can interest be imported into a contract which contains no stipulation to that effect. *Juggomohun Ghose* v. *Kaisreechund*, 9 Moore, Ind. App. 256.

Divorces.]—The principles and rules which obtain in the divorce court in England are to be applied, as nearly as may be, in India, under the Indian Divorce Act, 1869. The provisions of the Indian Statute of Limitations, 1859, do not apply to suits for divorce à vinculo. *Hay* v. *Gordon*, L. R. 4 P. C. 337; 21 W. R. 11.

Executors and Administrators.]—Agents being also appointed executors of the principal are not entitled to the commission upon remittances from India by the testator not received till after his death. *Hovey* v. *Blakeman*, 4 Ves. 596.

An executor in India passing his accounts in this court is entitled to the commission upon payments according to the practice in India. *Chetham* v. *Audley* (*Lord*), 4 Ves. 72.

Semble, an executor in India is entitled to a commission of 5 per cent. on all assets of a testator collected by him there, including the assets which he retains in respect of a legacy to himself not given to him in the character of executor, and including moneys belonging to the testator, which were in the hands of a commercial house in which the executor was, and the testator had been a partner. *Cockerell* v. *Barber*, 1 Sim. 23; 5 L. J. (O.S.) Ch. 77; 28 R. R. 181.

A planter in India obtained advances from his agents, who, by custom, were entitled to a commission on their advances and on the produce of the sales of the crop. The planter died, and his executors sold the factory, and got in the crops, and remitted them to the agents, who sold the latter, and accounted to the executors for the balance, after deducting the amount due to them:—Held, that the executors were entitled to 5 per cent. (Indian commission) on the gross proceeds of the factory and crop. *Matthews* v. *Bagshaw*, 14 Beav. 23; 15 Jur. 977.

By a decree made in a suit for administering the assets of a testator who died in India, the master was directed to allow Indian commission to the executor only in respect of assets received by him while resident in India. The testator (whose estate was solvent for the payment of legacies) died possessed of certain notes of the Bengal government, which the executor took from the treasury at Calcutta, and handed over to certain trustees, in discharge of a legacy of the testator of equal amount with the notes:—Held, that the notes were assets within the meaning of the decree. *Campbell* v. *Campbell*, 2 Y. & C. C. C. 607; 8 Jur. 28.

To a bill which seeks an account of the assets of an intestate who died in India possessed by a personal representative there, a personal representative of the intestate constituted in England is a necessary party, although it does not appear that the intestate at the time of her death had any assets in England. And it is not sufficient, in order to avoid a demurrer for want of parties in such a case, that the personal representative constituted in India, who is out of the jurisdiction, is made a party, and that process is prayed against her when within the jurisdiction, although the bill alleges that the Indian court was the proper court for granting administration, and that the administratrix constituted by it is the sole legal personal representative of the intestate. *Tyler* v. *Bell*, 2 Myl. & C. 89; 1 Keen, 826; 6 L. J., Ch. 169; 1 Jur. 20.

A creditor of a person who died intestate in India took out letters of administration to the deceased in that country. He then came to England, and obtained letters of administration from the prerogative court. Afterwards, one of the intestate's next of kin procured that administration to be revoked, and administration granted to himself:—Held, that the Indian administrator is compellable to account to him for assets possessed in India as well as in this country, in a suit instituted by him as personal representative only of the intestate, and to which the other next of kin, who were resident in India, were not parties. *Sandilands* v. *Innes*, 3 Sim. 263.

Testator appointed persons residing in India his executors. Will not proved in England. Executors in India remit money to their agent in England, and creditor of testator filed bill against agents, praying account and payment of money to accountant-general in the meanwhile; demurrable, because no personal representative of testator was made party. *Lowe* v. *Fairlie*, 2 Madd. 101.

Real estates in India being made by statute personal assets for the payment of the debts of a deceased debtor, it is unnecessary to make the debtor's heir-at-law a party to a suit instituted for the administration of the assets. *Story* v. *Fry*, 1 Y. & C. C. C. 603; 11 L. J., Ch. 373; 6 Jur. 1029.

A testator left assets in England and India. The court refused to restrain the Indian creditors from obtaining payment out of the English assets until the English creditors had been paid in full. *Brett, In re, Reynolds* v. *Lewis*, 29 L. J., Ch. 296; 8 W. R. 272.

False Imprisonment—Acting in Discharge of Public Duty.]—An officer in command of military cantonments, having general control of the police in the absence of the cantonment magistrate, believing the appellant to be, or to be likely to become, a dangerous lunatic, directed two medical officers to examine him, and placed a guard over him, until they could decide on the case. The medical officers reported that the appellant was perfectly sane:—Held, that as the conduct of the officer was not authorised by law, the fact that he acted in perfect good faith in the supposed discharge of a public duty, and on a bonâ fide belief that the appellant was dangerous, did not prevent his being liable for damages at the suit of the appellant. *Sinclair* v. *Broughton*, 47 L. T. 170—P. C.

Infants, Religious Education of.]—A child born in India, whose father was a European British subject and a Christian, must be presumed to have the father's religion, and his corresponding civil and social status, and it is the duty of a guardian to bring up his ward in his father's religion. *Skinner* v. *Orde*, 8 Moore, P. C. (N.S.) 261; L. R. 4 P. C. 60.

An infant, the child of a Christian father and the issue of a Christian marriage, was left, by the death of her father, of very tender age, and brought up by her mother as a Christian during her early youth. Her mother, after cohabiting with a man having a wife and professing the Christian religion, became with him a Mahomedan, for the purpose of giving legal effect to a Mahomedan marriage between them, but which marriage was not proved to have been duly celebrated. The infant, after attaining the age of fourteen, and being with her mother, professed a desire to become a Mahomedan in religion, and adopted the Mahomedan mode of life. The courts in India having been applied to, under the circumstances, by her relatives to remove the infant from the custody of her mother, made an order under the provisions of the acts, Nos. XL. of 1858 and IX. of 1861, and placed the infant under a Christian guardian. Such order, on appeal, confirmed by the judicial committee. *Ib.*

Limitations, Statute of.]—At the time of his death a testator was indebted to a Hindoo banker for advances made for the purposes of the business in India, such advances carrying interest at 12 per cent. In 1861 the testator died, and in 1865 the usual administration decree was made in an administration suit instituted in England by a legatee. The Indian statute of limitations provides that no suit for the recovery of money lent or interest shall be maintained in any court within the British territories in India unless the same be instituted within three years from the time when the debt became due. In 1870 the banker carried in a claim for the balance and principal due to him in 1861, with interest at 12 per cent. On summons to disallow the claim:—Held, that the question must be governed by the lex fori, and that, as the decree had operated as a judgment in favour of creditors to the extent of preventing the time limited by the English statute from running, the claim must be allowed, but with interest only at 4 per cent. *Finch* v. *Finch*, 45 L. J., Ch. 816; 35 L. T. 235.

Tenants in common of house property in Calcutta, under the will of a testator who died in 1803, became, in 1825, reduced to two. The property had all along been considered as leasehold, in which view one of the surviving cotenants would, in the events that had happened, be entitled to five-ninths and the other to four-ninths of the property; and the rents had been received by a common agent, and shared accordingly. In 1827 the supposed owner of the four-ninths settled her share, describing it as a moiety. This description was, nevertheless, treated as an error, and the rents were continued to be received as before, and to be shared in the same proportions, until 1864, when it was discovered, that the property was freehold, upon which footing the supposed owner of the five-ninths would really be entitled to four-fifths, and the supposed owner of the four-ninths to one-fifth only. In 1859 an act of limitations for India passed, which provided, that no suit for the recovery of immovable property shall be maintained in any court within the British territories in India unless the same, if instituted after two years from the passing of the act, be instituted within twelve years from the time when the cause of action arose. The property having been sold, and the proceeds paid into court, the owner of the three-fourths claimed to be entitled to that proportion of the fund:—Held, that under the English law the court would, after so long a possession and user, have presumed a grant. *Peat, In re*, L. R. 7 Eq. 302.

Held, also, that under the same law the court would have held the settlement in 1827 by one of the co-tenants to have been a legal ouster of the other. *Ib.*

Held, also, that the case was governed by Indian law, that under the provisions of the act

of the Indian legislature the claim had become barred, and that he was entitled to five-ninths only of the fund. *Ib.*

Lunatic "Charged" with Crime in "Court" in India, but "not tried"—Removal to England.]—By 14 & 15 Vict. c. 81, s. 1, if any person shall be indicted for or charged with any crime or offence in any court in India, and shall be acquitted of or not be tried for such crime or offence on the ground of his being found to be of unsound mind, he may be removed to England in the manner prescribed by the act. A European British subject in India having been arrested for homicide, a district magistrate was informed of it, and went with witnesses to a private house in the presidency, where the accused was detained. On seeing him, and receiving medical testimony on oath as to his state of mind, the magistrate deemed him insane and unfit to be tried, and so reported to the government of the presidency. The government made an order under 14 & 15 Vict. c. 81, s. 1, for the removal of the prisoner to England. By virtue of the order he was brought in custody to England, and on his arrival a royal warrant was issued, under s. 2, for his reception into a lunatic asylum, where he was accordingly kept:—Held, that the prisoner was charged with a crime in a "court," and "not tried" on the ground of being "found" to be of unsound mind within the meaning of s. 1, and that his detention was lawful. *Maltby, In re*, 50 L. J., Q. B. 413; 7 Q. B. D. 18; 44 L. T. 711; 29 W. R. 678; 14 Cox, C. C. 609; 45 J. P. 681.

Partnership.]—In the absence of any law or established custom existing in India in respect to partnership transactions, the law of England is to be resorted to for principles and rules to guide the courts. At the same time the usages of trade, and the habits of business of the Indian community, so far as they may be peculiar to or different from those in England, are to be taken into consideration. *Mollow* v. *Court of Wards*, L. R. 4 P. C. 419.

Registration Act.]—The Indian Registration Act, 1866, makes void all instruments relating to real estate in India which ought to have been registered under the Indian Registration Act, 1864, but were not so registered, and destroys all equities arising out of them. A., being resident at Madras, in 1865 executed a deed by which he conveyed land in India to the plaintiff, and covenanted for further assurance. The deed was not registered under the Indian Registration Act, 1864, which provides, that if such a deed be not registered, it shall not be received in evidence in any court in India. In 1866 A. mortgaged the same land to the defendant, who had notice of the plaintiff's conveyance, and the defendant registered the mortgage deed under the Indian Registration Act, 1866. The plaintiff filed a bill to enforce the covenant for further assurance against the defendant:—Held, that the plaintiff had no equity against the defendant, and the bill was dismissed. *Hicks* v. *Powell*, L. R. 4 Ch. 741; 17 W. R. 449.

Semble, that independently of the operation of the Indian Registration Act, 1866, as the plaintiff's deed was forbidden by the Indian Registration Act, 1864, to be received in evidence in India, it could not be sued on in England either as a deed of conveyance or as a deed of covenant for further assurance. *Ib.*

A correspondence between A. and B. amounting to a contract for a purchase of a future interest in immovable property does not require registration under the Indian Registration Act, 1866. *Port Canning Land and Dock Co.* v. *Smith*, L. R. 5 P. C. 114; 30 L. T. 531.

Religion.]—The tie that bound an undivided family together is dissolved by the conversion of a member to Christianity, so far as regards such member. A convert may renounce the old law with his former religion, or abide by the old law notwithstanding his change of faith. Lex loci does not apply to parties who have ceased to be Hindus in religion. Customs and usages not enjoined may be as voluntarily changed as they were voluntarily adopted. *Abraham* v. *Abraham*, 2 N. R. 431; 9 Jur. (N.S.) 729; 11 W. R. 905—P. C.

Succession to Property.]—By the Indian Succession Act, 1865, succession to the immovable property in India of a deceased person is regulated by the law of India, wherever he may have had his domicil at the time of his death; and succession to the movable property in India is regulated by the law of the country of the domicil. By the same act no man having a nephew, or a niece, or a nearer relation, has power to bequeath any property to charitable uses, except by a will executed twelve months before death, and deposited as therein required. *Macdonald* v. *Macdonald*, 41 L. J., Ch. 566; L. R. 14 Eq. 60; 26 L. T. 685; 20 W. R. 739.

A domiciled Scotchman, possessed of both movable and immovable property in India, made a will in Scotland, appointing both Indian and Scotch executors, and duly executed it according to the law of both countries. He thereby devised and bequeathed all his Indian property, movable and immovable, to the Indian executors to sell and realise, and after payment of costs and expenses, out of the free proceeds to pay 10,000*l.* to the Scotch executors, and to pay the residue to legatees. He then directed his Scotch executors to lay out the 10,000*l.* legacy in erecting and maintaining a hospital in Scotland. He died in Scotland a few days after the date of the will, leaving sisters. The movable and the immovable property in India each exceeded 10,000*l.* It being in evidence that there is no rule against marshalling in favour of charities known to the law of Scotland:—Held, that the 10,000*l.* might be well paid out of the movable property only; and that, the distribution of such movable property being by the law of India regulated by the laws of Scotland, the whole legacy was well given to the charity. *Ib.*

An adopted son, according to the Hindoo law, is entitled to succeed to his collateral as well as his direct relations by adoption. *Chowdry* v. *Dibeh*, 3 Knapp, 55.

Lands in the East Indies held by a tenure of the nature of the fee simple, do not pass by an unattested will, but descend to the person who would be heir-at-law in England. *Gardiner* v. *Fell*, 1 Jac. & Walk. 22; 2 Wils. 32; 20 R. R. 208.

In a suit for the division of the property of an undivided Hindoo family, the whole of the property of each individual is presumed to belong to the common stock, and it lies upon the party who wishes to except any of

it from the division, to prove that it comes within one of the exceptions recognised by the Hindoo law. *Sadasew* v. *Bajee*, 2 Knapp, 60.

Will—Absolute Interest—Precatory Trusts.]—A testator gave to his widow the whole of his real and personal property, "feeling confident that she will act justly to our children in dividing the same when no longer required by her:"—Held, that the widow took an absolute interest, and that the doctrine of precatory trusts did not apply. *Mussoorie Bank* v. *Raynor*, 51 L. J., P. C. 72; 7 App. Cas. 321; 46 L. T. 633; 31 W. R. 17—P. C.

4. Applicability of English Laws.

What Statutes Apply.]—The English law of felo de se, and forfeiture of goods and chattels, does not extend to a native Hindoo, though a British subject, committing suicide at Calcutta. *Bengal (Advocate-General)* v. *Ranee Surnomoye Dossee*, 9 Moore, Ind. App. 387; 2 Moore, P. C. (N.S.) 22; 2 N. R. 530; 9 Jur. (N.S.) 877; 8 L. T. 843; 12 W. R. 21.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state; and those who live amongst them and become members of their community become partakers of and subject to the same laws. *Ib.*

This rule does not apply to the early settlement of the English in India, as the permission given to the settlers to use their own laws within the factories did not extend those laws to natives associated with them within the same limits. *Ib.*

Where a country, which was previously under a settled government, accrues to the crown by cession or conquest, only such parts of the English law are to be considered as having force there as have either been specifically introduced by statute, or can be shown by a course of decisions to have been acted on in such country. That part of the English law which relates to the disability of aliens to hold or devise land has not force in the presidency of Calcutta, nor do the English statutes of mortmain apply to India, and, therefore, a devise for a charitable purpose by a person born in France, was held to be good. *Lyons (Mayor)* v. *East India Co.*, 1 Moore, P. C. 175.

Brief view of the introduction of the English law into the East Indies. *Ib.*

The Statute of Limitations, 21 Jac. 1 c. 16, extends to India, and applies to Hindoos and Mahomedans as well as Europeans, in civil actions in the supreme court. *Ruckmaboye* v. *Mottichund*, 5 Moore, Ind. App. 234; 8 Moore, P. C. 4.

But 8 & 9 Vict. c. 109, relating to games and wagers, does not. *Thackoorseydass* v. *Dhondmull*, 6 Moore, P. C. 300; 4 Moore, Ind. App. 339; 12 Jur. 315.

The Factors Act, 5 & 6 Vict. c. 39, is extended to India, by the act of the Indian legislature of 1844. *Gobind Chunder Sein* v. *Ryan*, 9 Moore, Ind. App. 140; 8 Jur. (N.S.) 343; 5 L. T. 559; 10 W. R. 155.

The 9 Geo. 4, c. 74, s. 56, extends to the British territories in India the provisions of the 9 Geo. 4, c. 31, s. 8, with respect to offences committed in two different places, or partially committed in one place and completed in another; but such statute does not render a person liable to punishment for the commission of a complete offence who was not liable before the passing of that statute. *Nga Hoong* v. *Reg.*, 7 Moore, Ind. App 72; 7 Cox, C. C. 489.

The words, "within the limits of the charter of the United Company," in 9 Geo. 4, c. 74, s. 56, meant within the limits of the trading charter of the East India Company. *Ib.*

5. Actions in England.

When Possible.]—By an act of the Indian legislature a company established in Calcutta was to be sued in the name of their secretary, and judgment so recovered was to have the like effect against the property of the company as if obtained against all the members as parties to the action; provided that if execution against the company's property was ineffectual, execution was to be issued against the members successively, and failing this, against any person who was a member when the contract on which the action was brought was entered into; no execution to be issued against any person other than the actual party to the action without leave granted in open court, on notice to the person to be charged. The plaintiff, having recovered a judgment in India against the secretary for a breach of contract made by the company there, without taking any further proceedings in that country, sued the defendant (who was a member at the time of the contract made and judgment recovered) in this country on the judgment and on the original contract:—Held, that the action was well brought in both cases. *Kelsall* v. *Marshall*, 1 C. B. (N.S.) 241; 26 L. J., C. P. 19; 2 Jur. (N.S.) 1142; 5 W. R. 114.

Staying Proceedings.]—An action having been brought for goods sold by a plaintiff in England, and delivered to the defendant in India, the court refused to stay the proceedings under 11 & 12 Vict. c. 21, s. 61, under which the defendant had duly obtained his discharge, but left him to any remedy the statute gave him by plea. *Reynolds* v. *Goodwin*, 6 C. B. (N.S.) 370.

Limitations, Statute of—Bond Executed in India.]—Specialty debts in India have no higher legal value nor greater efficacy than simple contract debts; and the same period of limitation, viz., three years, bars the remedy for both, but:—Held by Lopes, J., that where an action on a bond executed in India is brought in England, the bond cannot be treated as a simple contract; and, therefore, as the English statutes of limitation apply, the remedy is not barred until after the lapse of the period of twenty years prescribed by 3 & 4 Will. 4, c 42, s. 3, as the limitation for actions on contracts under seal. *Alliance Bank of Simla* v. *Carey*, 49 L. J., C. P. 781; 5 C. P. D. 429; 29 W. R. 306; 44 J. P. 735.

6. Civil and Military Service.

Civil.]—The civil servants of the Bengal establishment are not entitled, under the regulations of the Bengal Civil Service Fund, on accepting the retiring annuities, to any refund of their subscription in excess of half the value of their annuities. *Boldero* v. *East India Co.*,

11 H. L. Cas. 405; 11 Jur. (N.S.) 493; 13 L. T. 308; 13 W. R. 792.

Military.]—By a trust deed made in 1770, between Lord Clive and the East India Company, the East India Company became the trustees of a fund for the benefit of the persons employed by them in their military service, in the manner pointed out by the deed. The deed provided, that in case it should happen that the company should cease to employ a military force in their actual pay and service in the East Indies, then they should pay the fund to Lord Clive or his representatives. In 1858 the 21 & 22 Vict. c. 106 transferred the rights and liabilities of the East India Company to the crown:—Held, that, having regard to the whole of the provisions of that act, the representatives of Lord Clive were entitled to this fund. *Walsh* v. *Secretary of State for India*, 10 H. L. Cas. 367; 32 L. J., Ch. 585; 9 Jur. (N.S.) 757; 11 W. R. 823; 2 N. R. 339.

To entitle the widow of an officer in the East India Company's service to Lord Clive's bounty, the marriage must have taken place before he retired from the service. *M'Kenny* v. *East India Co.*, 3 Ves. 203.

A contract for the payment of money, in consideration of the resignation of a major in the service of the East India Company, is illegal by 49 Geo. 3, c. 126. *Eyre* v. *Forbes*, 12 C. B. (N.S.) 191. S. P., *Graeme* v. *Wroughton*, 11 Ex. 146; 24 L. J., Ex. 265; 3 W. R. 509.

An officer commanding forces of her Majesty and of the East India Company in India has no such legal right, by statute or otherwise, to his pay, as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus calling upon the company to discharge arrears, though he has always received his pay from the company, and their practice has been to discharge it monthly. *Napier, Ex parte*, 18 Q. B. 692; 21 L. J., Q. B. 332; 17 Jur. 380.

Pensions.]—A pension awarded by the East India Company to a military officer, on his retirement from service, is assignable. *Heald* v. *Hay*, 3 Giff. 467; 31 L. J., Ch. 311; 8 Jur. (N.S.) 379; 5 L. T. 740; 10 W. R. 264.

The retiring pension of a military officer of the East India Company does not, upon his bankruptcy, pass to his assignees. *Gibson* v. *East India Co.*, 5 Bing. (N.C.) 262; 7 Scott, 74; 1 Arn. 493; 8 L. J., C. P. 193; 3 Jur. 56.

A superannuation allowance, awarded by a resolution of the court of directors, pursuant to 53 Geo. 3, c. 155, s. 93, to a retired civil servant of the East India Company, is not a debt that is attachable under 17 & 18 Vict. c. 125, s. 61. *Innes* v. *East India Co.*, 17 C. B. 351; 25 L. J., C. P. 154; 2 Jur. (N.S.) 189; 4 W. R. 245.

J. M.

INDICTMENT.

See CRIMINAL LAW.

INDUSTRIAL SCHOOLS.

See SCHOOL.

INDUSTRIAL SOCIETY.

1. *In General*, 1324.
2. *Actions By and Against*, 1325.
3. *Winding Up*, 1326.

1. In General.

Statutes.]—*Industrial and Provident Societies Act*, 1893 (56 & 57 Vict. c. 39). *Industrial, &c. (Amendment) Acts*, 1894 (57 & 57 *Vict. c.* 8); 1895 (58 & 59 *Vict. c.* 30).

Rule—Charging past Invalid Loans on Assets—Money received on Deposit.]—An industrial society passed a rule in 1887, purporting to secure certain invalid loans, made prior to 1887, as a charge upon the assets of the society:—Held, that the rule of 1887 was invalid, and did not ratify the loans, so as to entitle the loan-holders to claim in the liquidation of the society in priority to the trade creditors; that in order to constitute a valid loan, it must have been made in accordance with the provisions of the society's rules as to loans; that these loans were in reality banking transactions, and as such prohibited by the Industrial and Provident Societies Act, 1876. *Bottomgate Industrial Society, In re*, 65 L. T. 712; 40 W. R. 139; 56 J. P. 216.

—— **Application of Profits — Subscription to Strike Fund—"Lawful Purpose."**]—By the rules of an industrial society established to carry on the business of general dealers, farmers, manufacturers, &c., it was provided that the profits of the society's business should be applied "either to increase the capital, reserve fund, or business of the society, or to any lawful purpose, and the remainder, less any grant that may be made for educational purposes," divided among the members:—Held, that a subscription to a strike fund was not a lawful purpose within the rules. *Warburton* v. *Huddersfield Industrial Society*, 61 L. J., Q. B. 422; [1892] 1 Q. B. 817; 67 L. T. 43; 40 W. R. 346; 56 J. P. 453—C. A.

Mortgage by Member of Property and "Other Moneys"—Defalcations.]—H., a member of the defendant society, mortgaged to the society certain property to secure principal money payable by certain instalments, with interest and subscriptions, and "other moneys becoming due from the mortgagor to the defendant society." H. was also secretary of the society, and in that capacity had received and misapplied moneys belonging to the society. He had conveyed the equity of redemption in the mortgaged property to the plaintiff, who claimed to redeem on payment of the mortgage debt, with interest, subscriptions, fines, and other payments due from H. as member. The society claimed in addition to this the amount which H. had embezzled, contending that it came within the words "other moneys":—Held, that the words applied to debts ejusdem generis with what had been mentioned before, and that the sums which H. had embezzled were not ejusdem generis with the mortgage debt, interest, and subscriptions, but were due from H. on a totally different contract, and the society could not insist upon the plaintiff paying such sums before redeeming the property. *Bailes* v. *Sunderland Equitable Industrial Society*, 55 L. T. 808; 51 J. P. 310.

Intestacy of Member—Non-Subsisting Nomination of Shares—Distribution without Letters of Administration — Presumption of Death of Nominee — Discretion of Committee.] — The action of a committee of a provident society under s. 27 of the Industrial and Provident Societies Act, 1893, in relation to the distribution of shares of deceased members in cases of intestacy and non-subsisting nomination, is purely discretionary, and such committee may, in the absence of such evidence as they may deem satisfactory, refuse to presume the death of a nominee who has not been heard of for upwards of seven years. *Escritt* v. *Todmorden Co-operative Society*, 65 L. J., Q. B. 358; [1896] 1 Q. B. 461; 74 L. T. 350; 44 W. R. 544.

2. Actions By and Against.

Society Registered under 15 & 16 Vict. c. 31.] —A bond given to trustees for an industrial society, registered under 15 & 16 Vict. c. 31, is by virtue of the certificate of registration under 25 & 26 Vict. c. 87, vested in the society, and the society can sue on it for breaches of the condition subsequent to the registration. *Queenshead Industrial Society* v. *Pickles*, 3 H. & C. 857; 35 L. J., Ex. 1; L. R. 1 Ex. 1; 11 Jur. (N.S.) 877; 13 L. T. 295; 14 W. R. 30.

Society in Corporate Capacity.] — An industrial and provident society, registered under 25 & 26 Vict. c. 87, is not liable to be sued in its corporate capacity in an action not then pending, but commenced after the time of its registration. *Linton* v. *Blakeney Joint Co-operative Industrial Society*, 3 H. & C. 853; 34 L. J., Ex. 211; 13 L. T. 39; 13 W. R. 843.

But an industrial and provident society formed under 15 & 16 Vict. c. 31, and afterwards registered under 25 & 26 Vict. c. 87, may sue in its corporate name upon a bond given to trustees for the society before the passing of the latter act. *Queenshead Industrial Society* v. *Pickles*, supra.

Committee.]—The 25 & 26 Vict. c. 87 repeals 15 & 16 Vict. c. 31, and subsequent acts, by which the officers of these societies are required to be sued; but s. 6 provides, that all legal proceedings then pending by or against any such trustee or other officer on account of the society, may be prosecuted by or against the society in its registered name, without abatement. Goods were supplied to a society before the passing of this act, and the society was afterwards registered under the act. In an action, commenced in 1863, against the committee of management for the value of the goods:—Held, that the action was rightly brought, the act having, by the repeal of former acts, restored the plaintiff's common-law right; and the proviso in s. 6 including only proceedings then pending, and not claims or rights of action. *Dean* v. *Mellard*, 15 C. B. (N.S.) 19; 32 L. J., C. P. 282; 10 Jur. (N.S.) 346; 11 W. R. 913.

Private Members.]—The members of a society registered under 15 & 16 Vict. c. 31, are not liable to be sued individually for the debts of the society. *Burton* v. *Tannahill*, 5 El. & Bl. 797; 25 L. J., Q. B. 135; 2 Jur. (N.S.) 184; 4 W. R. 205.

—— **Scire facias.**]—A scire facias may be issued against individual members of an industrial and provident society, after judgment recovered against the registered officers or trustees under 17 & 18 Vict. c. 25. *Myers* v. *Rawson*, 5 H. & N. 99; 29 L. J., Ex. 217; 1 L. T. 405; 8 W. R. 417.

—— **Society Unregistered.**]—Members of an unregistered society enrolled and certified under 15 & 16 Vict. c. 31, giving a promissory note in the following form for a debt of the society:—"Twelve months after date we, the undersigned, being members of the executive committee, on behalf of the L. and S. W. Railway Co-operative Society, do jointly promise to pay," &c., are personally liable. *Gray* v. *Raper*, L. R. 1 C. P. 694; 14 W. R. 780.

Officers.]—The only persons liable to be sued are the officers of the society appointed under 17 & 18 Vict. c. 25, s. 1, or, if there is no such officer, the trustees. *Burton* v. *Tannahill*, supra.

Trustees.]—Trustees of a provident society formed under 15 & 16 Vict. c. 31, but not registered under 25 & 26 Vict. c. 87, cannot be sued in an action commenced after the passing of the latter act, as the previous act is absolutely repealed by it without any saving clause. *Tutill* v. *Douglas*, 33 L. J., Q. B. 66; 8 L. T. 426.

Action on an Award.]—The rules of an industrial society provided, that in case of disputes between a member and the society, or of complaint against an officer, the matter should be settled by arbitration. A member was appointed a salesman of the society, and after he had resigned his appointment disputes arose as to his accounts, which the society proceeded to settle by arbitration; and an award having been made against him, the society proceeded to enforce it, by issuing a plaint in the county court, on which he, before the case had been brought before the judge of the county court, applied for a prohibition, on the ground that this was not a matter which could be settled by arbitration:—Held, that the application was premature, as the county court was the tribunal to decide, in the first instance, whether, on the facts, the matter was such as could be decided by arbitration. *Skipton Industrial Co-operative Society* v. *Prince*, 33 L. J., Q. B. 323; 11 Jur. (N.S.) 11.

And see Friendly Society.

3. Winding Up.

Jurisdiction—By what Court.]—Prior to the passing of the Companies (Winding-up) Act, 1890, the court of chancery had no jurisdiction to wind up an industrial society registered under the Industrial and Provident Societies Act, 1876; and the Companies (Winding-up) Act, 1890, gives no such jurisdiction to the chancery division. *London and Suburban Bank, In re*, 61 L. J., Ch. 316; [1892] 1 Ch. 604; 66 L. T. 716; 40 W. R. 326.

Superior Courts.]—The court of chancery has no jurisdiction, under the Companies Act of 1862, to wind up an industrial society formed under 15 & 16 Vict. c. 31, and entitled to, but not having obtained, at the date of the winding-up order, a certificate of registration under 25 & 26

Vict. c. 87. *Chatham Co-operative Industrial Society, In re*, 33 L. J., Ch. 737 ; 10 Jur. (N.S.) 983 ; 10 L. T. 842 ; 12 W. R. 1053.

Societies established under 15 & 16 Vict. c. 31, held to be within the provisions of the Winding-up Acts, 11 & 12 Vict. c. 45, 12 & 13 Vict. c. 108, and 20 & 21 Vict. c. 78. *National Industrial and Provident Society, In re*, 30 L. J., Ch. 940 ; 9 W. R. 774.

The court of chancery has jurisdiction to wind up a building society under the Companies Act, 1862. *Midland Counties Benefit Building Society, In re*, 4 De G., J. & S. 468 ; 33 L. J., Ch. 739 ; 12 W. R. 661.

Building societies are quite distinct from friendly and also industrial or provident societies, and are not affected by the provisions of the statutes regulating the latter two classes of companies. *Ib.*

The court stayed the drawing up of an order for winding-up a society which was registered under 15 & 16 Vict. c. 31, being of opinion that the county court of the county in which the society was situate had the jurisdiction over it ; but directed the society to be registered under the Act of 1862. *Rotherhithe Co-operative and Industrial Society, In re*, 32 Beav. 57 ; 7 L. T. 305.

A friendly and provident society which has ceased to carry on business for many years is an association within the terms of the Companies Act of 1862, and may be wound up under that, act. *Alfreton District Friendly and Provident Society, In re*, 7 L. T. 817 ; 11 W. R. 301.

Transfer to High Court.]—Section 10 of the Companies (Winding-up) Act, 1890, is applicable to the winding-up of registered industrial societies. Section 59 of the Industrial and Provident Societies Act, 1893, has not affected the jurisdiction of the county courts as conferred by the preceding act of 1876 ; except that proceedings pending at the time of the passing of the act may be transferred to the high court under the conditions imposed by the section. *Ferndale Industrial Co-operative Society, In re*, [1894] 1 Q. B. 828 ; 70 L. T. 448 ; 42 W. R. 430 ; 1 Manson, 303.

Withdrawable Share Capital—Suspension of Right of Withdrawal — Business Carried on at a Loss — Winding-up Order — "Just and Equitable."]—On a petition by three shareholders to wind up an industrial society, the county court judge found as a fact that the society was solvent as regards outside creditors, but that it could only continue to carry on business by a suspension of the right of withdrawal for a limited time. The petitioning shareholders had given notice of withdrawal, but the committee had exercised their right of suspension by successive resolutions for a period of nearly two years prior to the presentation of the petition. The winding-up was opposed by a majority of the shareholders :—Held, that, it not having been proved to be impossible to carry on the business of the society, it was not "just and equitable," within the meaning of s. 79, sub-s. 5, of the Companies Act, 1862, that the society should be wound up. *Horsham Industrial and Provident Society, In re*, 70 L. T. 801 ; 58 J. P. 639.

Stay of Actions.]—After the making of a note, upon which the holder was suing one of the members, the society was registered under 25 & 26 Vict. c. 87, and, after action, an order was obtained for winding it up under 25 & 26 Vict. c. 89, and proceedings under that order were taken in a county court. Section 202 of the Companies Act of 1862 enacts, that where an order has been made winding-up an unregistered company, no suit or other legal proceeding shall be commenced or proceeded with against any contributory to the company, in respect of any debt of the company, except with the leave of the court The plaintiff had not obtained leave to proceed :—Held, that the omission to obtain such leave could not be taken advantage of by plea to the further maintenance of the action ; but only, if at all, by application to the court in which the proceedings under the winding-up order were being pursued. *Gray* v. *Raper*, L. R. 1 C. P. 694 ; 14 W. R. 780.

—— **County Court—Appeal.**]—The judge of a county court, in which a society registered under 25 & 26 Vict. c. 87, was being wound up, having made an order to stay proceedings in an action brought against a member of such society for a debt of the society incurred before such registration, and for which the member was therefore individually liable :—Held, that no appeal against such order would lie to any of the superior courts of common law. *Henderson* v. *Bamber*, 19 C. B. (N.S.) 540 ; 35 L. J., C. P. 65.

Liability of Shareholders — Debts prior to Registration under Act of 1862.]—F. was holder of fully paid-up shares in an industrial society formed, with unlimited liability, under the act of 1852. After the passing of the Industrial and Provident Societies Act, 1862, which repeals the act of 1852, the society being in difficulties was registered under the act of 1862 as a company with limited liability, for the purpose of being wound up, it having been held that a winding-up order could not be made under the repealed act. Upon motion to settle the list of contributories :—Held, that his name must be omitted, notwithstanding there were debts contracted before the registration of the company with limited liability, the Companies Act of 1862, ss. 35 and 37, having taken away from the creditors their original remedy by action. *Sheffield Foresters' Co-operative Society, In re, Fountain's case, Swift's case*, 4 De G., J. & S. 699 ; 34 L. J., Ch. 593 ; 11 Jur. (N.S.) 553 ; 12 L. T. 335 ; 13 W. R. 667.

Debentures — Non-Registration as Bills of Sale—Validity of Debentures against Liquidator.]—The debentures of an industrial society formed under the Industrial and Provident Societies Acts, charging the society's personal chattels with the payment of money, are not excluded from the operation of the Bills of Sale Acts by s. 17 of the Bills of Sale Act, 1882, or by anything in the Bills of Sale Acts generally. Such a society is not a "company" within any of the legal meanings of that word. *Standard Manufacturing Co., In re* (60 L. J., Ch. 292 ; [1891] 1 Ch. 627), discussed and distinguished. *G. N. Ry.* v. *Coal Co-operative Society*, 65 L. J., Ch. 214 ; [1896] 1 Ch. 187 ; 73 L. T. 443 ; 44 W. R. 252 ; 2 Manson, 621.

W. A. G. W.

INFANT.

[By E. E. H. BIRCH.]

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A. RIGHTS AND LIABILITIES.

1. IN GENERAL.

Specific Performance.]—An infant cannot sustain a suit for specific performance, because the remedy is not mutual. *Flight* v. *Bolland*, 4 Russ. 298; 28 R. R. 101.

Next Friend.]—Infant ought to sue by next friend, not to wait till of age. *Blade* v. *Banbury*, 1 Ves. J. 195.

Executory Agreement.]—An infant cannot plead infancy under an executory agreement made with his ancestor where the immediate performance of his part of the contract is essential. *Griffin* v. *Griffin*, 1 Sch. & Lef. 352; 9 R. R. 51.

Covenant.]—Infant not bound by his covenant. *Johnson* v. *Boyfield*, 1 Ves. J. 314.

Bond.]—An infant can on no account bind himself in a bond with a penalty conditioned for payment of interest as well as principal. *Fisher* v. *Mowbray*, 8 East, 330. S. P., *Baylis* v. *Dinely*, 3 M. & S. 477.

Factor.]—Infant cannot be made to account as factor. *Smally* v. *Smally*, 1 Eq. Ca. Abr. 6.

Accounts.]—Dealings between tradesmen and their customers may be subject of account in equity, in case of securities obtained from extravagant young men on misrepresentation. *Courteney* (*Lord*) v. *Godschall*, 9 Ves. 473.

—— **When Opened.**]—Solicitor who advanced money to infant, and acted as his confidential adviser, is a guardian to him, and an account settled between them, within a month after infant became of age, without any assistance, was opened. *Revett* v. *Harvey*, 1 Sim. & S. 502; 24 R. R. 219.

Gift by Child to Parent.]—Where a gift is made by a child to a parent before the parental authority and dominion have terminated, it is to be presumed to be made under parental influence, and therefore invalid; and the burthen of proof lies on the parent to rebut this presumption, by showing that the child had independent advice, or was otherwise placed in a position to exercise an independent judgment as to the gift. *Wright* v. *Vanderplank*, 2 K. & J. 1; 8 De G., M. & G. 133; 25 L. J., Ch. 753; 2 Jur. (N.S.) 599; 27 L. T. 91; 4 W. R. 410.

Injunction.]—Articles, under which A. had served his clerkship to an attorney, contained a provision that A. should not practise within a certain district. A., who was an infant, served for three years after he attained his full age, and with a knowledge of the articles completed his clerkship, and afterwards began to practise within the forbidden district. A motion to restrain him was refused with costs. *Capes* v. *Hutton*, 2 Russ. 357; 26 R. R. 102.

Mistake as to Age.]—I., who was tenant in tail in remainder of certain lands, and was supposed to be of full age, agreed in 1840 for a re-settlement. I. discovered in 1850, for the first time, that he was under age at the date of the resettlement, which he thereupon repudiated:—Held, that by I.'s repudiation the resettlement of his lands in 1840 was rendered void ab initio. *Paget* v. *Paget*, 11 L. R., Ir. 26.

Fraud—Notice.]—An infant charged his reversionary interest in a fund, and executed a statutory declaration stating (untruly) that he was then of full age. After attaining twenty-one, he mortgaged his interest in the fund for an amount exceeding what was ultimately available without disclosing the fact of the prior charge:—Held, that the charge was avoided by the subsequent mortgage executed, when of full age, to a mortgagee without notice. *Inman* v. *Inman*, L. R. 15 Eq. 260; 21 W. R. 433.

—— **Lien.**]—Army agents advancing reasonable sums of money to a minor, on the assurance that he required them for regimental purposes:—Held, in the absence of fraud, entitled to a lien for the amount upon the proceeds of the sale of his commission, the agent not being fixed with notice. *Lawrie* v. *Bankes*, 4 K. & J. 142; 27 L. J., Ch. 265; 4 Jur. (N.S.) 299; 6 W. R. 244.

Promissory Note.]—Where a promissory note appeared to have been signed by a lady in her twenty-second year as surety for her stepfather, in whose house she had been residing, the court restrained execution against her on a judgment by the payee. *Espey* v. *Lake*, 10 Hare, 260; 22 L. J., Ch. 336; 16 Jur. 1106; 1 W. R. 59.

—— **Bond.**]—A woman, at the time of her marriage, was indebted on two promissory notes; after the marriage the husband, an infant, gave his bond for the amount to the creditor, who thereupon delivered up the notes. On a bill filed for relief, the court ordered the notes to be returned to the plaintiff, with directions that to any action the plaintiff should bring on the notes defendant should not raise any plea which could not have pleaded at the time the bond was given. *Clarke* v. *Cobley*, 2 Cox, 173; 2 R. R. 25.

Devise to Pay Debts.]—If an infant borrows money, and gives his bond for it, and devises his personal estate (being of sufficient capacity) for payment of his debts, this bond debt shall be paid. *Hampson* v. *Sydenham*, Nels. Ch. Rep. 55.

Payment by Infant.]—Although an infant is not absolutely bound by a contract, not for necessaries, and cannot be compelled to pay, yet, if he does pay money under it, he cannot in general recover it back when he comes of age. *Taylor, Ex parte, Burrows, In re*, 8 De G. M. & G. 254; 25 L. J., Bk. 35; 2 Jur. (N.S.) 220; 4 W. R. 305.

Though an infant who has entered into a contract cannot be compelled to complete it, yet he cannot maintain an action to recover back a deposit. *Wilson* v. *Kearse*, Peake's Add. Cas. 196.

If an infant pays money without a valuable consideration he cannot recover it back, and therefore, where A. during infancy paid a sum to B. as premium for a lease, which he avoided after he became of age, and received no benefit from the occupation from that period:—Held, that he was not entitled to recover. *Holmes* v. *Blogg*, 2 Moore, 552; 19 R. R. 445.

—— **Goods Used or Consumed.**]—An infant who has used or consumed goods for which he has paid money under a contract void under the Infants' Relief Act, 1874, s. 1, cannot recover back from the vendor the money so paid. *Valentini* v. *Canali*, 59 L. J., Q. B. 74; 24 Q. B. D. 166; 61 L. T. 731; 38 W. R. 331; 54 J. P. 295.

Statute of Limitations.]—When a father has entered upon the estates of his infant children, the presumption is, that he entered as their guardian and bailiff, and therefore the statute of limitations does not begin to run against the children until they attain twenty-one, and from that time at least a child has twenty years within which he may recover possession. *Thomas* v. *Thomas*, 2 K. & J. 79; 25 L. J., Ch. 159; 1 Jur. (N.S.) 1160; 4 W. R. 135.

—— **Acknowledgment.**] — An infant may during his infancy effectually sign an acknowledgment in writing, so as to bar the statute of limitations, if the debt acknowledged is for necessaries. *Williams* v. *Smith*, 4 El. & Bl. 180; 3 C. L. R. 16; 24 L. J., Q. B. 62; 1 Jur. (N.S.) 163.

Bankruptcy.]—An infant cannot be adjudicated a bankrupt in respect of debts contracted since the Infants' Relief Act. *Rainey, In re*, 3 L. R., Ir. 459. See also *Jones, In re, Jones, Ex parte*, 18 Ch. D. 109; 29 W. R. 747; and *Reg.* v. *Wilson*, 5 Q. B. D. 28; 41 L. T. 480; 28 W. R. 307.

The bond upon suing out a commission of bankruptcy must be by the petitioning creditor; the commission, therefore, was superseded on account of his infancy. *Barrow, Ex parte*, 3 Ves. 554.

A petition to annul an adjudication in bankruptcy on the ground of the infancy of the bankrupt, not presented until after the time limited by s. 233 of the Bankrupt Law Consolidation Act, 1849, dismissed as out of time. *West, In re*, 3 De G. M. & G. 198; 22 L. J., Bk. 71; 1 W. R. 421.

Immunity from Crime.]—An infant under the age of seven cannot incur the guilt of felony. *Marsh* v. *Loader*, 14 C. B. (N.S.) 535; 11 W. R. 784.

Recognisance.]—Infancy is not a ground for discharging a forfeited recognisance to appear at the assizes to prosecute a felony. *Williams, Ex parte*, 13 Price, 673; McCle. 493; 28 R. R. 735.

See also CRIMINAL LAW.

Common Informer.]—An infant cannot be a common informer, because he can only sue by guardian; and the 18 Eliz. c. 5, s. 1, requires an informer to sue either in person or by attorney. *Maggs* v. *Ellis*, Bull. N. P. 196.

Clerk of Court of Requests.]—An infant could not be appointed to the office of clerk of a court of requests, where it was part of the duty for such clerk to receive the money of the suitor, as it is an office of public trust. *Claridge* v. *Evelyn*, 5 B. & Ald. 81; 24 R. R. 289.

Clerk of the Peace.]—The office of clerk of the peace being merely ministerial, may be held by an infant. *Crosbie* v. *Hurley*, 1 Alcock & Napier, 431.

Bailiff.]—Semble, that an infant cannot be a bailiff or a sheriff's officer. *Cuckson* v. *Winter*, 2 Man. & Ry. 313.

Separate Examination of Married Woman.]—A surrender taken out of court of copyhold lands of a married woman, and requiring her separate examination and consent, may be taken by a deputy steward who is an infant. *Edleston* v. *Collins*, 3 De G. M. & G. 1; 22 L. J., Ch. 480; 17 Jur. 331; 1 W. R. 169.

Infant under Age is a "Person."]—The Crown Lands Alienation Act, 1861, of New South Wales, by s. 13, provides that crown lands shall be opened for conditional sale in the manner following, viz.:—"Any person may tender a written application for the conditional purchase of any such lands":—Held, that "person" is not limited to persons of the age of twenty-one years. *O'Shanassy* v. *Joachim*, 45 L. J., P. C. 43; 1 App. Cas. 82; 34 L. T. 265; 24 W. R. 792—P. C.

Right to Absolute Gift.]—If a father makes to a son under age an absolute gift of an article of dress or ornament, he cannot afterwards reclaim the gift. *Smith* v. *Smith*, 7 Car. & P. 401.

Right to Insurance Money.]—During the infancy of a tenant in tail of freehold estates devised in strict settlement, part of which consisted of a corn-mill, the rents were received by his mother on his behalf, and she thereout paid the premiums for keeping up a policy in her name against fire. The will contained no provision for fire insurance. The mill having been burnt down:—Held, that the insurance moneys belonged to the infant tenant in tail as his personal estate. *Warwicker* v. *Bretnall*, 23 Ch. D. 188; 31 W. R. 520.

Liability of Solicitor to Infant.]—An attorney for an infant who has received the damages and costs recovered in an action, is liable to the infant in an action for money had and received. *Collins* v. *Brook*, 5 H. & N. 700; 29 L. J., Ex. 255; 6 Jur. (N.S.) 999; 2 L. T. 774; 8 W. R. 474—Ex. Ch.

Married Infant cannot Waive Right to Equity to a Settlement.]—A fund in court belonging to an infant married woman will not be paid out to her husband, as she cannot waive her equity to a settlement. *D'Angibau, In re* (15 Ch. D. 228) noticed. *Shipway* v. *Ball*, 50 L. J., Ch. 263; 16 Ch. D. 376; 44 L. T. 49; 29 W. R. 302.

En ventre sa Mère—Loss of Father.]—In an

action in the admiralty court on behalf of the owners of a brig which had been run down, an appearance was entered on behalf of a child of one of the drowned men en ventre sa mère. The court reserved leave to the child, en ventre, if born within due time, to prefer a claim for damages sustained by the death of the father. *The George and Richard*, L. R. 3 Adm. 466 ; 24 L. T. 717. The child was afterwards born, and its claim was assessed. 20 W. R. 245.

Power of Court to Mortgage Real Estate for Repairs.]—When an infant was absolutely entitled, subject to trusts, to the beneficial interest in real estate, the legal estate being in trustees : —Held, that the court had jurisdiction to raise money by a mortgage of the estate, for paying repairs certified to be absolutely necessary. *Jackson, In re, Jackson* v. *Talbot*, 21 Ch. D. 786.

Vesting Order—Stock in Name of Infant and Another.]—Where stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person :—Held, that the court had jurisdiction under the Trustee Extension Act, 1852, to make an order vesting in such other person the right to transfer such stock. *Harwood, In re*, 51 L. J., Ch. 578 ; 20 Ch. D. 536 ; 30 W. R. 595.

Compromise.]—A party to a suit, who, knowing that other parties are infants, agrees that a certain course should be taken, cannot object that the other parties were infants and could not consent. *Pisani* v. *Att.-Gen.* (*Gibraltar*), L. R. 5 P. C. 517.

The court has no authority to sanction an arrangement affecting property settled upon infants, even though it be of opinion that such arrangement would be beneficial to them. *Day* v. *Day*, 9 Jur. 785.

—— **How obtained.**]—A compromise on behalf of infants is to be obtained upon petition, supported by an affidavit of a solicitor that counsel's opinion has been given that the compromise is for the benefit of the infants. *Gray* v. *Paul*, 46 L. J., Ch. 818 ; 25 W. R. 874.

—— **Next Friend.**]—The court has no power to compromise a claim in which infants are interested against the wish of the next friend or guardian ad litem of the infants, acting under the advice of counsel. *Birchall, In re, Wilson* v. *Birchall*, 16 Ch. D. 41 ; 29 W. R. 27.

Release by Cestuis Que Trustent.]—Degree of weight to be attached to deeds of release executed by cestuis que trustent within a few days of their coming of age, when such releases profess to proceed upon the examination of complicated accounts. *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41 ; 8 L. J., Ch. 177 ; 3 Jur. 596. Affirming 2 Keen, 722.

Release of Executors.]—An agreement to release executors entered into about three months after an infant came of age, and carried into effect about three months subsequently by deed, set aside ; having been entered into in the absence of proper independent advice and assistance, and without a proper opportunity of examining the accounts. *Thornber* v. *Sheard*, 12 Beav. 589.

2. CONTRACTS.

a. In General.

Form of Action.]—A plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant. *Jennings* v. *Rundall*, 8 Term Rep. 335 ; 4 R. R. 680.

—— **Ex Delicto.**]—An infant hired a mare for a ride along the road, being told that she was not fit for leaping. The mare was put to a fence, and so injured that she died :—Held, that he was guilty of an actionable wrong and therefore liable irrespective of the question of necessaries. *Burnard* v. *Haggis*, 14 C. B. (N.S.) 45 ; 32 L. J., C. P. 189 ; 9 Jur. (N.S.) 1325 ; 8 L. T. 320 ; 11 W. R. 644.

The nature and extent of the liability of an infant cannot be changed by suing ex delicto in respect of a claim arising on a contract. *Ib.*

In an action to recover damages for injuries to a mare, whilst let on hire to the defendant, the statement of claim alleged that the defendant drove at an excessive speed and ill-treated the mare. The defendant pleaded infancy :—Held, that it was clear, from the statement of claim, the whole of which must be looked at in order to see whether the case was in contract or in tort, that the plaintiff claimed damages for a tort ; and that the defendant committed a separate and independent wrong apart from the contract, and was liable for such wrong in an action in tort to which the plea of infancy was no defence. *Walley* v. *Holt*, 35 L. T. 631.

A., an infant admitted receiving and retaining moneys of his master C. After coming of age he signed a memorandum acknowledging that he owed the money, and promised to pay the sum within a week, he also charged moneys due to him, and authorised the trustees to pay the money owing to C. On summons by C. for payment :—Held, that this was no ratification, and that the Infants' Relief Act, 1874, did not apply. But held, that A. was liable to an action of tort ; and that as he gave the charge to avoid being sued in tort, there was good consideration, and the summons was allowed. *Seager, In re, Seeley* v. *Briggs*, 60 L. T. 665.

—— **Trespass.**]—To trespass quare clausum fregit, a plea, that the close was the close and freehold of P., wherefore the defendant, as his servant and at his command, committed the trespass, is good, though P. was an infant. *Ewer* v. *Jones*, 9 Q. B. 623 ; 16 L. J., Q. B. 42 ; 10 Jur. 965.

On an Account stated.]—The statement of an account by an infant is not binding on him. *Hedgley* v. *Holt*, 4 Car. & P. 104.

And an action on an account stated does not lie against an infant. *Trueman* v. *Hurst*, 1 Term Rep. 40.

Even though the items are for necessaries. *Bartlett* v. *Emery*, 1 Term Rep. 42, n.

An account stated by an infant is not evidence against him after he becomes of age, even to show that he has been supplied with necessaries, as stated in the account. *Ingledew* v. *Douglas*, 2 Stark. 36.

But an account stated by an infant is voidable only, and may therefore be ratified by him after he comes of age. *Williams* v. *Moore*, 11 M. & W.

256 ; 2 D. (N.S.) 993 ; 12 L. J., Ex. 253 ; 7 Jur. 817.

Joint Contracts.]—The several covenant of one grantor of an annuity is not avoided by the infancy of another who grants in the same deed. *Haw* v. *Ogle*, 4 Taunt. 10.

If one of two partners is an infant, the holder of a bill of exchange accepted by both partners may declare on it as accepted by the adult only in the names of both. *Burgess* v. *Merrill*, 4 Taunt. 468.

A plea in abatement that the defendant made the promise jointly with another is supported by evidence that the promise was made by the defendant jointly with an infant. *Gibbs* v. *Merrill*, 3 Taunt. 307.

Where a plaintiff declares on a joint contract, and one defendant pleads infancy, the plaintiff cannot enter a nolle prosequi and proceed against the other, but should commence a new action against the adult. *Chandler* v. *Parkes*, 3 Esp. 76. S. P., *Jaffray* v. *Frebain*, 5 Esp. 47.

In an action on contract against two, one pleaded never indebted, and the other never indebted and infancy, and the plaintiff took issue upon the other pleas, but to the plea of infancy entered a nolle prosequi :—Held, that the plaintiff having admitted upon the record that there never was any joint binding contract, could not recover against either. *Boyle* v. *Webster*, 17 Q. B. 950 ; 21 L. J., Q. B. 202 ; 16 Jur. 683.

Trading Contract.]—An infant, who has been dealt with as a trader, is not consequently liable in respect of a trade debt. *Miller* v. *Blankley*, 38 L. T. 527.

The trading contract of an infant is not void, but he may enforce it at his election. *Bruce* v. *Warwick*, 6 Taunt. 118 ; 2 M. & S. 205 ; 14 R. R. 634, 638.

—— **Money Paid by Infant.**]—A plaintiff may recover back a sum which, while an infant, he paid towards the purchase of a share in the defendant's trade, to be retained by the defendant if he failed to enter into partnership with the defendant. *Corp* v. *Overton*, 10 Bing. 252 ; 3 M. & Sc. 738 ; 3 L. J., C. P. 24.

—— **Work done.**]—Where an infant carries on a trade, an action is not maintainable against him for work done for him in the course of that trade. *Dilk* v. *Keighley*, 2 Esp. 480 ; 5 R. R. 747.

—— **Premium.**]—An infant paid a premium on entering into a partnership, and before he became of age disaffirmed the contract :—Held, that he could not have recovered back the premium had his partners remained solvent, and therefore could not prove for it under their bankruptcy. *Taylor, Ex parte*, 8 De G. M. & G. 254 ; 25 L. J., Bk. 35 ; 2 Jur. (N.S.) 220 ; 4 W. R. 305.

Semble, that there is no distinction between a trade carried on by a minor and his occupation in a manual employment, and that he is not liable for the rent of a house taken for either purpose. *Lowe* v. *Griffiths*, 1 Scott, 458 ; 1 Hodges, 30.

—— **Partnership.**]—An infant held himself out as being in partnership with S. till within a short period of his coming of age, but there was no proof of his doing any act as a partner after twenty-one :—Held, that it was his duty to give notice of his disaffirmance of the partnership on his arriving at age ; and that he was responsible for goods supplied to S. subsequently to the infant's attaining twenty-one, on the credit of the partnership. *Goode* v. *Harrison*, 5 B. & Ald. 147 ; 24 R. R. 307.

Rescission of Agreement for Partnership.]—The plaintiff, during infancy, agreed with the defendant in writing to buy one-half share of a business of the defendant, the defendant to provide board and lodging for the plaintiff, and the plaintiff not to receive any fruits of the partnership until the balance should be paid. The plaintiff paid an instalment of the purchase-money, and went to board and lodge with the defendant, but before his majority, rescinded the agreement :—Held, that the plaintiff might recover back the instalment paid under the agreement, less the amount expended by the defendant in providing board and lodging. *Everett* v. *Wilkins*, 29 L. T. 846.

Apprenticeship.]—By an indenture an infant, with the consent of his father, bound himself apprentice to a tradesman, "his executors and administrators, such executors or administrators carrying on the same trade or business, and in the town of W.," and with him and them to serve for the term of seven years:—Held, that upon the death of the master, the apprentice was bound to serve his widow, his executrix, whilst she carried on the same business in the same town, and that she was bound to teach the apprentice. *Cooper* v. *Simmonds*, 7 H. & N. 707 ; 31 L. J., M. C. 138 ; 8 Jur. (N.S.) 81 ; 5 L. T. 712 ; 10 W. R. 270.

—— **Covenant to Serve—Negative Covenant.**]—An indenture of apprenticeship between the plaintiff, and an infant and her mother, contained covenants that during the term of the apprenticeship the services of the apprentice should be at the plaintiff's disposal, and that the apprentice should not enter into any professional engagement without the written consent of the plaintiff. The infant having, without the plaintiff's consent, entered into a professional engagement :—Held, that an injunction could not be granted, as no action at law could lie as against an apprentice. *Gilbert* v. *Fletcher*, (Cro. Car. 179) followed. *Fellows* v. *Wood* (59 L. T. 513), explained. *De Francesco* v. *Barnum*, 59 L. J., Ch. 151 ; 43 Ch. D. 165 ; 62 L. T. 40 ; 38 W. R. 187 ; 54 J. P. 420.

Wages.]—Infancy is no answer to a claim for wages accruing due after majority has been attained, although on a contract of hiring originally made under age. *Thomas* v. *Waldo*, 1 F. & F. 173.

Marriage.]—An infant is not liable to an action for breach of promise of marriage. *Hale* v. *Ruthven*, 20 L. T. 404.

Shares—Calls.]—A plea of infancy to an action for calls should allege that the infant repudiated the contract within a reasonable time after he came of age. *Dublin and Wicklow Ry.*, v. *Black*, 8 Ex. 181 ; 7 Railw. Cas. 434 ; 22 L. J., Ex. 94.

To a declaration for calls charging defendant as the holder of shares under a railway act, in-

corporated with 8 & 9 Vict. c. 16, it is no answer to plead that when he became indebted he was an infant, or that when he became registered he was an infant, and that he has not since he attained his age been registered anew, or ratified the original registration, for by the express wording of the 8 & 9 Vict. c. 16, an infant is liable for calls: at all events, if after attaining his age, he still holds the shares, for such holding is a ratification. *Cork and Bandon Ry.* v. *Cazenove*, 10 Q. B. 935; 11 Jur. 802.

Action for calls on railway shares; plea, that the defendant at the time of contracting, and also at the time of making the calls, was an infant; that while he was an infant he repudiated the contract and gave notice to the company:—Held, a good primâ facie bar. *Newry and Enniskillen Ry.* v. *Combe*, 3 Ex. 565; 5 Railw. Cas. 633; 18 L. J., Ex. 325.

To an action for calls the defendant pleaded, that at the time of making the calls and his becoming the holder of the shares, he was an infant:—Held, that the pleas were bad, as they did not show that the defendant was a shareholder by contract, and had avoided it. *Leeds and Thirsk Ry.* v. *Fearnley*, 5 Railw. Cas. 644; 7 D. & L. 68; 4 Ex. 26; 18 L. J., Ex. 330.

Action for calls; plea, that, at the time when the defendant first became the holder of the shares, and at the time of his making the contracts he was an infant. The defendant became the purchaser of the shares whilst he was an infant, but the call was made after he attained his full age:—Held, that the term "contract" meant the contract by which the defendant became a shareholder, and that the plea was proved. *Birkenhead, Lancashire, and Chester Junction Ry.* v. *Pilcher*, 6 Railw. Cas. 564; 5 Ex. 121; 19 L. J., Ex. 207; 14 Jur. 297.

Under the Companies Clauses Act, 8 & 9 Vict. c. 16, an infant shareholder is not absolutely bound, he is not deprived of the right of waiving a purchase which he has made; and if he waives it, his liability to pay calls is at an end, though the avoidance may not have taken place till the call was due. *L. & N. W. Ry.* v. *M'Michael*, 6 Railw. Cas. 618; 5 Ex. 114; 20 L. J., Ex. 97; 15 Jur. 132.

Sale.]—Semble, that a contract of sale by an infant is absolutely void, and is no answer to an action of trover subsequently brought by him to recover the value of the goods. *Latt* v. *Booth*, 3 Car. & K. 292.

A. sold goods to an infant and delivered them to B. for the purpose of being worked up by him for the vendee. The vendee afterwards went with A to B.'s shop, and desired that the remainder might be returned to A.:—Held, that it was competent to A. thus to rescind the contract without writing. *Douglas* v. *Watson*, 17 C. B. 685.

Deeds.]—A deed which takes effect by delivery, and is executed by an infant, is voidable only, and not void; and *Zouch* v. *Parsons* (3 Burr. 1794) is sound law. A voidable deed is valid until some act is done to avoid it; and it lies upon those who claim in opposition to the deed to show that such act has been done. *Allen* v. *Allen*, 2 Dr. & War. 307; 1 C. & L. 427.

Mortgages.]—The conveyance of an infant mortgagee is binding, and cannot be avoided by entry during the infancy. *Zouch* d. *Abbott* v. *Parsons*, 3 Burr. 1794; 1 W. Bl. 575.

An infant charged his reversionary interest with payment of a sum lent upon his promissory note, and executed a statutory declaration stating (untruly) that he was then of full age. After attaining twenty-one he mortgaged his interest without disclosing the prior charge:—Held, that the charge given by the infant during his infancy was avoided by the subsequent mortgage executed when of full age to a mortgagee without notice. *Inman* v. *Inman*, L. R. 15 Eq. 260; 21 W. R. 433.

Conveyance—Repudiation after Age.]—In 1840 I., who was tenant in tail in remainder of certain lands, and was supposed to be of full age, agreed for a resettlement. I. discovered in 1850 that he was under age at the date of the resettlement, which he thereupon repudiated:—Held, that the resettlement in 1840 was void ab initio. *Paget* v. *Paget*, 11 L. R., Ir. 26—C. A.

b. Liability of Parent.

Contract by Parent.]—A father is not liable to pay for clothes for his son under age, without some proof of a contract on his part either express or implied. *Blackburn* v. *Mackey*, 1 Car. & P. 1. S. P., *Fluck* v. *Tollemache*, 1 Car. & P. 5; 28 R. R. 765.

The mere moral obligation on a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him, even for necessaries. *Shelton* v. *Springett*, 11 C. B. 452.

No one is bound to pay another for maintaining his children, except he has entered into some contract to do so. *Seaborne* v. *Maddy*, 9 Car. & P. 497.

Every man is to maintain his own children; and it requires a contract to enable another person to do so, and charge him for it. *Ib.* S. P., *Mortimore* v. *Wright*, 6 M. & W. 482; 9 L. J., Ex. 158; 4 Jur. 465.

To charge a father with clothes supplied to his son, it is essential that the clothes should have been supplied with the assent or by the authority of his father; and the father is the person to judge what is proper for his son. *Rolfe* v. *Abbott*, 6 Car. & P. 286.

What amounts to Contract.]—A. having furnished goods to the defendant's son (an infant), the defendant repudiating all liability on his part, on the ground that the goods were not necessaries, wrote to the plaintiff: "Should you keep entirely from him, and not trust him any further sum, I will pay you one moiety and try to provide the means for him to pay the other. If you agree to this, I wish to have the account sent to him here, per return of post." The plaintiff sent the account, but did not in terms accept the proposal, and some months afterwards he wrote to the defendant, intimating his willingness to accept from him one-half of his claim, but reserving to himself his rights against his son for the remaining half:—Held, that these letters did not entitle the plaintiff to sue the father for the moiety of the account. *Andrews* v. *Garrett*, 6 C. B. (N.S.) 262.

Proof of Parent's Authority.]—The defendant's son, a youth about seventeen, in his employ, caused a servant, whom he suspected of

obtaining money by false pretences, to be apprehended, and taken before a magistrate, who ultimately discharged him. The son told his father what he had done, the latter said, that as he (the son) had begun it, he would not interfere :—Held, no evidence for a jury of subsequent ratification by the father. *Moon* v. *Towers*, 8 C. B. (N.S.) 611.

Where a minor orders articles which are necessary and suitable to his situation in life, it is a question for the jury whether they can infer an authority given to that effect by the father. *Baker* v. *Keen*, 2 Stark. 501.

Where a father has seen his son (a boy of fourteen) wearing a suit of clothes, it is a question for the jury whether he authorised the purchase of them. *Law* v. *Wilkins*, 1 N. & P. 697 ; 6 A. & E. 718 ; W., W. & D. 235 ; 6 L. J., K. B. 166.

Extravagance.]—If a tradesman colludes with an infant, and furnishes him with clothes to an extravagant degree, he cannot recover his demand from his father. *Simpson* v. *Robertson*, 1 Esp. 17.

Allowance by Parent.]—And no such contract will be implied, when the father has allowed the son a sufficiently reasonable sum for his expenses. *Crantz* v. *Gill*, 2 Esp. 471 ; 5 R. R. 746.

Where Father Deserts Infant.]—Quære, whether a father deserting his infant child is liable to a party who supplies the child with necessaries, no further proof of contract being given. No such action can be maintained, if the father had reasonable ground to suppose that the child was provided for. *Urmston* v. *Newcomen*, 4 A. & E. 899 ; 6 N. & M. 454 ; 5 L. J., K. B. 175.

c. Necessaries.

General Rule.]—It is incumbent on a tradesman, before he trusts an infant with what may appear necessaries, to inquire whether he is provided by his friends. *Ford* v. *Fothergill*, Peake, 229 ; 1 Esp. 211 ; 3 R. R. 695. S. P., *Cook* v. *Denton*, 3 Car. & P. 114. S. P., *Story* v. *Pery*, 4 Car. & P. 526.

Infant with Allowance.]—Where an infant has an allowance made to him for his support, a tradesman is not entitled to be paid for articles supplied on credit, unless he can make out, that having regard to the infant's circumstances and station (which he is bound to inquire into) the articles were necessaries. *Mortara* v. *Hall*, 6 Sim. 465 ; 4 L. J., Ch. 53.

Infant already Supplied.]—On a replication to a plea of infancy, that the articles supplied were necessaries, the question is whether the defendant had a sufficient supply of those articles at the time, for, if he had, the goods supplied by the plaintiff were not necessaries, and the plaintiff cannot recover for them. *Steedman* v. *Rose*, Car. & M. 422.

If a minor has been supplied with ten coats by one tradesman, and immediately after that the plaintiff supplies him with another, he will not be entitled to be paid for that other coat, as it was unnecessary. *Burghart* v. *Angerstein*, 6 Car. & P. 690 ; 1 M. & Rob. 458.

Conduct of Parties.]—The necessity for inquiry by a tradesman before giving credit to an infant for necessaries may be dispensed with by the conduct of the parties. *Dalton* v. *Gibb*, 7 Scott, 117 ; 5 Bing. (N.C.) 198 ; 1 Arn. 463 ; 8 L. J., C. P. 151 ; 3 Jur. 43.

Where an infant, living in some pretension, purchased in four months silks to the amount of 35*l*., some of which were delivered in the presence of her mother, and some sent to an hotel where the infant and her mother lived :—Held, that the infant was liable, notwithstanding the tradesman omitted to make any inquiries whether the articles were necessary for the infant.

In a subsequent case held, that there is no inflexible rule making it incumbent on a tradesman to institute inquiries as to the situation of an infant before he gives him credit for necessaries. *Brayshaw* v. *Eaton*, 7 Scott, 183 ; 5 Bing. (N.C.) 231 ; 1 Arn. 466 ; 8 L. J., C. P. 153 ; 3 Jur. 222.

Onus probandi on the Plaintiff.]—An infant bought on credit a pair of solitaires, composed of crystals adorned with diamonds and rubies, and a silver goblet for presentation. No evidence was given of anything peculiar in his station rendering it exceptionally necessary for him to have such articles :—Held, that as the onus was on the plaintiff, and he gave no evidence to show that the articles were necessaries, the question ought not to have been left to the jury. *Ryder* v. *Wombwell*, 38 L. J., Ex. 8 ; L. R. 4 Ex. 32 ; 19 L. T. 491 ; 17 W. R. 167—Ex. Ch.

The question in such a case is one of mixed law and fact, the preliminary question being whether there is any evidence on which the jury could properly find for the party on whom the onus of proof lies. The judge must determine, first, whether the case is such as to cast on the plaintiff the onus of proving that the articles in question are necessaries, and then whether there is any sufficient evidence for the jury to satisfy that onus ; and if there is not he ought to direct a nonsuit. *Ib.*

—— **Evidence.**]—Where an infant is sued for goods supplied on credit, he may give evidence that, when the order was given, he was already sufficiently supplied with goods of a similar description, and it is immaterial whether the plaintiff did or did not know of the existing supply. *Ryder* v. *Wombwell* (L. R. 3 Ex. 90) dissented from. *Baines* or *Barnes* v. *Toye*, 53 L. J., Q. B. 567 ; 13 Q. B. D. 410 ; 51 L. T. 292 ; 33 W. R. 15 ; 48 J. P. 664. S. P., *Johnstone* v. *Marks*, 57 L. J., Q. B. 6 ; 19 Q. B. D. 509 ; 35 W. R. 806.

What are—Question for Jury.]—Whether articles furnished by a tradesman to an infant are necessaries or not is a question of fact for the jury, regard being had to his condition in life. *Brayshaw* v. *Eaton*, supra.

In an action for goods sold to an infant, the issue being necessaries, if any part of the articles proved to have been furnished may fall within the description of necessaries, the evidence ought to be left to the jury. *Maddox* v. *Miller*, 1 M. & S. 738 ; 14 R. R. 565.

Though it is a question for the jury to say what are necessaries for an infant, yet it is subject to the control of the judge ; and the jury having found that certain things were necessaries, contrary to the opinion expressed by the

judge, the court granted a new trial. *Harris* v. *Fane*, 1 Scott (N.R.) 287; 1 Man. & G. 550; 4 Jur. 508.

It is a question for the jury, whether the articles supplied are such as a reasonable person of the age and situation of the infant would require for real use. *Peters* v. *Fleming*, 6 M. & W. 42; 9 L. J., Ex. 81.

A minor is only liable for necessaries suitable to his state and degree, and the jury must consider not only whether the clothes were suitable in point of quality, but also in point of quantity. *Burghart* v. *Angerstein*, 6 Car. & P. 690; 1 M. & Rob. 458.

The term necessaries includes such things as are useful and suitable to the state and condition in life of the party, and not merely such as are requisite for bare subsistence. *Peters* v. *Fleming*, supra.

—— **Undergraduate.**]—In considering whether the goods were necessaries, suitable to the degree and condition of the defendant, an undergraduate, his rank or allowance is not so much to be considered as his situation in statu pupillari at college. *Wharton* v. *Mackenzie*, 5 Q. B. 606; Dav. & M. 545; 13 L. J., Q. B. 130; 8 Jur. 466.

Dinners and Confectionery.]—Dinners, game, poultry, suppers, ices, soda-water, fruits and confectionery are not primâ facie necessaries; and the judge should so direct the jury, if no explanation showing their necessity is given. If any special circumstances are shown, then the jury must decide whether the articles were necessaries or not. *Wharton* v. *Mackenzie*, supra.

Dinners, confectionery or fruit, supplied to an undergraduate in the university, are not primâ facie necessaries. *Brooker* v. *Scott*, 11 M. & W. 67.

Regimentals.]—Regimentals furnished to an infant who was a member of a volunteer corps are necessaries. *Coates* v. *Wilson*, 5 Esp. 152; 8 R. R. 841.

Livery.]—A captain in the army, who is an infant, is liable to pay for a livery ordered for his servant as necessaries, but not for cockades ordered for the soldiers of his company. *Hands* v. *Slaney*, 8 Term Rep. 578.

Clothes.]—On the trial of an action for the amount of a tailor's bill, it appeared that the defendant was an infant, but it was proved that he had an allowance of 500*l.* a year, besides his pay as a captain in the army. The judge was of opinion, that if the minor had a sufficient income allowed him to supply him with necessaries suitable to his condition for ready money, he could not contract even for necessaries upon credit:—Held, that this was a misdirection. *Burghart* v. *Hall*, 4 M. & W. 727; 8 L. J., Ex. 235.

Cigars and Tobacco.]—Cigars and tobacco cannot, under ordinary circumstances, and in the absence of evidence of any special circumstances rendering them necessary medicinally or otherwise, be considered necessaries for an infant. *Bryant* v. *Richardson*, 12 Jur. (N.S.) 300; 14 L. T. 24; 14 W. R. 401.

Carriages and Horses.]—An infant, who was sole manager of a farm belonging to his father, bought one pair of spurs, a suit of best-made kersey horse clothing, a breastplate, set of best plated harness, &c.:—Held, that there was reasonable evidence, considering the position of the defendant, that the goods supplied were necessaries. *Hill* v. *Arbon*, 34 L. T. 125.

A tradesman sued an infant for the price of a hunter worth 150*l.* He was an English youth on a visit to a country gentleman, and stated that he was a member of the Surrey Stag Hunt, and that he was accustomed to hunt his step-father's horses, and talked of being allowed 600*l.* a year by his step-father:—Held, that there was no evidence which could properly be left to the jury that the hunter was a necessary. *Skrine* v. *Gordon*, Ir. R. 9 C. L. 479.

An apprentice of a chemist, who was entitled to some property when of age, bought a horse when nearly of age. He had been advised by a medical man to take exercise on horseback. The jury found that the horse was a necessary. The court refused a new trial. *Hart* v. *Prater*, 1 Jur. 623.

A minor held a commission in the army, but sold it by reason of not having sufficient fortune to hold it. His father, a clergyman, paid various sums for him during his minority:—Held, that a stanhope was not necessary for him while a minor. *Charters* v. *Bayntun*, 7 Car. & P. 52.

Presentation Goblet.]—A silver goblet for presentation to a friend at whose house an infant was staying is not a necessary. *Ryder* v. *Wombwell*, supra.

Betting Books.]—Betting books are not necessaries. *Jenner* v. *Walker*, 19 L. T. 398.

Watch.]—A lieutenant in the royal navy who is under twenty-one is not answerable for the price of a chronometer. *Berrolles* v. *Ramsay*, Holt, 77; 17 R. R. 610.

Marriage Settlement.]—A settlement which affords a provision to an infant, who on her marriage has no other certain provision, is a necessary. *Helps* v. *Clayton*, 17 C. B. (N.S.) 553; 34 L. J., C. P. 1; 10 Jur. (N.S.) 1184; 11 L. T. 476; 13 W. R. 161.

Money Lent.]—Infant borrows money and applies it towards payment of his debts for necessaries, infant liable to pay this in equity though not law. *Marlow* v. *Pitfield*, 1 P. Wms. 558.

A deed executed by an infant to secure advances made to him for expenditure upon necessaries is not binding upon him when he becomes of age. *Martin* v. *Gale*, 46 L. J., Ch. 84; 4 Ch. D. 428; 36 L. T. 357; 25 W. R. 406.

An infant is not liable for money lent to supply himself with necessaries. *Probart* v. *Knouth*, 2 Esp. 472, n. *See also* 1 Salk. 279.

—— **Apprenticeship.**]—Money advanced to place out an infant apprentice is not recoverable on a promise by the infant to repay, as not being for necessaries. *Smith* v. *Gibson*, Peake's Ad. C. 52; 4 R. R. 888.

—— **Arrest for Debt.**]—Money advanced to an infant to procure him liberation from arrest, which was for necessaries, or where he was in execution, may be recovered; but the plaintiff

must show that the money was advanced under such circumstances. *Clarke* v. *Leslie*, 5 Esp. 38.

—— **Wages.**]—Payments made to an infant on account of wages due to her to purchase necessaries are valid payments. *Hedgeley* v. *Holt*, 4 Car. & P. 104.

Bill of Exchange.]—An infant is not liable upon a bill of exchange at the suit of an indorsee of the bill, although it was accepted for the price of necessaries. Where, therefore, such an acceptance was not paid at maturity :—Held, that it did not constitute a debt due from the acceptor to the indorsee which would support a bankruptcy petition. *Margrett, Ex parte, Soltykoff, In re*, 60 L. J., Q. B. 339 ; [1891] 1 Q. B. 413 ; 39 W. R. 337 ; 55 J. P. 100 ; 8 Morrell, 27—C. A.

Husband's Funeral Expenses.]—An infant widow is liable to pay for her deceased husband's funeral expenses. *Chapple* v. *Cooper*, 13 M. & W. 252 ; 13 L. J., Ex. 286.

Presents to Future Wife.]—Semble, that presents to a bride who eventually becomes the infant's wife, are necessaries. *Jenner* v. *Walker*, 19 L. T. 398.

Infant Trading.]—An action may be maintained against an infant to recover the amount of such goods supplied to him to trade with as were consumed as necessaries in his own family. *Turberville* v. *Whitehouse*, 1 Car. & P. 94 ; 12 Price, 692.

—— **Rent.**]—When an infant rented a house, and exercised his calling therein as a barber :—Held, that it was properly left to the jury to decide whether it came within the term of necessaries. *Lowe* v. *Griffiths*, 1 Scott, 458 ; 1 Hodges, 30 ; 4 L. J., C. P. 94.

.d. Misrepresentation as to Age.

General Rule.]—An infant is not liable for a fraudulent representation that he was of full age, whereby a party was induced to contract with him. *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex. 422 ; 2 C. L. R. 512 ; 23 L. J., Ex. 163 ; 18 Jur. 191 ; 2 W. R. 233.

In Equity.]—A false representation made by an infant that he is of age, to another person who knows such representation to be false, is not such a fraud as a court of equity will relieve against. *Nelson* v. *Stocker*, 4 De G. & J. 458 ; 28 L. J., Ch. 760 ; 5 Jur. (N.S.) 751 ; 7 W. R. 603.

A partner entered into a joint and several bond to secure money lent to the firm. As part of the security he agreed to insure his life, and for that purpose signed a declaration that he was of the age of twenty-two. He was an infant, and after he attained twenty-one he became bankrupt :—Held, that the bankrupt was liable in equity to the debt. *Unity Joint Stock Mutual Banking Association, Ex parte, King, In re*, 3 De G. & J. 63 ; 27 L. J., Bk. 33 ; 4 Jur. (N.S.) 1257 ; 6 W. R. 640.

Promissory Notes.]—In an action on promissory notes bearing interest, one of the makers of the notes pleaded infancy. A reply that at the time of the loan the defendant fraudulently represented himself to be of full age, and thereby induced the plaintiff to advance the money :—Held, on demurrer, bad. *Bateman* v. *Kingston*, 6 L. R., Ir. 328.

Release.]—Where a person represents to another that he is of age, and executes to him a release, upon which the latter acts :—Held, that he could not afterwards impeach the validity of the release on the ground of his minority. *Wright* v. *Snowe*, 2 De G. & Sm. 321.

Payment by Trustee.]—Payment by a trustee to a cestui que trust, nineteen years of age, on the false representation by herself and her parents that she was twenty-one :—Held, to be a discharge to the trustee for the sum so paid ; but a release by the infant to the trustee of all demands in respect of the trust, held not to be a bar to a suit by the cestui que trust against the trustee, not brought until seven years after the cestui que trust had attained twenty-one. *Overton* v. *Banister*, 3 Hare, 503 ; 8 Jur. 906.

Infant fraudulently concealing his age, and obtaining from trustees stock which he was entitled to when of age, and, when of age, applying for and receiving the residue of such stock :—Held, that neither infant nor his assignees could call upon trustees to repay stock paid to infant ; and that infant recognised such payment by applying when of age for the residue. *Cory* v. *Gertcken*, 2 Madd. 40 ; 17 R. R. 180.

Lease.]—In an action against an infant who had obtained a lease of a house on an implied representation that he was of age :—Held, that the lease must be declared void, and possession given up ; but that he was not liable for use and occupation. *Lempriere* v. *Lange*, 12 Ch. D. 675 ; 41 L. T. 378 ; 27 W. R. 879.

Agreement not to Trade.]—A. agreed with B. to serve him for a certain time, and not to carry on the same business on his own account within two miles of his house for two years after quitting his service. At the time of the agreement, A. was a minor, but he represented himself to be of age. He left some time after coming of age, and immediately set up in business within the prescribed limits :—Held, that B. was entitled to an injunction. *Cornwall* v. *Hawkins*, 41 L. J., Ch. 435 ; 26 L. T. 607 ; 20 W. R. 653.

Charge—Subsequent Mortgage.]—An infant charged his reversionary interest with payment of a sum lent to him, and executed a statutory declaration stating (untruly) that he was of age. After attaining twenty-one, he mortgaged his interest without disclosing the fact of the prior charge :—Held, that the charge given during his infancy was avoided by the subsequent mortgage executed by him to a mortgagee without notice. *Inman* v. *Inman*, L. R. 15 Eq. 260 ; 21 W. R. 433.

No Express Representation.]—A man cannot be charged in equity, after his majority, on a purchase or sale or contract, made during his minority, on the mere ground that without any false assertion by the infant the other party believed he was not a minor, and dealt with him on the supposition that only adults could enter

into such transactions. The court therefore refused an injunction to restrain an action brought to recover shares which had been assigned by deed to the plaintiff in equity by the plaintiff at law, during the infancy of the plaintiff at law, there being no evidence against the plaintiff at law of misrepresentation as to his infancy *Stikeman* v. *Dawson*, 1 De G. & Sm. 90 ; 4 Railw. Cas. 585 ; 16 L. J., Ch. 205 ; 11 Jur. 214.

e. Agreements for Benefit of Infant.

General Rule.]—If an agreement made by an infant is for his benefit at the time, it will bind him. *Maddon* d. *Baker* v. *White*, 2 Term Rep. 159 ; 2 Esp. 530 ; 1 R. R. 453.

Apprenticeship—Premium.]—By a covenant in an apprenticeship deed the apprentice covenanted to pay the plaintiff the balance of the premium on a day named. At the date of the deed the defendant was under twenty-one. In an action upon the covenant, the jury found that the deed was a provident and proper arrangement for the defendant if he wished to learn the plaintiff's business, and that the premium was fair and reasonable :—Held, that instruction in a business might be a necessary for an infant, and that, upon the finding of the jury, the defendant was liable for payment of the premium. *Walter* v. *Everard*, 60 L. J., Q. B. 738 ; [1891] 2 Q. B. 369 ; 65 L. T. 443 ; 39 W. R. 676 ; 55 J. P. 693—C. A.

An agreement with a proviso that should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combinations of workmen, or from any cause over which they should not have any control, they shall have power to terminate the agreement, and discharge the infant upon giving him fourteen days' notice, is not void on the face of it ; the question, whether the provision is or is not inequitable depending upon whether it was at the time of the agreement common to labour contracts, or was in the then condition of trade such as the master was reasonably justified in imposing as protection for himself, and also upon whether the wages were a fair compensation for the services of the infant. *Leslie* v. *Fitzpatrick*, 47 L. J., M. C. 22 ; 3 Q. B. D. 229 ; 37 L. T. 461.

A contract by an infant binding him to serve during a certain time for wages, but enabling the master to stop the work whenever he chooses, and to retain the wages during stoppage, is wholly void, as not being beneficial to the infant. *Reg.* v. *Lord*, 12 Q. B. 757 ; 3 New Sess. Cas. 246 ; 17 L. J., M. C. 181 ; 12 Jur. 1001.

Under Employers and Workmen Act.]—An infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out employ himself in any other manner or with any other person for his own benefit :—Held, that, this provision not being for the benefit of the infant, the apprenticeship deed could not be enforced against the infant under the Employers and Workmen Act, 1875, ss. 5, 6. *Meakin* v. *Morris*, 53 L. J., M. C. 72 ; 12 Q. B. D. 352 ; 32 W. R. 661 ; 48 J. P. 344.

An apprenticeship deed contained a stipulation that the master should not be liable to pay any wages to the apprentice, an infant, so long as his business should be interrupted or impeded by or in consequence of any "turn out" ; and that the apprentice might employ himself in any other manner, or with any other person for his own benefit during any such "turn out," and for such reasonable time thereafter as might be necessary to enable him to determine such employment :—Held, that the contract was as a whole unfair, and the apprenticeship deed was invalid and could not be enforced under s. 6 of the Employers and Workmen Act, 1875. *Meakin* v. *Morris* (12 Q. B. D. 352) followed. *Corn* v. *Matthews*, 62 L. J., M. C. 61 ; [1893] 1 Q. B. 310 ; 4 R. 240 ; 68 L. T. 480 ; 41 W. R. 262 ; 57 J. P. 407—C. A.

A deed of apprenticeship, whereby an infant apprentice is bound for a term not to accept employment except from the master or with his consent, and which contains no co-relative covenant by the master to provide employment for the apprentice, and which may be terminated by the master only, is invalid as being unreasonable and not for the benefit of the infant. *De Francesco* v. *Barnum*, 60 L. J., Ch. 63 ; 45 Ch. D. 430 ; 63 L. T. 438 ; 39 W. R. 5.

Release of Right of Action.]—An infant railway servant, as a condition of his service, entered an insurance society, established and contributed to by the railway company, and agreed to accept the benefits of the society in lieu of any claims under the Employers' Liability Act. The rules of the society provided for compensation on a stated scale in all cases of accidents not caused wilfully or by gross negligence on the part of the insured :—Held, that the contract was for the infant's benefit and binding on him. Per Kay, L.J. : The rule that an infant's contract is binding on him if for his benefit is not confined to contracts of apprenticeship or service. *Clements* v. *L. & N. W. Ry.*, 63 L. J., Q. B. 837 ; [1894] 2 Q. B. 482 ; 9 R. 641 ; 70 L. T. 896 ; 42 W. R. 663 ; 58 J. P. 818—C. A.

Agreement by an infant with a railway company, in consideration of being allowed to travel on special terms, to waive all claims by himself, his executors, administrators, or relatives, for accident, injury, or loss to himself or his property on the railway even if occasioned by negligence of the company's servants, and to indemnify the company against any such claim :—Held, detrimental to the infant and not binding on him. *Flower* v. *L. & N. W. Ry.*, 63 L. J., Q. B. 547 ; [1894] 2 Q. B. 65 ; 9 R. 494 ; 70 L. T. 829 ; 42 W. R. 519—C. A.

Injunction to restrain Breach.]—An infant contracted to serve at a salary, and agreed that for two years after leaving service he would not serve any of his master's customers :—Held, that this contract was beneficial to the infant, and could be enforced by injunction against him, and that s. 1 of the Infants' Relief Act, 1874, did not apply. *Fellows* v. *Wood*, 59 L. T. 513 ; 52 J. P. 822.

An infant, in consideration of his being employed by the plaintiff, agreed not to carry on a similar business within certain limits as to place

and time :—Held, to be a contract for the benefit of the infant, and enforceable by injunction. *Fellows* v. *Wood* (supra) followed. *Evans* v. v. *Ware*, 62 L. J., Ch. 256 ; [1892] 3 Ch. 502 ; 3 R. 32 ; 67 L. T. 285. And see *Capes* v. *Hutton*, supra, col. 1332.

To take Shares in Company—Payment—Repudiation of Contract—Right to Repayment.]—Shares in a company were on the application of an infant, and payment in respect thereof, allotted to her and her name was placed on the register of members. She afterwards repudiated the contract, and her name was removed from the register :—Held, that there was a total failure of consideration, and that the infant was therefore entitled to the repayment of the money. *Corpe* v. *Overton* (supra, col. 1337) applied. *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, 63 L. J., Ch. 795 ; [1894] 3 Ch. 589 ; 8 R. 750 ; 71 L. T. 325 ; 43 W. R. 126.

f. Ratification.

i. *Before* 37 & 38 *Vict. c.* 62.

Soon after Majority.]—Protection in respect of infancy continued after majority until proper information has been obtained. *Walker* v. *Symonds*, 3 Swanst. 69 ; 19 R. R. 155.

Note of hand obtained from an infant just come of age, for extravagant supplies previously made, set aside under circumstances. *Brooke* v. *Gally*, 2 Atk. 34 ; Barnard. 1.

Although the court has no jurisdiction generally over the acts of persons of full age, who, however, recently had been wards of the court ; yet, if the act was the completion of a treaty entered into during minority without the sanction of the court, the court has power to control that. *Donne*, *In re*, 2 Moll. 490.

Debt.]—If an infant who contracted a debt during his minority confirms it after he comes of age, it will bind him though voidable at his election. *Smith* v. *French*, 2 Atk. 245.

Voidable Deed.]—The deed of an infant which takes effect by delivery is voidable only, and not void. *Allen* v. *Allen*, 2 Dr. & War. 307 ; 1 Con. & L. 427 ; 4 Ir. Eq. R. 472.

A voidable deed is valid until some act is done to avoid it, and it lies upon those who claim in opposition to the deed to show that such act has been done. *Ib.*

Case in which a deed executed by a tenant for life and his eldest son, an infant tenant in quasi tail in remainder, was held to have been rendered a valid bar by subsequent dealings of the son with the property. *Ib.*

Bond with Penalty.]—Action on a bond with a penalty :—Held, an infant cannot give a bond with a penalty for the payment of interest ; and unless he is estopped by some act at full age of as high authority as the bond, he can avoid it. *Baylis* v. *Dineley*, 3 M. & S. 477. And see *Fisher* v. *Mowbray*, 8 East, 330.

Account Stated.]—An account stated by an infant is not absolutely void, but voidable only, and may be ratified by him after attaining his majority ; and if he does so ratify it, an action may be maintained thereon. *Williams* v. *Moore*, 11 M. & W. 256 ; 2 D. (N.S.) 993 ; 12 L. J., Ex. 253 ; 7 Jur. 817.

Knowledge of Person Ratifying.]—An infant on coming of age may ratify securities given by him during his minority without receiving any further consideration, but he must, on the occasion, have full knowledge and complete information respecting the transaction. *Kay* v. *Smith*, 21 Beav. 522.

The promise sufficient to bind an infant after his attaining full age must be given voluntarily, and with knowledge that he was discharged by his nonage. *Harmer* v. *Killing*, 5 Esp. 102.

Sufficiency.]—A written promise to pay a debt contracted during infancy is sufficient, although it neither contains the name of the creditor, the amount due, nor the date ; and parol evidence is admissible to supply these particulars. *Hartley* v. *Wharton*, 3 P. & D. 529 ; 11 A. & E. 934 ; 9 L. J., Q. B. 209 ; 4 Jur. 576.

Any written instrument signed by the party which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. *Harris* v. *Wall*, 1 Ex. 122 ; 16 L. J., Ex. 270.

A recognition when of full age of a debt contracted in infancy, and a promise to pay it "as a debt of honour" when of ability, is not such "a ratification of the contract made during infancy" as is required by 9 Geo. 4, c. 14, s. 5, to charge the party. *Macord* v. *Osborne*, 45 L. J., C. P. 727 ; 1 C. P. D. 568 ; 35 L. T. 164 ; 25 W. R. 9.

—— **Bill of Exchange.**]—A defendant, whilst an infant, accepted a bill of exchange. After the defendant came of age he wrote to the plaintiff as follows : "Has L. ever paid you interest on the bill? Answer by return of post." Subsequently the defendant wrote the following letter :—"Your brother tells me that you are very uneasy about the bill. Pray make yourself easy about it, as I will take care it is paid" :—Held, per Parke and Alderson, BB., that there was no ratification by the defendant of the contract made during infancy. Platt and Martin, BB., dissentiente. *Mowson* v. *Blane*, 10 Ex. 206 ; 23 L. J., Ex. 342 ; 2 W. R. 588.

—— **Goods Sold.**]—To support a ratification of a debt for goods sold and delivered a copy of the items of the account was put in, at the foot of which the defendant, after he came of age, had written :—"Particulars of account to end of 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory," with his signature :—Held, not a sufficient recognition to satisfy 9 Geo. 4, c. 12, s. 5. *Rowe* v. *Hopwood*, 38 L. J., Q. B. 1 ; L. R. 4 Q. B. 1 ; 19 L. T. 261 ; 17 W. R. 28.

—— **Shares.**]—An infant applied for shares which were allotted to him, but he never paid any money in respect of them. After he came of age the company was ordered to be wound up, and he then executed a transfer :—Held, that there was sufficient evidence of his having ratified the contract after coming of age. *Constantinople and Alexandria Hotels Co., In re*, *Ebbetts*, *Ex parte*, 39 L. J., Ch. 679 ; L. R. 5 Ch. 302 ; 22 L. T. 424 ; 18 W. R. 394.

—— **Continued Employment.**] — An infant entered into service and covenanted not to carry on the same trade, and after he came of age he

continued in the same service for eighteen months :—Held, that this amounted to a ratification of the contract in equity, and an injunction was granted. *Cornwall* v. *Hawkins*, 41 L. J., Ch. 435 ; 26 L. T. 607 ; 20 W. R. 653.

An infant entered into a contract with the plaintiff to serve him for five years : he served for some time, but shortly after attaining his majority he gave him notice by letter to quit :—Held, that continuing in service after he became of age, and then giving notice of his intention to quit, was not a sufficient ratification in writing, with 9 Geo. 4, c. 14, s. 5. *Birkin* v. *Forth*, 33 L. T. 532.

Receiver's Accounts.]—Receiver's accounts which had been passed, ordered to be received on application of the person, late a minor, who had attained his age. *Wildridge* v. *M'Kane*, 2 Moll. 545.

Settlement — Partial Confirmation.]—Partial accession at the age of twenty-one, to a settlement by a female, an election to abide by the whole. *Milner* v. *Harewood* (*Lord*), 18 Ves. 277.

Bankrupt's Commission.]—Bankrupt praying to supersede his commission on the ground of infancy left to his action, having traded two years as an adult, and the creditors resisting. *Watson*, *Ex parte*, 16 Ves. 265.

Payment to Agent.]—The guardian of an infant sold part of his estates for the redemption of the land tax ; the vendee paid the purchase money to the agent of the vendor, who was also agent for the vendee, and the conveyance was executed ; but the agent did not pay the money into the bank as required by 38 Geo. 3, c. 60. The purchaser entered and continued in possession for many years, paying the land tax. Nearly twenty years after attaining his age, the heir-at-law brought an ejectment against the purchaser, to restrain which, and obtain a confirmation of the contract, the purchaser filed his bill. The court dismissed the bill without costs. *Hicks* v. *Morant*, 3 Y. & J. 286. Affirmed, 2 Dow. & Cl. 414 ; 5 Bli. (N.S.) 643.

Lease.]—R. devised lands and houses to infant children. The guardian demised the premises on a building lease for forty-one years. The eldest son joined in the lease, and covenanted that the rest, when of age, should confirm it. They all attained twenty-one, and accepted the rent for ten years after the youngest came of age, and then brought ejectments against the lessees, who prayed to have the lease established, which was decreed. *Smith* v. *Low*, 1 Atk. 489.

—— **Mortgage.**]—Where a party takes a lease of an infant's lands, and the infant on coming of age mortgages the property to the lessee, by deed, referring to the lease, this is a confirmation of the lease. *Story* v. *Johnson*, 2 Y. & C. 586.

Receipt—Release to Trustees.]—A legatee, on coming of age, signed a receipt for principal, and an acknowledgment and discharge for the dividends, as having been paid to her father for her maintenance. Six months afterwards she was paid her share of her estate, and executed a formal release to the trustee :—Held, that she could not maintain a suit against the trustee for the dividends paid to the father. *Aveline* v. *Melhuish*, 10 Jur. (N.S.) 788 ; 12 W. R. 1020—L.JJ.

Employment of Attorney.]—A continued employment of an attorney by an infant client, after the latter comes of age, may amount to an undertaking to pay a prior bill of costs. *Guy* v. *Burgess*, 1 Smith, 117.

Devise to pay Debts.]—One borrows money during his infancy, and applies it to the buying of necessaries, and afterwards coming of age devises lands for payment of his debts, this debt is within the trust. *Marlow* v. *Pitfield*, 1 P. Wms. 558.

Incomplete Contract.]—If goods are delivered to a carrier by the vendor addressed to the purchaser, while the latter is under twenty-one, but they do not reach him till he has attained that age, infancy is a good defence for the price of the goods. *Griffin* v. *Langfield*, 3 Camp. 254.

Fine on Admittance of Infant Copyholder.]—A lord of a manor may maintain an action against an infant copyholder when he comes of age, for a fine on his admittance during his nonage. *Evelyn* v. *Chichester*, 3 Burr. 1717.

Pleading and Proof]—Where a defendant pleads infancy, and the replication avers a ratification by a promise in writing when he was of age, the plaintiff has merely to prove the promise, and not that the defendant was of age when he made it ; it lies on the defendant to prove that he was not then of age. *Hartley* v. *Wharton*, 3 P. & D. 529 ; 11 A. & E. 934 ; 9 L. J., Q. B. 209 ; 4 Jur. 576.

A promise made by a defendant after the commencement of the action is not sufficient to sustain a replication that he had ratified the contract after he came of age. *Thornton* v. *Illingworth*, 4 D. & R. 545 ; 2 B. & C. 824 ; 2 L. J. (O.S.) K. B. 175.

A replication that the defendant since the making of the promises attained twenty-one, and that before the commencement of the suit he ratified and confirmed the promises, is good after verdict, though it omits to allege that he ratified and confirmed after he came of age. *Cohen* v. *Armstrong*, 1 M. & S. 724.

If a plaintiff replies a new promise after full age, and the evidence is of a promise to pay when the party is able, the plaintiff must prove that the defendant was of ability ; but it is sufficient to give evidence of ability from ostensible circumstances and appearance in the world. *Cole* v. *Saxby*, 3 Esp. 159.

Set-off.]—Upon the true construction of 2 Geo. 2, c. 22, s. 13, and 9 Geo. 4, c. 14, s. 5, a set-off cannot be maintained of a debt contracted by a person during infancy and not ratified by him in writing after attaining majority. *Rawley* v. *Rawley*, 45 L. J., Q. B. 675 ; 1 Q. B. D. 460 ; 35 L. T. 191 ; 24 W. R. 995—C. A.

ii. *Since* 37 *&* 38 *Vict. c.* 62.

Contracts before, Ratification after, Act.]—Sect. 2 of the Infants' Relief Act, 1874, applies to ratifications made after passing of the act of contracts made before that time. *Kibble*, *Ex parte*, *Onslow*, *In re*, 44 L. J., Bk. 63 ; L. R. 10 Ch. 373 ; 32 L. T. 138 ; 23 W. R. 433.

Bill of Exchange.]—An action is maintainable by an indorsee for value against the acceptor of a bill of exchange, accepted by the latter after attaining twenty-one years of age, for a debt contracted during infancy, and after the passing of the Infants' Relief Act, 1874, though not in respect of necessaries. *Belfast Banking Co.* v. *Doherty*, 4 L. R. Ir. 124.

—— **Compromise of Action.**]—The defendant during infancy became, jointly with two others, indebted to a firm of brokers, who brought an action against them after the defendant had attained his majority to recover the amount of the debt. The action was compromised on the terms that the defendant should give two acceptances for 50*l.* each. One of the bills given by the defendant to the brokers was indorsed by the latter to the plaintiff, who had acted as their solicitor, and who took the bill with notice of the circumstances under which it was given :—Held, that the transaction merely amounted to a promise made by the defendant after full age to pay a debt contracted during infancy, or to a ratification made by him after full age of a promise or contract made during infancy ; and was, therefore, avoided by s. 2 of the Infants' Relief Act, 1874. *Smith* v. *King*, [1892] 2 Q. B. 543 ; 67 L. T. 420 ; 40 W. R. 542 ; 56 J. P. 775.

Restraint of Trade—Breach.]—In 1886 an infant entered the plaintiffs' service and agreed in writing, under a penalty, not to solicit their customers after the expiration of his service ; in 1887 he attained twenty-one, and remained in their service until 1892, he then left and committed a breach of the agreement not to solicit their customers :—Held, that it must be inferred from the conduct of the parties that a new contract was entered into after the defendant attained twenty-one containing the terms of the written agreement, and that an injunction ought to be granted. *Brown* v. *Harper*, 3 R. 585 ; 68 L. T. 488.

New Promise.]—An infant executed mortgages to secure 500*l.* and interest. After attaining majority a reconveyance was executed to him of the property and a fresh mortgage to secure the original 500*l.*, and a further advance of 50*l.* was made to the same mortgagee, and he thereby covenanted for payment of the 550*l.* and interest :—Held, that this mortgage was a fresh promise for good consideration, and therefore valid and binding. *Foulkes, In re, Foulkes* v. *Hughes*, 3 R. 682 ; 69 L. T. 183.

Payment of Purchase-Money.]—In May, 1882, an infant purchased a plot of land from the trustees of a building society of which he was a member. In July of that year he came of full age. For four and a half years he paid monthly instalments of the purchase money :—Held, that he had ratified the contract, and was liable. *Whittingham* v. *Murdy*, 60 L. T. 956.

Promise to Marry.]—The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62) s. 2, applies to a promise of marriage. *Coxhead* v. *Mullis*, 47 L. J., C. P. 761 ; 3 C. P. D. 439 ; 39 L. T. 349 ; 27 W. R. 136.

In July, 1875, the plaintiff and defendant (both being then under the age of twenty-one) mutually agreed to marry one another. The engagement continued until March, 1879, when (both having attained the age of twenty-one) the plaintiff fixed the wedding-day for the 5th of June, to which the defendant assented, but ultimately he broke his promise :—Held, by Denman and Lindley, JJ., that when the wedding-day was fixed there was a fresh promise made after the defendant came of age, and upon a good consideration. By Lord Coleridge, C.J., that it was a mere ratification of the original promise. *Ditcham* v. *Worrall*, 49 L. J., C. P. 688 ; 5 C. P. D. 410 ; 43 L. T. 286 ; 29 W. R. 59 ; 44 J. P. 799.

The defendant during his infancy made an offer of marriage to the plaintiff, which she accepted. The day after he came of age he saw the plaintiff, and told her his father agreed to the engagement,—adding, "Now I may and will marry you as soon as I can" :—Held, that it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy. *Northcote* v. *Doughty*, 4 C. P. D. 385.

The plaintiff and defendant (both under age) became engaged to be married in 1886. In September, 1886, the defendant came of age. In October, 1886, the plaintiff's father made an assignment of his property to his creditors, and immediately afterwards informed the defendant of the fact, and told him if he wished to be released from his engagement he could. The defendant then refused to be released, and said he was quite willing to marry the plaintiff, and asked her whether she thought they were old enough ; to which the plaintiff replied they had better wait awhile :—Held, that there was evidence to go to the jury that there had been a new promise to marry made by the defendant after he came of age. *Holmes* v. *Brierley*, 36 W. R. 795—C. A.

B. WARD OF COURT.

1. JURISDICTION.

a. Extent of.

In General.]—As to the jurisdiction of court of king's bench over infants. *De Manneville* v. *De Manneville*, 10 Ves. 59 ; 7 R. R. 340.

Right of Crown.]—The court acts for the protection of infants by virtue of a general right delegated by the crown, as pater patriæ, to interfere for the benefit of persons incapable to protect themselves. *Butler* v. *Freeman*, Amb. 302.

The right which the king has as pater patriæ to take care of his subjects in cases of charities, idiots, lunatics, and infants, falls under the direction of the court of chancery. *Eyre* v. *Shaftesbury* (*Countess*), 2 P. Wms. 118.

Crimes.]—The court of chancery has no jurisdiction to prevent crimes, except in the protection of infants. *Gee* v. *Pritchard*, 2 Swanst. 413 ; 19 R. R. 87.

Distinction between the general jurisdiction of the court of chancery, in case of an infant, and that of the lord chancellor under a special commission in lunacy. *Phillips, Ex parte*, 19 Ves. 122 ; 12 R. R. 151.

Infant of Unsound Mind.]—The jurisdiction of the court over its infant ward is not taken

away by any physical or mental disability to which the infant may be subject, and such directions may be given as to his treatment, whether in a lunatic asylum or not, as the court considers to be most for his benefit. *Edwards, In re*, 48 L. J., Ch. 233; 10 Ch. D. 605; 40 L. T. 113; 27 W. R. 611—C. A.

Scotland.]—In cases relating to infants, the benefit of the infant is the foundation of the jurisdiction. On this subject there ought to be a perfect reciprocity of action between the courts of England and Scotland, although, as to judicial jurisdiction, the two countries are independent foreign countries. *Stuart* v. *Bute* (*Marquis*), 9 H. L. Cas. 440.

Minor's Solicitor.]—On petition in the matter of a minor, held that the court had not jurisdiction to enforce an agreement by which the minor's solicitor bound himself to give a lien on the costs which should become due to him as the minor's solicitor, the jurisdiction in the matter of a minor existing for the sole end of protecting the person and property of the minor. *Leech, Ex parte*, 5 Ir. Eq. R. 371.

Extra-judicial Directions.]—This court may give extra-judicial directions for an infant; as on a stranger's application and undertaking to pay costs. *Pomfret* v. *Windsor*, 2 Ves. Sen. 484.

Minors resident Abroad.] — The court of chancery has jurisdiction over the custody of the children of an English subject, though such children were born and are resident abroad. *Hope* v. *Hope*, 4 De G. M. & G. 328; 23 L. J., Ch. 682; 2 W. R. 698.

Foreign Minor.]—When an infant, a citizen of a foreign country, is sent to England, the court of chancery will carry out in all respects the orders of the courts of the foreign country in regard to the infant, so far as consistent with the laws of England. *Di Savini* v. *Lousada*, 22 L. T. 61; 18 W. R. 425.

Testamentary Guardians.]—Where testamentary guardians have been appointed, though the court cannot, upon petition, order their removal against their consent, yet the court has full jurisdiction, upon petition, to order the minors to be made wards of court. *M'Culloch's, In re*, Dr. 276; 6 Ir. Eq. R. 393.

Form of the order in such cases. *Ib.*

Habeas Corpus.]—A habeas corpus issued to bring up the body of a ward of court who had been taken in execution in an action by a tradesman for necessaries, and the tradesman was ordered to attend at the bar of the court at the same time. *Bond* v. *Roberts*, 13 Sim. 400.

b. How Created.

Filing Bill.]—Mere filing a bill is sufficient to make an infant a ward of the court. *Butler* v. *Freeman*, Amb. 303.

—— **Infant in Scotland.**]—The court has jurisdiction to appoint guardians to an infant, although his domicil and all his property are situated in Scotland, and the infant being made a ward of court by the mere filing of the bill, the court is bound to appoint guardians. *Johnstone* v. *Beattie*, 10 Cl. & F. 42; 7 Jur. 1023. Affirming 1 Ph. 17; 10 L. J., Ch. 300.

Order for Maintenance.]—An order for the maintenance of an infant made without suit constitutes the infant a ward of court. *Graham, In re*, 39 L. J., Ch. 724; L. R. 10 Eq. 530; 22 L. T. 904; 18 W. R. 988.

Guardian.]—An order in chancery, on petition, constituting a guardian of an infant makes that infant a ward of court. *Stuart* v. *Bute* (*Marquis*), 9 H. L. Cas. 440.

Payment into Court.]—In an administration action to which an infant was not a party, moneys were paid in to her separate account:—Held, sufficient to constitute the infant a ward of court. *De Pereda* v. *De Mancha*, 51 L. J., Ch. 204; 19 Ch. D. 451; 30 W. R. 226.

A summons for the appointment of a guardian was taken out before the action, and no order was made, but an arrangement was made as to access to the infant. Semble, this was of itself sufficient to constitute the infant a ward of court. *Ib.*

—— **Under Trustee Relief Act.**]—The payment into court, under the Trustee Relief Act, of money belonging to an infant, renders the infant a ward of court. *Benand, In re*, 16 W. R. 538.

Money belonging absolutely to a minor having been paid into court under the Trustee Relief Act, and an order made upon petition under that act for her maintenance:—Held, that the infant was thereby made a ward of court. *Hodges, In re*, 3 K. & J. 213; 3 Jur. (N.S.) 860.

—— **Legacy.**]—The payment into court, under 36 Geo. 3, c. 52, s. 32, of a legacy bequeathed to an infant does not constitute such infant a ward of court. *Hillary, In re*, 2 Dr. & Sm. 461; 12 L. T. 840; 13 W. R. 959.

—— **Foreign Infants.**]—A legacy had been paid into court to which, on the death of the tenant for life, two female infants, who were French subjects by birth, and resident in France, became absolutely entitled. They were both married, and by the French law their husbands were absolutely entitled to receive their shares:—Held, that the infants, not being subjects of, or domiciled, or resident in England, the court had a discretion as to whether or not they should be treated as wards of court, and that the money might therefore be paid out to the husbands. *Brown* v. *Collins*, 53 L. J., Ch. 368; 25 Ch. D. 56; 49 L. T. 329.

Whether, in any case, the mere fact that there is a fund in court to a share in which an infant is entitled makes the infant a ward of court, quære. *De Pereda* v. *De Mancha* (supra) doubted on this point. *Ib.*

Contingent Interest.]—A lady who was entitled to property upon attaining twenty-one or marriage married under age:—Held, that this contingent interest in property was sufficient to entitle her to be made a ward of court. *Russell* v. *Nicholls*, 16 L. J., Ch. 47.

Settlement.]—An infant being about to contract an improper marriage, his parent settled a small sum of money for his benefit, and on a bill filed for execution of the trusts of the settle-

ment, an injunction was granted to restrain the marriage. *Dawson* v. *Thompson*, 12 L. T. 178.

Infant Plaintiff.]—An infant plaintiff is a ward of court without any order to that effect; and if she marries without the sanction of the court, her fund in court will not be paid out to her husband without a settlement. *Gynn* v. *Gilbard*, 1 Dr. & Sm. 356; 7 Jur. (N.S.) 91.

Infant Petitioner.]—Where land belonging to an infant is taken by a company, which pays the purchase money into court, and the infant petitions for investment and payment of dividends, this does not constitute her a ward of court. *Brewer, Ex parte, Wilts, Somerset, and Weymouth Ry., In re*, 13 L. T. 207; 13 W. R. 959.

2. REMOVAL OUT OF JURISDICTION.

General Rule.]—Court will not make an order for taking infant out of jurisdiction. *Mountstuart* v. *Mountstuart*, 6 Ves. 363.

Wards of the court not to be removed out of the jurisdiction. *Lyons* v. *Blenkin*, Jacob, 265; 23 R. R. 38.

Order for the father of the wards of the court to be at liberty to take them abroad. *Ib.*

Clandestine Removal.]—The clandestine removal of a ward of court from the custody of the person with whom such ward has been residing, under the authority of the court, is in its nature a criminal contempt. *Wellesley* v. *Beaufort* (*Duke*), 2 Russ. & M. 639.

Ward Enlisting.]—It is a contempt of court to remove an infant ward of court out of the jurisdiction, even where he has enlisted in the army without leave of the court, by sending him with the regiment on foreign service. *Harrison* v. *Goodall*, Kay, 310.

Where an infant ward enlisted, and was about to be sent to the East Indies, the court ordered a habeas corpus to be issued to the sergeant in whose charge he was, and on the return of the writ made an order that he should not be removed out of the jurisdiction without leave of the court; and the former order having been duly served, ordered that the infant should be discharged and delivered over to his guardian. *Rochford* v. *Hackman*, Kay, 308; 23 L. J., Ch. 261; 2 Eq. R. 223; 2 W. R. 205.

Ne exeat regno.]—If a child were grown up, and about to leave the kingdom, the prerogative might, by ne exeat regno, prevent him; and if gone, might by great or privy seal call on him to return, and if not obeyed, take his property. *De Manneville* v. *De Manneville*, 10 Ves. 63; 7 R. R. 343.

As to the jurisdiction of K. B. over infants, 10 Ves. 59; 7 R. R. 343.

No affidavit is necessary to obtain an order that child, a ward of court, shall not be taken out of the jurisdiction, even to Scotland. *S. C.*, 10 Ves. 56; 7 R. R. 342.

Leave to take Ward.]—Where a resident in Jamaica left two infant children who lived with their mother there till they came over to be educated in England, accompanied by the mother, who now wished to return permanently, and to take with her the daughter aged twenty years and three months, the son, who was apprenticed, remaining in England. The children were wards of court, and the mother had been appointed by the court sole guardian:—Held, that leave may be given to take a ward out of the jurisdiction without a case of necessity being shown, the court having only to be satisfied that the step is for the benefit of the ward, and that there is sufficient security that future orders will be obeyed. Leave was accordingly given upon a relative resident in England being appointed guardian along with the mother. *Callaghan, In re, Elliott* v. *Lambert*, 54 L. J., Ch. 292; 28 Ch. D. 186; 52 L. T. 7; 33 W. R. 157—C. A.

—— **On Medical Grounds.**]—The court will not make an order, permitting its infant wards to be removed out of the jurisdiction, with a view to their residing permanently abroad, except in a case of imperative necessity; as, where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health. Such an order should contain an undertaking to bring them within the jurisdiction when required. *Campbell* v. *Mackay*, 2 Mont. & C. 31.

It appearing that an infant ward of the court had been sent abroad, in consequence of the advice of medical men that the infant's removal to a milder climate was necessary for his health, the court granted a reference to approve of a plan for the infant's maintenance and education out of the jurisdiction, but limited the allowance to be made to one year. *Wyndham* v. *Enismore* (*Lord*), 1 Keen, 467.

An infant allowed to be taken out of the jurisdiction, upon the guardian entering into a recognisance, it being for the benefit of the infant that this should be done. *Medley, In re*, Ir. R. 6 Eq. 339.

Form of recognisance in such case. *Ib.*

—— **On Short Visit.**]—Order made that an infant ward of court might be at liberty to go abroad for a short period to visit his father, on satisfactory security being given that he would be restored to the jurisdiction within a limited time. *Biggs* v. *Terry*, 1 Myl. & Cr. 675.

Foreign University.]—An infant allowed to be placed at the University of Dublin under special circumstances. *Lethem* v. *Hall*, 7 Sim. 141.

Father Bankrupt.]—An undischarged bankrupt about to emigrate to Manitoba, where he would obtain an allotment of land, proposed to take his sons with him. The eldest was in government employment. The infants were wards of court:—Held, that, an uncle having undertaken to provide for the maintenance of the eldest son so long as he remained in the government employment, it would not be for his benefit to accompany his father, and leave to take him out of the jurisdiction of the court was refused. Leave was given to take the other five sons, and to apply for leave to remove the eldest after the lapse of a year if he was successful in Manitoba. *Plomley, In re, Vidler* v. *Collyer*, 47 L. T. 283—C. A.

The action having been commenced for the purpose of making the infants wards of court in order to prevent their removal by their father, the onus of satisfying the court of the impro-

priety of so removing them was on the persons who sought to restrain their removal. *Ib.*

Compelling Removal.]—Although the court will, under special circumstances, allow an infant ward to go out of the jurisdiction, yet it will not compel the removal of an infant ward out of the jurisdiction. *Dawson* v. *Jay*, 3 De G. M. & G. 764.

3. CONCEALMENT.

Criminal Offence.]—The clandestine removal of a ward from the custody of the person with whom such ward has been residing, under the authority of the court, is a criminal contempt. *Wellesley* v. *Beaufort* (*Duke*), 2 Russ. & M. 639.

By Father.]—Father secreting infant to prevent his being served with subpœna, ordered to discover where infant was. *Hockley* v. *Lukin*, Dick. 353.

Guardian Appointed.]—A messenger who had been ordered to bring an infant defendant into court, to have a guardian assigned for putting in her answer, stated that the infant was secreted by her mother. The vice-chancellor ordered the senior clerk to be appointed guardian, without the infant being produced. *Steed* v. *Caley*, 7 Sim. 148; 4 L. J., Ch. 1.

Wife Absconding with Children.]—Where the wife's brother assisted her to abscond with infant children, an application by the husband that the brother might either produce the children or disclose the place of the concealment, was refused on an affidavit of the brother, that the children were not in his custody or under his control. *Spence, In re*, 2 Ph. 247; 16 L. J., Ch. 309; 11 Jur. 399.

Address known to Solicitor.]—When a party to a suit is in contempt, and his place of residence is unknown, an officer of the court, whether or not acting as a solicitor to the person must reveal his place of residence. *Burton* v. *Darnley* (*Lord*), 21 L. T. 292; 17 W. R. 1057.

—— **Envelopes.**]—The mother of wards concealed their residence and her own from the court, but wrote to her solicitor giving no address. The production of the envelopes was ordered. *Ramsbotham* v. *Senior*, L. R. 8 Eq. 575; 21 L. T. 293; 17 W. R. 1057.

Service of Subpœna.]—Where a mother secretes her children who are infants, service of a subpœna on her is sufficient. *Smith* v. *Marshall*, 2 Atk. 70.

Personal Attendance Ordered.]—The court has jurisdiction to summarily order the personal attendance of any persons supposed to be in a position to give information as to the place of concealment of wards. Such jurisdiction is based on the law which relates to the custody of infants. The court, in such cases, proceeds by order and not by subpœna. *Rosenberg* v. *Lindo*, 48 L. T. 478.

4. MARRIAGE.

a. Without Leave of Court.

Father alive.]—It is a contempt to marry a ward of the court without leave, though the father of the infant be living. *Butler* v. *Freeman*, Amb. 301.

Motion to Commit.] — A motion to commit for contempt in marrying an infant ward ought not to be made until the matter has been brought before the judge in chambers to consider whether it is for the infant's benefit. *Brown* v. *Barrow*, 48 L. T. 357.

How Punished.]—Punishment of contempt in marrying ward of court is discretionary, and not dispensed with from length of time. Rule as to settlement. *Ball* v. *Coutts*, 1 V. & B. 292.

Criminal Offence.]—Contempt in marrying ward, &c., is of criminal nature; therefore defendant in Marshalsea for debt cannot be charged in custody, but must be brought before court by habeas corpus. *Brandon* v. *Knight*, Dick. 160.

Indictment of Offender.]—Upon marriage of ward under flagrant circumstances, the clergyman was ordered to attend and reprimanded; the husband was committed and indicted. Being convicted, and having suffered the punishment, upon his petition he was discharged on executing a settlement. *Millet* v. *Rowse*, 7 Ves. 419.

Proceedings laid before Att.-Gen.]—Upon marriage of ward of court under flagrant circumstances, the clergyman and clerk were ordered to attend; though husband was committed, the court directed proceedings to be laid before attorney-general. *Priestly* v. *Lamb*, 6 Ves. 421.

—— **Bribe.**]—Affidavit of a bribe offered to assist in obtaining possession of a ward, ordered to be laid before the attorney-general. *Wade* v. *Broughton*, 3 V. & B. 172.

Marriage of a ward under gross circumstances, punishable by indictment, as a conspiracy. *Ib.*

Injunction.]—Injunction upon affidavit of an intended marriage with a male infant aged eighteen, restraining communication with him until further order; service of the order at the last place of abode, though apparently shut up, good service. *Pearce* v. *Crutchfield*, 14 Ves. 246.

Excommunication.]—The court will restrain a woman who has married a ward of the court from proceeding on an excommunication either against the infant or his guardian. *Hill* v. *Turner*, 1 Atk. 517.

Attempt to Marry.]—Abortive endeavour to marry a ward of court is a contempt. Parties concerned ordered to attend on an inquiry whether the marriage was valid, and upon the report a suit for nullity of marriage was ordered, and all the parties were restrained by injunction from all intercourse with the infant. *Warter* v. *Yorke*, 19 Ves. 451.

Settlement by Party in Contempt.]—Upon the marriage of a female ward, all parties concerned ordered to attend; and the husband committed, and restrained from receiving her visits. The husband after some time was permitted to propose a settlement, but Lord Chancellor refused to discharge him on his undertaking to execute the settlement. *Bathurst* v. *Murray*, 8 Ves. 74; 6 R. R. 230.

Generally, upon the marriage of a ward without leave, the marriage being found valid, the party in contempt having executed the settlement and paid the costs is discharged. *Field* v. *Brown*, 17 Beav. 146.

There must be a reference to the master for a proper settlement before contempt, for marrying a ward of court, can be cleared. *Stevens* v. *Savage*, 1 Ves. Jun. 154.

Appearance.]—Infant plaintiff, a ward of court, having married, proceedings stayed till husband shall appear. *Brummell* v. *McPherson*, 7 Ves. 237.

Upon marriage of ward both parties being foreigners, property abroad, and marriage in Scotland on same day bill was filed constituting her a ward, the court took jurisdiction, but did not commit the husband, but ordered him to attend from time to time, and to be at liberty to make proposals. *Salles* v. *Savignon*, 6 Ves. 572.

In case of ward of court, marriage, in fact, is sufficient to ground contempt. *Ib.*

Personal attendance of a person running off with and marrying a ward dispensed with on offering to go before the master and settle. *Green* v. *Pritzler*, Amb. 602.

Discharge from Prison.]—The court will not discharge a person committed for marrying an infant ward until a certificate produced of the due solemnisation of the marriage, and a proper settlement of the wife's property prepared and approved. *Coæ* v. *Bennett*, 31 L. T. 83; 22 W. R. 819.

Order not to Marry.]—Court took care of infant from her testamentary guardian, and ordered her not to marry without leave of court. *Tombes* v. *Elers*, Dick. 88.

—— **Recognisance.**]—Committee of an infant heiress gave a recognisance in this form, "That the infant shall not marry with the committee's privity without the consent of the court." *Davis's case*, 1 P. Wms. 698.

On this court committing the custody of an infant to the care of anyone, such committee enters into a recognisance that the infant shall not marry without leave of the court. *Eyre* v. *Shaftsbury* (*Countess*), 2 P. Wms. 112.

Notice that Infant is Ward.]—Marrying an infant ward is a contempt, though the parties concerned had no notice the infant was a ward of court. *Herbert's case*, 3 P. Wms. 116.

Acts of the court, as the commitment of a wardship, and in a cause depending, are to be taken notice of by everyone at his peril. *Ib.*

—— **Petition.**]—Commitment for eloping with a ward of the court, and against another person for assisting; ignorance that she was a ward of court not admitted as an excuse. The parties under commitment cannot be heard except on petition. *Nicholson* v. *Squire*, 16 Ves. 259, a.

—— **Giving away the Bride.**]—The giving away a ward at her marriage as the father is a ceremony always required, and therefore the person who did it is liable to be committed. *More* v. *More*, 2 Atk. 157.

To make persons liable to a contempt, they must be concerned in original contrivance, and apprised of her being a ward of court. *Ib.*

Evidence.]—In cases relating to clandestine marriages, hearsay evidence and declarations are no defective proof, but have weight with the court, especially when uncontradicted by anything on the other side. *Beard* v. *Travers*, 1 Ves. Sen. 313.

Any person may make application on behalf of an infant, though a mere stranger. *Ib.*

Consent of Guardian.]—Under what circumstances the court will control the consent of a guardian to the marriage of an infant ward; and will refuse to confirm a master's report, approving of proposals for a settlement. *Gordon* (*Lord*) v. *Irwin* (*Viscountess*), 4 Bro. P. C. 355.

b. Settlements on.

i. *In general.*

Right of Husband.]—Husband is entitled to the income of his wife's equitable interest, unless he has received some fortune with her, or has run away with a ward. *Macaulay* v. *Philips*, 4 Ves. 16.

Reference to Master.]—When infants under the care of the court are upon a treaty of marriage, the court refers it to a master to see whether the settlement proposed is proper, and if improper the court will not give the infant leave to marry. *Smith* v. *Smith*, 3 Atk. 304.

A mother petitioned that an infant ward should be restrained from marrying her daughter:—Ordered, that his guardian should not permit it without leave of the court. *Ib.*

Lately a Ward of Court.]—On the petition of a wife, lately a ward, who had married on the day after she attained twenty-one, the court directed the transfer of stock to her, to which she was entitled to her separate use, notwithstanding that, in contemplation of marriage, an order had been made for the settlement of the fund. *Sams* v. *Cronin, Reed, Ex parte*, 29 L. T. 885; 22 W. R. 204.

Ward married the day after she came of age: after marriage a settlement was made, but wife never confirmed the same in court. Settlement after husband's death was set aside as not approved of by the court, and as a surprise on the wife. *Long* v. *Long*, 2 Sim. & S. 119.

Where a female infant had been made a ward, and, in contemplation of her marriage, terms for the settlement of her property and that of her intended husband had been approved by the master, and his approval confirmed by the court, it was not competent, by delaying the marriage till after her majority, and entering into fresh settlements, to defeat the settlement of the court. *Hobson* v. *Ferraby*, 2 Coll. C. C. 412.

—— **Undertaking of Proposed Husband**].—Permission was obtained by a suitor, undertaking to abide by the orders of the court, to pay his addresses to a ward with a view to proposals to the court for marriage. The ward waited until she came of age before marrying, and then settled her property in favour of the proposed husband:—Held, that the undertaking was only intended to last so long as the ward was under the control of the court, and that the court had no jurisdiction to prohibit the marriage or to determine the form of the settlement. *Bolton* v. *Bolton*, 60

L. J., Ch. 689; [1891] 3 Ch. 270; 65 L. T. 698; 40 W. R. 145—C. A.

Real Estate.]—The court has no jurisdiction to compel a settlement of the real estate of a ward of court, so as to bind the inheritance, even where the marriage is a contempt of court, and the estate of the ward is only equitable. *Field* v. *Moore*, 7 De G. M. & G. 691; 25 L. J., Ch. 66; 2 Jur. (N.S.) 145; 4 W. R. 187.

Where, therefore, an infant ward having married without consent, a settlement of her real estate was directed by the court, and such settlement, in pursuance of an order of the court made after she came of age, was executed by her and all other necessary parties, but was not acknowledged by her under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74):—Held, that the estate was not bound by the settlement. *Ib.*

A female infant cannot contract, nor can her parents or guardians for her, for a power of appointment to her over her real estate; nor has the court any greater power to contract for its infant wards as to their real estate. *Ib.*

Jurisdiction to Order Settlement to be Executed.]—The court has no jurisdiction to make an order in invitum against a male infant ward of court to execute a settlement which will have the effect of depriving him of his own property. The power which the court possesses of committing an infant to prison for contempt does not give it power to force him to execute a settlement whether he wishes it or not. *Leigh, In re, Leigh* v. *Leigh*, 58 L. J., Ch. 306; 40 Ch. D. 290; 60 L. T. 404; 37 W. R. 241—C. A.

No means of enforcing a settlement on marriage of an adult, unless the husband seeks to obtain her property in court; but, if the marriage is a contempt, the court compels a settlement. *Ball* v. *Coutts*, 1 V. & B. 300.

The mere fact of marriage with a female ward without the court's consent, confers upon the court a jurisdiction to decline, during the joint lives of husband and wife, to part with a fund in its custody belonging to the ward, even upon the application of the husband and wife, until a proper settlement should have been made thereof. *Martin* v. *Forster*, 7 De G. M. & G. 98; 24 L. J., Ch. 519; 1 Jur. (N.S.) 337; 3 Eq. R. 555; 3 W. R. 339.

Quære, whether in such a case it would be in the power of the court to enforce a settlement against the wishes both of the wife and husband. *Ib.*

In 1839 A. B. married a ward without sanction:—Held, in 1852, that the court possessed the same power over the parties which it would have had on an application shortly after the marriage, subject, nevertheless, to the due protection of the rights and interests of persons who have come into esse since that period. *Cave* v. *Cave*, 15 Beav. 227.

Reversionary Interest in Personalty.]—The Infants' Settlement Act, 1855 (18 & 19 Vict. c. 43) removed the disability of infancy only. In 1862 an infant ward married without sanction. An inquiry as to her fortune having been directed, a post-nuptial settlement was executed by her in 1863, with the approval of the vice-chancellor, whereby she settled a reversionary interest in personalty. The testator having died before Malins' Act (20 & 21 Vict. c. 57) came into force, that act had no application. During coverture the wife recognised the settlement by various acts, and after a dissolution of the marriage the reversionary interest fell into possession:—Held, that neither the sanction of the court nor the effect of that act could make the settlement of the wife's reversionary interest in personalty binding upon her; that no acts of acquiescence and confirmation could have that effect, and that she was entitled to a transfer of the property. *Seaton* v. *Seaton*, 57 L. J., Ch. 661; 13 App. Cas. 61; 58 L. T. 565; 36 W. R. 865—H. L. (E.)

Trustees—Form of Settlement.]—S. having married a ward, in contempt, was committed, and a settlement was prepared by the court of the wife's property, giving S. no interest, and containing a power of appointment by will to the wife in default of children in favour of anyone except her husband. The wife objected to the trustees named on personal grounds, and objected also to the power of appointment excluding her husband:—Held, that, as the proposed trustees were personally distasteful to the wife, it was desirable to substitute others for them. That it would be conducive to the happiness of the husband and wife that the wife should not be debarred in default of children from appointing anything to her husband, and the settlement was therefore altered in those respects. *Ib.*

Disentailing Assurance—Omitted Property—Mistake.]—A public body took, under compulsory powers, certain freeholds at A. to a moiety of which a female ward was entitled in tail, and they paid the purchase moneys into court. Before the marriage of the ward a settlement was prepared purporting to bar the infant's entail in certain properties and to vest them in trustees of the settlement. Amongst the properties so specified were included by inadvertence the freeholds at A. This settlement was sanctioned by the court, and was carried out in 1884 by a disentailing deed, and a deed of declaration of trust, both of which were approved by the court. The freehold property at A. was included in the parcels to the disentailing deed, but no mention of the purchase money was made, either in the proposals or in the deeds; and the disentailing deed contained no covenant for further assurances, or for the settlement of other or after-acquired property. After marriage the lady on attaining twenty-one, disentailed the fund in court, and claimed it as her absolute property under the Married Women's Property Act:—Held, that the disentailing deed of 1884 was not effectual to bar the estate tail of the lady in the fund in court; yet inasmuch as both the marriage and the settlement were sanctioned by the court upon a representation of the lady that she was entitled in tail to a moiety of the property, she was bound in equity to make good such representation, notwithstanding her infancy at the time, and that having disentailed the fund in court, and thus become the only person who could claim any interest in it, she was precluded from setting up any title adverse to that of the plaintiffs as trustees of the settlement, and that one moiety of such fund ought to be transferred to and held by them upon the trusts of the settlement. *Mills* v. *Fox*, 57 L. J., Ch. 56; 37 Ch. D. 153; 57 L. T. 792; 36 W. R. 219.

Misunderstanding.]—A settlement of personal property belonging to a ward was made on her

marriage and approved by the court. On an affidavit by the wife that she had misunderstood the settlement, the court declared that she was entitled absolutely to the fund. *Smith* v. *Iliffe*, 44 L. J., Ch. 755; L. R. 20 Eq. 666; 33 L. T. 200; 23 W. R. 851.

Dissolution of Marriage.]—On the marriage of a female ward her fortune, consisting of choses in action, was settled, with the sanction of the court. The marriage was dissolved by act of parliament, after which the husband released all his right and interest under the settlement to the wife:—Held, that the settlement was not binding on the wife, and that she was at liberty to resettle her property on her second marriage. *Hastings* v. *Orde*, 11 Sim. 205.

Settlement not Executed.]—A ward of court was married under age, and without consent, which marriage was subsequently annulled. Upon her coming of age, the husband petitioned to make proposals for a settlement, and to have a legal marriage celebrated, undertaking to execute such settlement as the court should direct. The master approved of a draft settlement, but the chancellor declined making any order as to the execution of this settlement, the amount of the property not being ascertained. A second marriage having been celebrated, there was issue thereof two children. The wife subsequently eloped:—Held, that the children had no right, during the life of their mother, to be maintained out of her separate estate. *Hodgens* v. *Hodgens*, 4 Cl. & F. 323; 11 Bli. (N.S.) 62; Ll. & G. t. Plunk. 533.

Held, also, that the proposed settlement, though not executed, having been acted upon by the court by different orders, could not be varied. *Ib.*

Order of Court.]—Upon the petition for the settlement on marriage of a fund belonging to an infant paid into court under the Trustee Relief Act, the court declined to embody a settlement in the order itself, on the ground that part of the property consisted of leaseholds. *Benand, In re*, 16 W. R. 538.

Where a ward of court married without consent, and subsequently became entitled to property in the hands of the court, the court will order it to be carried to a separate account, and, with a view to save expense, may direct it to be inserted in the order that the fund shall be settled on the wife for her separate use. *Thorp* v. *Owen*, 2 Sm. & Gif. 90; 2 Eq. Rep. 392; 23 L. J., Ch. 286; 18 Jur. 641; 2 W. R. 208.

—— **Small Fund.**]—The terms of a settlement of a small fund belonging to a ward embodied in the order directing it to be settled. *Wright* v. *King*, 18 Beav. 461.

Costs—Payment out of Corpus.]—The costs of a settlement of the property of a female ward of court, made upon her marriage with the sanction of the court, were ordered to be paid out of the corpus of the settled property. *Anon.* (4 Russ. 473) followed. *De Staepoole* v. *De Staepoole*, 57 L. J., Ch. 463; 37 Ch. D. 139; 58 L. T. 382; 36 W. R. 320.

The husband's costs of making a settlement on a female ward who had been married without consent were allowed, he having no property, and there being no great misconduct on his part. *Anon.*, 4 Russ. 473; 28 R. R. 155.

ii. *Form and Limitations of.*

In General.]—Form of proposals for a settlement upon marriage of infant ward of court. *Healy, In re*, 1 Con. & L. 393.

The form of an order given to a male infant to marry, after reference to the master to consider if the proposed match were proper, and to approve of articles. *Plymouth (Earl)* v. *Lewis*, Dick. 801.

Form of settlement on ward under direction of court. *Millet* v. *Rowse*, 7 Ves. 419.

Husband Excluded.]—The almost invariable modern practice in the case of a marriage with a ward without consent is to exclude the husband altogether from taking any interest in her property. *Wade* v. *Hopkinson*, 19 Beav. 613.

Where a husband has married a ward without consent, the ward's interest alone is to be consulted in framing the settlement, unless protection against the husband can be accomplished without prejudice to the ward. A settlement approved where, in default of issue, a power of appointment by will was given to the wife, and, in default of issue or such appointment, to go to her next-of-kin; and in the event of her surviving her husband, and having no children, that it should be at her own disposal; and in the event of her marrying again, a power of appointing to each child of the second marriage a sum not exceeding that given to each child of the first. *Birkett* v. *Hibbert*, 3 Myl. & K. 227; Coop. t. Brough. 459; 3 L. J., Ch. 158. See *Bathurst* v. *Murray*, 8 Ves. 74.

A. married a ward without consent, and had been guilty of great contumacy. The court directed the ward's fortune to be settled so as to exclude A. from taking any interest in it. *Burgess* v. *Kent*, or *Burgees* v. *Kent*, 11 Sim. 361; 10 L. J., Ch. 100; 5 Jur. 166.

Upon a marriage with a ward under gross circumstances a settlement giving the husband, on surviving her, a life interest was rejected, and the court refused to pay out of the accumulation his debts contracted in the maintenance of his wife and children. *Chassaing* v. *Parsonage*, 5 Ves. 15.

—— **Children.**]—Even where there is no contempt or misconduct, the children can only be entitled under and after their mother; they have no independent right; and where there is a contempt, the husband is excluded as against the wife altogether, and generally as against the children also. *Walker, In re*, Ll. & G. t. Sugd. 327. *S. C., Hodgens* v. *Hodgens*, 4 Cl. & F. 323; 11 Bli. (N.S.) 627; Ll. & G. t. Plunk. 533.

In cases of contempt, the rule is to exclude the husband entirely from the wife's property. But where the contempt is not very flagitious a portion is sometimes, though rarely, given to the husband during coverture. *Id.*

—— **Account.**]—Under a settlement of a female ward, the husband having been committed and prosecuted, and having released all right and interest in the residue, was thereby deprived of all further interest; and not permitted to attend the account directed against the executors. *Pearce* v. *Crutchfield*, 16 Ves. 48.

Future Marriage.]—Upon a settlement under a commitment for marrying a ward, a power was inserted, enabling the wife to settle the interest of a moiety of her fortune upon any future husband for life; the husband on undertaking to execute the settlement was discharged. *Winch* v. *James*, 4 Ves. 386.

In a settlement on the marriage of a female ward, provision must be made for the children of a future marriage. *Rudge* v. *Winnall*, 11 Beav. 98; 17 L. J., Ch. 215.

Proposal for settlement on marriage of female ward disapproved, as not providing sufficiently for the event of a future husband and children. *Halsey* v. *Halsey*, 9 Ves. 471.

Upon the clandestine marriage of a female ward a settlement was made giving wife power to appoint to children of second marriage a share not exceeding shares of each child by first marriage. *Bathurst* v. *Murray*, 8 Ves. 74; 6 R. R. 230. And see *Stevens* v. *Savage*, 1 Ves. Jun. 154; *Birkett* v. *Hibbert*, supra, col. 1366.

Upon the settlement of a ward who had married a man of no property, the court secured a provision for a future marriage. *Wells* v. *Price*, 5 Ves. 398.

Where Husband has Fortune.]—Distinction upon contempt by marriage of a ward. A person of no property, whose only object is the fortune, is not permitted to touch it; otherwise, when the husband, of equal rank and fortune, makes an equivalent settlement. *Ball* v. *Coutts*, 1 V. & B. 303.

A widower, with children, having a life income of 3,000*l.*, about to marry a ward having an income of 700*l.*, proposed to settle her own fortune on her. Proposal approved of. *Blair* v. *Cuthberston*, 13 Jur. 442.

Though the husband married an infant ward in contempt of the court, a settlement was made of her estate which made some provision for him. *Baseley* v. *Baseley*, 4 Cl. & F. 378, n.

Ward not Known to be Such.]—Where a ward of court married without leave, but the husband was ignorant that the infant was a ward, the court approved of a settlement under which the husband took a life interest after the wife's death in a moiety of her property, determinable on his marrying again, bankruptcy, or insolvency, and directed 500*l.* to be advanced to the husband on his bond. *Richardson* v. *Merrifield*, 4 De G. & Sm. 161.

The court, on a petition where the husband married in ignorance that she was a ward of court, settled her property on her for life, with remainder to her children; and with a power for the wife to appoint the property by will to her husband for his life. *Wilkinson* v. *Joughin*, 41 L. J., Ch. 234.

Husband Releasing his Rights.]—On the marriage of a female ward, her fortune (choses in action) was settled, with the sanction of the court, in trust for her husband and herself for their lives, with remainder for their children, with remainder for her absolutely if she survived her husband, but if not then as she should appoint by will, with remainder for her next of kin. The marriage, of which there was no issue, was dissolved. After this the husband released all his right and interest under the settlement to the wife:—Held, that the settlement was not binding on the wife, and that she was at liberty to re-settle her property on her second marriage. *Hastings* v. *Orde*, 11 Sim. 205.

Ward Coming of Age.]—Court retains jurisdiction over property of ward, after ward becomes of age, so long as property remains in court; and, if ward marries, will order proper settlement to be made, or reform an improper one, unless ward consents to settlement. *Austen* v. *Halsey*, 2 Sim. & S. 123, n.

Ward married day after she came of age. After the marriage, a settlement was made, but wife never confirmed the same in court. Settlement was, after husband's death, set aside as not approved of by the court, and as a surprise on wife. *Long* v. *Long*, 2 Sim. & S. 119.

—— **Excluding Wife.**]—The court has not jurisdiction to compel a male ward, married without its consent, on attaining his full age, to execute a settlement so as to exclude his wife. *Murray, In re*, 3 Dr. & War. 83; 2 Con. & L. 136; 5 Ir. Eq. R. 266.

Real Estate.]—Disinclination of the court to sanction the marriage of an infant ward, where it is impossible for him, by reason of his infancy, to settle his real estate so as to go along with his title, and to make provision for younger children. *Honywood* v. *Honywood*, 20 Beav. 451.

Leaseholds — Power of Sale.]—On the marriage of a female ward, entitled to a leasehold estate to her separate use, a settlement was made under the court, giving to the trustees a power of sale over the leasehold estate: a sale made by the trustees under the power, during the minority of the infant, is not valid. *Simson* v. *Jones*, 2 Russ. & M. 365; 9 L. J. (o.s.) Ch. 106.

Reference to Master.]—Husband and wife agreed to refer it to the master to approve of a proper settlement to be executed of a sum of 1,500*l.*, money in court, the property of the wife. The court would not adopt a settlement whereby 30*l.* per annum was given to the separate use of the wife for life; but a clause giving the principal of the money, in the event of there being no children, to the husband and wife moietively was allowed. *Harpur* v. *Ball*, 2 Jo. & Lat. 599. And see *S. C.*, 8 Ir. Eq. R. 404, 580.

Tenant in Tail and for Life.]—T. B., entitled, under one will, to an estate tail, expectant on the death of two elder brothers without issue or recovery suffered, and entitled, under another will, to an estate for life, with a remote remainder in tail, proposes on his marriage with a ward, in case either limitation in his favour shall take effect, to charge the estate to which he shall become entitled with an addition of 8,000*l.* to the fortune of the younger children. The master settles the covenant in the marriage articles, "that in case he shall become seised of, or entitled to, all or any of the manors, hereditaments, or estates devised by such wills, or by either of them, or of any other lands, &c., for any estate of inheritance in possession or otherwise, capable of being settled or bound in law or equity," he will charge the estate as aforesaid; and this is approved by the court. T. B. becomes entitled in possession to the life estate only; and, on reference to a master, he reports that the limitations under which T. B. covenanted to charge the estates never took place. The report confirmed,

and the judgment affirmed by the lords. *Willis* v. *Robertson*, 1 Dow (N.S.) 469 ; 4 Bligh (N.S.) 101.

Roman Catholic—Name and Arms.]—The court refused to sanction a clause in a settlement by a female infant, providing that no person professing the Roman Catholic religion should take any interest under the settlement. *Williams, In re*, 6 Jur. (N.S.) 1064 ; 8 W. R. 678.

The court sanctioned a clause making it compulsory on successive owners or their husbands to assume the name and arms of the ancestor from whom the settlor derived the estates. *Ib.*

Consent to vary Investments.]—By a settlement made with the sanction of the court, upon the marriage of "an infant of seventeen years," funds belonging to her were vested upon trust to re-invest with the consent of the lady and her husband during their joint lives ; the lady taking the first life interest :—Held, that the lady had power to consent to a reinvestment notwithstanding her minority. *Cardross, In re*, 47 L. J., Ch. 327 ; 7 Ch. D. 728 ; 38 L. T. 778; 26 W. R. 389.

Power of Appointment.]—By a settlement made on the marriage of "an infant of the age of nineteen years and upwards," it was agreed that, after the marriage, personal estate in which the lady would take a vested interest on marriage should be assigned to trustees, in trust for investment and to pay the income to the wife for her separate use, and after her death to her husband till bankruptcy or alienation ; and then to hold the capital in trust for such person or persons as the wife should appoint. The wife appointed the fund to her husband, and died an infant :—Held, by James and Brett, L.JJ. (Cotton, L.J., dissentiente), that the appointment by the minor was valid. *D'Angibau, In re, Andrews* v. *Andrews*, 49 L. J., Ch. 756 ; 15 Ch. D. 228 ; 43 L. T. 135 ; 28 W. R. 930—C. A.

iii. *Rectification.*

Ward Attaining Majority.]—Court retains its jurisdiction over property of ward, after ward becomes of age, so long as property remains in court ; and if ward marries, will reform an improper settlement. *Austen* v. *Halsey*, 2 Sim. & S. 123, n.

A few days after a ward attained her majority, a settlement was executed such as the court would not have approved :—Held, that the jurisdiction of the court over the ward had not ceased, and the settlement was rectified, so as to be what the court would have made. *Money* v. *Money*, 3 Drew. 256; 24 L. J., Ch. 684; 3 W. R. 425.

In 1839 A. B. married a ward of court without its sanction :—Held, in 1852, that the court possessed the same power over the parties which it would have had on an application shortly after the marriage, subject to the due protection of the rights and interests of persons who have come into esse since that period. The court referred it to the master whether a settlement made in 1850 was a proper one. *Cave* v. *Cave*, 15 Beav. 227. *And see cases*, supra, col. 1362.

After-acquired Property.]—The draft settlement of a ward containing a covenant to settle after-acquired property was approved by the intended husband, but never executed, though a post-nuptial settlement in different terms was executed: the court varied the latter settlement by adding the covenant as to after-acquired property. *Hoare's Trust, In re*, 4 Giff. 254; 1 N. R. 161; 9 Jur (N.S.) 167 ; 7 L. T. 523 ; 11 W. R. 181.

Restraint on Anticipation.]—On the settlement of a ward, no clause against anticipation was attached to her separate life estate. She incumbered her interest :—Held, that the settlement could not be rectified to the prejudice of her incumbrancers. *Blaikie* v. *Clark*, 15 Beav. 595 ; 22 L. J., Ch. 377.

As to the binding effect upon a ward of court and her husband of an order made after she came of age to settle her real estate. *Ib.*

Draft Settlement Accepted by Court.]—Where the master approved of a draft settlement but the chancellor declined making any order as to the execution of this settlement, the amount of the property then in litigation not being ascertained :—Held, that the proposed settlement, though not executed, having been acted upon by the court by different orders, could not be varied. *Hodgens* v. *Hodgens*, 4 Cl. & F. 323 ; 11 Bligh (N.S.) 62 ; Ll. & G. t. Plunk. 533.

Misunderstanding by Ward.]—A settlement of personal property belonging to a ward of court was made on her marriage and approved by the court. It provided that in the event which happened the property should go to the wife's next of kin. On an affidavit by the wife that she had misunderstood the settlement, the court declared that she was entitled absolutely to the fund. *Smith* v. *Iliffe*, 44 L. J., Ch. 755 ; L. R. 20 Eq. 666 ; 33 L. T. 200 ; 23 W. R. 851.

iv. *Payment out of Court.*

Settlement by Husband.]—An infant plaintiff is a ward of court without any order to that effect ; and if she marries without the sanction of the court her fund in court will not be paid out to her husband without a settlement. *Gynn* v. *Gilbard*, 1 Dr. & Sm. 356 ; 7 Jur. (N.S.) 91.

The court will give no direction as to dividends of separate property to which a ward of court is entitled, who is under age and has married without consent, until the husband has executed the settlement. *Cator* v. *Mason*, 2 W. R. 667.

Payment Obtained by Fraud.]—The fortune of an infant ward, a married woman, taken out of court under an order obtained on an affidavit that she was adult : ordered, on summary application by petition, to be replaced by the person who made the affidavit, and also by the solicitor who had in his possession proceedings which showed the infancy, and might have guarded the court against the surprise. *Barrington* v. *Grogan*, Beat. 199.

Marriage in Contempt.]—The mere fact of marriage with a female ward of court, without the court's consent, confers upon the court a jurisdiction to decline, during the joint lives of the husband and wife, to part with a fund in its custody belonging to the ward until a proper settlement should have been made thereof. *Martin* v. *Forster*, 7 De G. M. & G. 98 ; 24 L. J., Ch. 519; 1 Jur. (N.S.) 337; 3 Eq. R. 555 ; 3 W. R. 339.

Payment to Husband.]—A female ward of

court married a fortnight after attaining twenty-one; upon a joint petition of herself and her husband, asking for payment of a fund in court to her husband, the court refused to accede to the prayer, but ordered the dividends to be paid to the husband during the joint lives of himself and his wife, without prejudice to any question. *Biddles* v. *Jackson*, 26 Beav. 282. Affirmed, 3 De G. & J. 544; 28 L. J., Ch. 290; 5 Jur. (N.S.) 901; 7 W. R. 248.

A female minor having married without assent of the court, and the parties being poor, upon the production of a draft settlement, which the court approved of, and the husband undertaking to execute it, the court transferred the minor's fund to the husband. *Baker* v. *Herbert*, 8 Ir. Eq. R. 108.

An infant ward married, and a petition was presented by her and her husband for the payment of the money out of court to the husband. The court disapproved of the principle, but allowed the petition on affidavits that it would be beneficial for the husband to receive the money. *Cooke, In re*, 21 L. J., Ch. 145; 15 Jur. 765.

To Trustees—Separate Examination.]—A ward of the court married under twenty-one without the consent of the court, and prior to her marriage a settlement was made of her property. On her attaining twenty-one, she and her husband applied to have her property transferred to the trustees; which was ordered upon her being examined separately. *Leeds* v. *Barnardiston*, 4 Sim. 538.

Marriage after Majority.]—A ward of court was entitled to money for her separate use, but she was not restrained from anticipation. An allowance was made for her maintenance, and the surplus was accumulated in court. She attained twenty-one, and the next day married:—Held, that the fund must be paid out to the wife on her separate receipt, but, though the fund was under 200*l.*, she was required to be examined separately as to her consent. *White* v. *Herrick*, 38 L. J., Ch. 679; L. R. 4 Ch. 345; 20 L. T. 386; 17 W. R. 522.

On a petition of a wife, lately a ward of court, who had married on the day after she attained twenty-one, the court directed the transfer of stock to her, to which she was entitled to her separate use, notwithstanding that, in contemplation of marriage, an order had been made for the settlement of the fund. *Sams* v. *Cronin, Reed, Ex parte*, 29 L. T. 885; 22 W. R. 204.

C. PROPERTY.

1. In General.

Practice—Report of Master.]—Money in funds belonging to wards of the court cannot be transferred into the name of the accountant-general to the credit of the cause, until the account is taken by a master and his report made. Such a transfer could not operate as an acquittance and discharge of the trustees until they had passed their accounts. *Beneraft* v. *Rich*, 1 Bro. C. C. 56, and note there.

Vesting Order—Stock standing in Names of Infants and Others.]—Infants were entitled to certain legacies, which had been invested in consols in the names of the executor and executrix, and of the infant entitled thereto:—Held, that the court would, under s. 3 of the Trustee Extension Act, 1852, make an order vesting in the executor and executrix the right to transfer the stock and receive the dividends accrued prior to the transfer. *Barnett, In re, Foster* v. *Barnett*, 61 L. T. 676.

Stock to which an infant was absolutely entitled was standing in her own name alone. The will contained no direction for maintenance, but the stock constituted the only property of the infant, who was domiciled in Scotland, and a Scotch court had ordered that advances should be made out of the capital of her property for the purpose of maintenance:—Held, following the principle of *Gardner* v. *Cowles* (3 Ch. D. 304), that the court could make an order under s. 3 of the Trustee Extension Act, 1852, vesting in the guardian of the infant the right to transfer the stock and receive the dividends. *Findlay, In re*, 55 L. J., Ch. 395.

Where stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person:—Held, that the court had jurisdiction under s. 3 of the Trustee Extension Act, 1852, to make an order vesting in such other person the right to transfer such stock. *Harwood, In re*, 51 L. J., Ch. 578; 20 Ch. D. 536; 30 W. R. 595.

Transfer into Court.]—A testatrix directed funds to be transferred in the bank books into the names of A. B. and wife, and their children, who were infants, for the benefit of A. B. and wife for life, with remainder to their children:—Held, that the court had no jurisdiction, under 1 Will. 4, c. 60, to order the infants to transfer the funds into court. *Watts* v. *Scrivens*, 1 Beav. 223.

Change of Investment.]—By a marriage settlement, reciting that the lady was an infant, property was assigned to trustees upon the usual trusts, with power to vary investments with the consent in writing of the husband and wife, or the survivor:—Held, that the wife, whilst still an infant, could consent to a proposed change of investment. *Cardross, In re*, 47 L. J., Ch. 327; 7 Ch. D. 728; 38 L. T. 778; 26 W. R. 389.

Payment out of Court—Majority according to Domicil.]—Funds in court to the separate credit of an infant domiciled abroad were paid out to her on attaining age, according to the law of her domicil, although she had not come of age according to English law. *Donohoe* v. *Donohoe*, 19 L. R., Ir. 349.

—— **Small Sum.**]—Small sums representing shares of infants of a fund in court directed to be paid out into the post-office savings bank to accounts in the names of the infants. *Elliott* v. *Elliott*, 54 L. J., Ch. 1142.

Conveyance.]—No objection to sale in court in execution of will, that infants interested under will cannot join in the conveyance. *Powell* v. *Powell*, 6 Madd. 53.

—— **Custom of Kent.**]—There is an absolute disability in an infant to dispose of his inheritance, and it has never been held that an infant could exercise such a power over a real estate. *Hearle* v. *Greenbank*, 3 Atk. 712.

By the custom of Kent an infant may alien his estate, for custom is lex loci, and being so, it

stands as strong as if a private act had passed for the purpose. *Id.* 711.

—— **By Administratrix.**]—Conveyance by administratrix of infant's devisor, in bar of infant's rights, set aside on his attaining full age. *Bailie* v. *Bailie*, 1 Ridgw. L. & S. 364.

—— **Attestation.**]—Where an infant defendant cannot write, the court will order her execution of the purchase deed, pursuant to the 1 Will. 4, c. 47, to be attested by a commissioner for taking affidavits. *Archbold* v. *Rice*, 5 Ir. Eq. R. 33.

—— **Infant Out of Jurisdiction.**]—The court has not power, under the 28 Geo. 3, c. 35, to direct the master to execute a conveyance in the name of an infant resident out of the jurisdiction. *M'Geehan* v. *Rankin*, 12 Ir. Eq. R. 182.

An application to the court for that purpose, under the 1 Will. 4, c. 47, or 1 Will. 4, c. 60, must be made by petition. *Ib.*

Disagreement of Trustees—Refusal of Court to order Sale.]—Two trustees having power to sell property of an infant, and one trustee having declined to exercise the power of sale, the court refused to order them to sell, notwithstanding that the effect of the sale would be to increase very considerably the income. *Camden (Marquis)* v. *Murray*, 50 L. J., Ch. 282; 16 Ch. D. 161; 43 L. T. 661; 29 W. R. 190.

Equitable Mortgage by a Testator—Power to Mortgage.]—By will, K. devised to G. freehold property. The title deeds of portion of the property had been deposited by K., by way of equitable mortgage, K. died, and the mortgagee brought an action for sale and a receiver, the court allowed G. (a minor) under the 1 Wm. 4, c. 47, and 2 & 3 Vict. c. 60, to raise and pay the equitable mortgage by a mortgage of the devised lands. *National Bank* v. *Gourley*, 17 L. R., Ir. 357.

Right of Father to charge on Contingent Interest.]—The court refused to declare that sums advanced by a father for the benefit of his infant son were a charge on property to which the son would become entitled only in the event of his attaining twenty-one. *Tanner, In re*, 53 L. J., Ch. 1108; 51 L. T. 507.

Semble, the court has no jurisdiction to make such a charge, and the only proper form of order in such a case is that in *Arbuckle, In re* (14 W. R. 435). *Ib.*

Benefice—Presentation by Infant.]—As to presentation and nomination by infant to a benefice, see *Arthington* v. *Coverly*, 2 Eq. Ca. Abr. 518. *See* the observations on this case, 1 Fonbl. Tr. Eq. 84, n.

Deputation.]—An infant may execute a deputation to a seneschal of his manor. *Hallibarton* v. *Leslie*, 2 Hog, 252.

Surrender.]—An infant may be the deputy steward of a manor, and take a surrender by a married woman. *Edlestone* v. *Collins*, 16 Jur. 790.

Copyhold—Admittance.]—If the lord seize the lands of infant copyholders, the 9 Geo. 1, c. 29, s. 1 shows how to proceed. *Clayton* v. *Cookes*, 2 Atk. 449.

—— **Forfeiture.**]—Forfeiture of copyhold for waste during minority. *Litton's Case*, Cary, 6.

Notice.]—A feme covert, or infant, is just as much bound by notice as an adult. *Jones* v. *Kearney*, 1 Dr. & War. 134; 1 Con. & L. 34; 4 Ir. Eq. R. 86.

Tenant in Tail.]—Infants may be bound if conusant of their right, as where tenant in tail, aged nineteen, ingrosses a mortgage of the estate. *Teynham (Lord)* v. *Webb*, 2 Ves. Sen. 212.

—— **Insolvent Act.**]—Infant tenant in tail, taking benefit of Insolvent Act (49 Geo. 3, c. 115), his estate tail does not pass to his assignees. *Burton* v. *Haworth*, 5 Madd. 50.

Receiver.]—The court will not appoint a receiver of an infant's estate where there is no bill filed. *Anon*, 1 Atk. 489.

Rent.]—The receiver in a minor's matter paid rent due up to a certain period in respect of lands bequeathed to the minor. The bequest had not been assented to by the executor:—Held, that the minor was liable only to the extent of the profits received of the lands. *Fair, In re*, 13 Ir. Eq. R. 278.

Consignee of Estate.]—A consignee over an estate of infants cannot be appointed without giving security. *Cobham* v. *Cobham*, 5 Jur. 931.

Bankrupt Costs.]—Infant bankrupt being brought before court as party to suit refused his costs. *Maguuran* v. *Jamieson*, 2 Moll. 520.

Witness.]—Though a witness be an infant, his tender years will not invalidate his evidence. *Smith* v. *French*, 2 Atk. 245.

Possession as Bailiff—Tenants in Common.]—A father was entitled in fee to an undivided moiety of gavelkind land, the other moiety of which belonged to his wife in fee. She died, and her two sons became entitled to her moiety in equal shares subject to the father's right (by custom) to a moiety of the rents of her moiety while he remained a widower. The father took possession and received all rents without accounting. John, a son, died before the father:—Held, that, as to that one-eighth to which John became entitled on the death of his mother, the father must be taken to have entered as bailiff for his infant son, and that, consequently, the title of John was not barred by s. 12 of 3 & 4 Will. 4, c. 27, and that his brother Samuel was entitled to that one-eighth. But held, that, as to Samuel's own one-eighth the same presumption did not arise, and there being no evidence that the father had received the rents as agent for Samuel, or had acknowledged his title in writing, or accounted to him for the rents, the title to that one-eighth was barred by the statute. Consequently, Samuel was entitled to three-eighths of the whole property and the remaining five-eighths passed under the father's will. *Hobbs, In re, Hobbs* v. *Wade*, 57 L. J., Ch. 184; 36 Ch. D. 553; 58 L. T. 9; 36 W. R. 445.

—— **Guardian by Nurture — Liability to Account.**]—The owner of a public-house and cottages devised them to his widow during widowhood, with remainder to his four infant children. His widow married again, but continued to reside in the public-house and received the rents and maintained the children. One of the children, an infant, married, but she and her husband resided in the public-house. They then left and brought an action against her mother for one-fourth of the rents and profits :—Held, that after her second marriage the mother was in possession as bailiff for her infant children, and not as guardian by nurture, and was therefore a trustee and liable to account to the daughter and her husband for the rents and profits. *Wall* v. *Stanwick*, 56 L. J., Ch. 501 ; 34 Ch. D. 763 ; 56 L. T. 309 ; 35 W. R. 701.

Statute of Limitations.]—An executor, administrator, or trustee for an infant neglecting to sue within six years, the statute of limitations shall bind the infant. *Wych* v. *East India Co.*, 3 P. Wms. 309.

Ne Exeat Regno.]—Where the writ of ne exeat was not applied for until after six months from the time when a defaulting trustee had declared his intention to leave the kingdom, yet as the persons most interested were infants the court granted the writ. *Waller* v. *Fowler*, Sau. & Sc. 274.

And see CONVERSION AND RECONVERSION.

2. LEASES.

Rights of Infant.]—If a person, jointly interested with an infant in a lease, obtains a renewal to himself only, and the lease proves beneficial, he will be held to have acted as trustee, and the infant may claim his share ; but if it does not prove beneficial, he must take it upon himself. *Grace*, *Ex parte*, 1 Bos. & P. 376.

—— **Disclaimer.**]—Semble, that an infant, in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession and has not disclaimed, at all events unless he still continues a minor. *North-Western Ry.* v. *M'Michael*, 5 Ex. 114 ; 20 L. J., Ex. 97 ; 15 Jur. 132.

Where an estate vests in an infant by operation of law, and he has not disclaimed, he becomes liable for rent, notwithstanding his infancy. *Kelly* v. *Coote*, 5 Ir. C. L. R. 469.

Occupation Rent.]—Where an infant obtained a lease of a furnished house on an implied representation that he was of full age :—Held, that the lease must be declared void, and possession given up, and the defendant restrained from parting with the furniture ; but that he was not liable for use and occupation. *Lempriere* v. *Lange*, 12 Ch. D. 675 ; 41 L. T. 378 ; 27 W. R. 879.

Where there were tenants in common, one of whom was an infant and the other had been in occupation at the death of the infant's mother, the former tenant, and continued in occupation during the infancy :—Held, that the occupation of the defendant was an entry on the estate of the infant, and therefore he was liable to account for rents and profits under 4 Anne. c. 16, although he had not received any rent, and that he must pay an occupation rent. *Pascoe* v. *Swan*, 27 Beav. 508 ; 29 L. J., Ch. 159 ; 5 Jur. (N.S.) 1235 ; 1 L. T. 17 ; 8 W. R. 130.

Lands were let to an infant. He took possession and left before attaining his majority, and then repudiated the contract :—Held, that he was liable to the payment of the rent due during possession. *Blake* v. *Concannon*, Ir. R. 4 C. L. 323.

Copyholder—Trespass.]—An infant copyholder who has been admitted, and has entered into possession by his guardian, may maintain trespass for the wrongful occupation by the lord for a prior period. *Barnett* v. *Guildford* (*Earl*), 11 Ex. 19 ; 24 L. J., Ex. 281 ; 1 Jur. (N.S.) 1142 ; 3 W. R. 406.

Surrender.]—The provisions of the act 11 Geo. 4 & 1 Will. 4, c. 65, apply to a lease to which an infant is only beneficially entitled, the legal estate being vested in a trustee. *Griffiths*, *In re*, 54 L. J., Ch. 742 ; 29 Ch. D. 248 ; 53 L. T. 262 ; 33 W. R. 728.

It was referred to the master to inquire whether the infant lessee was within the act of the 29 Geo. 2, and if he were, whether it was for his benefit to surrender the old lease and take a new one. *Swann*, *Ex parte*, Dick. 749.

—— **Concurrence of Guardian.**]—An order that tenants of a minor should be at liberty to execute a surrender was granted upon a motion of the receiver, it being for the minor's benefit, but the concurrence of the minor's guardian was required. *Davis* v. *Cotter*, Sau. & Sc. 685.

Renewal.]—The tenant of a lease for lives renewable upon payment of fines and a penal rent, being an infant, and there having been no renewal for a period of fifty years :—Held, that the court would require a suit to be instituted. *Colthurst*, *In re*, 2 Con. & L. 35 ; 3 Dr. & War. 35 ; 5 Ir. Eq. R. 322.

Lease by Infant.]—Where an infant makes a lease, reserving a rent, he cannot avoid it until of full age. *Slator* v. *Trimble*, 14 Ir. C. L. R. 342.

—— **How avoided.**]—A lease by an infant is voidable only. *Slator* v. *Brady*, 14 Ir. C. L. R. 61.

A lease by an infant is not avoided by a lease made to a third party by the infant upon his full age. *Ib.*

To avoid a lease made by an infant, under which the lessee is in possession, some act of notoriety, viz. ejectment, entry, or demand of possession is requisite. *Ib.*

By Guardians.]—Where tutors dative executed an agreement for a lease, at a rent to be paid to the infant :—Held, that he might maintain an action in his own name upon the agreement to recover arrears of rent. *Carnegie* v. *Waugh*, 2 D. & R. 277.

So, where rent was covenanted to be paid to the tutors dative, the infant, or to any other person duly authorised to receive the same for the infant. *Fitzmaurice* v. *Waugh*, 3 D. & R. 273.

Lease made by guardian, and executed by infant, ordered to be fully recognised by infant after his coming of age, or infant to refund con-

sideration. *Erroy* v. *Nicholas*, 2 Eq. Ca. Abr. 488. *S. C.*, nom. *Esron* v. *Nicholas*, 1 De G. & Sm. 118, n.

Confirmation.]—Acceptance by an adult beneficiary of rent accruing under an invalid lease is not a confirmation of the lease. *Robson* v. *Flight*, 4 De G. J. & S. 608 ; 34 L. J., Ch. 226 ; 11 Jur. (N.S.) 147 ; 11 L. T. 725 ; 13 W. R. 393.

—— **By Mortgage.**]—Where a party takes a lease of infant's lands, and the infant on coming of age mortgages the property to the lessee by deed referring to the lease this is a confirmation. *Story* v. *Johnson*, 3 Y. & C. 586.

—— **Agreement for Lease.**]—A minor and his guardian agreed to let defendant a farm ; defendant entered, and paid rent. The minor when of age sold the estate ; defendant then quitted, and refused to take a lease :—Decreed, defendant should take a lease and pay costs. *Clayton* v. *Ashdown*, 9 Vin. 393, pl. 4.

—— **Acceptance of Rent.**]—R. devised lands and houses to infant children. The mother as guardian demised the premises on a building lease. The eldest son joined in the lease, and covenanted that the rest, when of age, should confirm it. They all attained twenty-one, and accepted the rent for ten years after the youngest came of age, and then brought ejectments :—Decreed, that the lease should be established. *Smith* v. *Low*, 1 Atk. 489.

Stamping Agreement.]—Where a tenant held lands under an unstamped accepted proposal, which rendered him liable to the payment of tithe composition, the court directed the receiver to stamp the same, and that the expenses thereof should be allowed to him. *Langley* v. *Langley*, 1 Dr. & Wal. 232.

Reduction of Rent.]—As to reduction of tenant's rent where landlord is a minor or lunatic. *Anon.*, 2 Moll. 342.

Arrears of Rent.]—Order made relieving the tenant of an infant's estate from payment of arrears of rent. *Henneker* v. *Chafy*, 3 W. R. 300.

Trade Fixtures—Covenants.]—Where a lease under the sanction of the court had been executed for the benefit of an infant, a bill for rectification, on the ground that it contained an improper demise of trade fixtures, and an improper covenant by the lessee, was dismissed with costs. *Seaton* v. *Staniland*, 4 Giff. 61 ; 9 Jur. (N.S.) 69 ; 7 L. T. 347.

Small Property.]—Order for liberty to trustee to let infant's estate, without reference to master, property being small ; but not to extend to building leases, or beyond minority. *P*—— v. *Bell*, 6 Ves. 419.

Administration.]—Upon the administration of the real property of an infant, this court will not delegate to the master the power of approving leases of the estates. *Symons* v. *Symons*, 2 Y. & C. 1 ; 5 L. J., Ex. Eq. 95.

Indefeasible Interest.]—An estate, of which A. died seised in fee, descended upon A.'s infant sisters. The father and mother of the infants being alive, it was held that the infants were not seised of or entitled to land in fee, within the meaning of the 1 Will. 4, c. 65, s. 17. *Evans, In re*, 2 Myl. & K. 318.

The court has no jurisdiction under 11 Geo. 4 & 1 Will. 4, c. 65, s. 17, to lease an infant's estate unless the infant is indefeasibly seised either in fee or in tail in possession. *Legh, Ex parte*, 15 Sim. 445.

—— **Tenant by the Curtesy.**]—The court has power, under 11 Geo. 4 & 1 Will. 4, c. 65, to sanction a building lease of an infant's estate when he is seised in fee-simple in reversion after a life estate by the curtesy vested in his father. *Letchford, In re*, 45 L. J., Ch. 530 ; 2 Ch. D. 719 ; 35 L. T. 466.

—— **House.**]—Under the 17th section of stat. 11 Geo. 4 & 1 Will. 4, c. 65, the court, on petition to confirm a master's report, permitted a lease for twenty-one years to be made of a house in which an infant had an interest. *Harris* v. *Davis*, 9 Jur. 1084.

—— **Mining Lease.**]—Where an infant was seised in fee, defeasible in the event of his dying under twenty-one without issue, and all the persons who would be entitled in defeasance of his estate joined with him in a petition for a mining lease under 11 Geo. 4 & 1 Will. 4, c. 65, s. 17, the court made the order. *Clark, In re*, 35 L. J., Ch. 314 ; 13 L. T. 732 ; 14 W. R. 378.

The court cannot (independent of the 1 Will. 4, c. 65) authorise trustees for infants to grant a mining lease, although the legal estate is vested in such trustees, and such lease would be beneficial to the infants. *Wood* v. *Patteson*, 10 Beav. 541.

When infants were tenants in fee, but their father was in possession as tenant by the curtesy, the court of chancery granted a lease of their coal mines under 11 Geo. 4 & 1 Will. 4, c. 65, s. 17. *Spenser, In re*, 37 L. J., Ch. 18 ; 17 L. T. 200.

Ejectment by Infant.]—Where ejectment has been brought by an infant, which has been compromised, and the tenant in possession has attorned to the infant, though he on his coming of age does not do any act to confirm the tenancy, he will not be allowed to bring a new ejectment without giving notice to quit. *Doe* d. *Miller* v. *Noden*, 2 Esp. 530.

Agreement for Lease.]—Tenant for life, agreeing to grant lease, dies. Next tenant in tail being his son, an infant, and father having a right to appoint testamentary guardian, which he does, agreement was carried into execution against the son during his minority, it being first modified by court to advantage of son. *Brummell* v. *Clavering*, 3 Swanst. 690.

3. Mortgage by Court.

Payment of Ancestor's Debts.]—The 1 Will. 4, c. 47, does not empower the court to direct a mortgage of infant's real estate for payment of the ancestor's debts to which it is liable. *Smethurst* v. *Longworth*, 2 Keen, 603 ; 7 L. J., Ch. 18.

In a creditors' suit the court has no jurisdiction, under 1 Will. 4, c. 47, or 2 & 3 Vict. c. 60,

to extend the sum to be raised by an infant for payment of debts of his ancestor, so as to include repairs which are necessary to obtain a mortgage, which would be more beneficial for the infant than a sale would be. *Hill* v. *Maurice*. 1 De G. & Sm. 214; 16 L. J., Ch. 280; 11 Jur. 795.

Repairs.]—When an infant was absolutely entitled to the beneficial interest in real estate, the legal estate being in trustees:—Held, that the court could raise money by means of a mortgage, for paying the cost of repairs certified to be absolutely necessary. *Jackson, In re, Jackson* v. *Talbot*, 21 Ch. D. 786. *And see* preceding case.

Where property was devised to sons in succession, and the use of the house to the widow until the eldest son attained twenty-one, and the house was out of repair and in an unsanitary condition, and all the children were under age:—Held, the court had no jurisdiction to authorise the construction of new buildings in place of the old house, but had power to sanction the raising of money by mortgage for the payment of repairs in the nature of salvage, as necessary for the preservation of the infant's property. *Hurst, In re, Hurst* v. *Hurst*, 29 L. R., Ir. 219.

Form of.]—Authority was given to insert a power of sale in a mortgage of an infant's real estate, to pay debts and costs. *Selby* v. *Cooling*, 23 Beav. 418.

Costs.]—Where the court sanctioned a mortgage, but the matter went off without the default of the mortgagee, he was allowed his costs out of the estate. *Craggs* v. *Gray*, 35 Beav. 166.

Where an action had been brought by an infant tenant in tail, which was approved by the court, the court sanctioned a charge upon the infant's interest to raise a sufficient sum to pay the costs of the action, the person advancing the money accepting the risk of losing it if the action failed and the infant died under age. *Jones, In re*, 48 L. T. 188; 31 W. R. 399. *And see cases*, infra, col. 1382.

4. Sale by Court.

General Rule.]—A. being an infant, no sale of lands to which she is entitled can be made during her minority, except by the intervention of the court. *Batho* v. *Fulton*, 2 L. J. (o.s.) Ch. 196.

Practice — Master's Report.]—Where estate devised to infants charged with payment of debts, if personal estate is insufficient, sale of real not decreed till master report personal insufficient. *Birch* v. *Glover*, 4 Madd. 376.

In an administration action the court will not direct the sale of real estate in which an infant is interested till the accounts of the personal estate have been taken, and the cause heard for further directions. *Baillie* v. *Jackson*, 10 Sim. 167.

Benefit of Infant — Conversion.]—The court has no authority to sell the real estate of an infant or to convert it, upon the notion that it would be beneficial. *Calvert* v. *Godfrey*, 6 Beav. 97; 12 L. J., Ch. 305.

Where a conveyance is directed, the decree must provide for its being settled by the master, at all events if it be executed by an infant. *S. C.*, 2 Beav. 267.

—— **Reference.**]—The court has no authority to dispose of minor's real estate, however much it may be for the benefit of the minor. The course is to give a reference to inquire whether it will be for the benefit of the minor to apply for an act of parliament. *Russell* v. *Russell*, 1 Moll. 525.

—— **Power of Sale.**]—Generally the court has no authority to direct a sale of the real estate of an infant, or to convert it, merely upon the notion that it would be for the benefit of the infant. But where a testator had given all his real and personal estate to trustees upon certain trusts, with power of sale at their discretion, and the trustees disclaimed:—Held, that the court had jurisdiction to direct a sale to carry the trusts of the will into execution. *Browne* v. *Paull*, 16 Jur. 707.

—— **Creditor's Action.**]—An estate descended to an infant heir cannot be sold at the suit of creditors on the ground that a sale will be beneficial to the infant. *Brookfield* v. *Bradley*, Jacob, 634.

—— **Mortgagees Consent.**]—Inquiry directed in case the mortgagees consent to a sale, whether it will be for the benefit of the infant heir of the mortgagor. *Mondey* v. *Mondey*, 1 V. & B. 223.

—— **Costs.**]—An infant being entitled to one-ninth of a real estate, and it being for her benefit, the court declared the costs a charge on the infant's share, and ordered a sale of the whole estate. *Davis* v. *Turvey*, 32 Beav. 554.

Special Circumstances.]—Sale of infant's property carried into execution under special circumstances. *Garmstone* v. *Gaunt*, 1 Coll. C. C. 577; 14 L. J., Ch. 162; 9 Jur. 78.

Publication—References.]—Publication passed in a supplemental suit, by consent, although an infant party, and the object the more speedy sale of the minor's inheritance, and the cause set down out of the regular course, without a reference whether for his benefit. *Sheppard* v. *Green*, 1 Moll. 275.

Form of Conveyance.]—Where the estate of infants is concerned, the master directed to settle the conveyances absolutely, and not in case the parties differ. *Cheese* v. *Cheese*, 15 L. J., Ch. 28.

Copyhold—Fine.]—When copyholds are sold for payment of debts during infancy of heir under decree, part of purchase money will not be retained in court to pay expense of fine which would be payable on the death of the heir before a conveyance. *Morris* v. *Clarkson*, 3 Swanst. 558; 19 R. R. 277.

By Trustees.]—Trustees, who had power of sale but no power of leasing, first granted leases and afterwards sold subject to them. Infants being interested, the court sanctioned the sale on their behalf:—Held, that the purchaser was bound to complete. *Micholls* v. *Corbett*, 34 Beav. 376. And see *Browne* v. *Paull*, supra.

—— **Discretion.**]—Where trustees have a discretionary power of sale, and disagree as to its exercise, the court will not order sale, notwith-

standing that the effect of the sale would be to increase considerably the income. *Camden (Marquis)* v. *Murray*, 50 L. J., Ch. 282 ; 16 Ch. D. 161 ; 43 L. T. 661 ; 29 W. R. 190.

Postponing Sale.]—An infant aged ten was entitled, on marrying or attaining twenty-one, to the proceeds of real estate, which was directed to be sold as soon as conveniently might be after the death of the tenant for life. An order was made postponing the sale, upon the ground that the property was likely to increase greatly in value. *Morris* v. *Morris*, 4 Jur. (N.S.) 802.

Conditions—Sale of Reversion.]—When in an administration suit an order has been made by the court for the sale of an infant's reversion in personal property, and the sale has been effected subject to a condition that the jurisdiction of the court to make such an order should not be questioned, the purchaser is entitled to a declaration on the face of the order confirming the sale that all parties to the suit are bound by it. *Nunn* v. *Hancock*, 40 L. J., Ch. 700 ; L. R. 6 Ch. 850 ; 25 L. T. 469 ; 19 W. R. 1041.

Specific Performance—Costs.]—Where a testator, after devising his real estate, entered into a contract for the sale, and died leaving his devisee an infant, the court refused, in a suit by the purchaser for the specific performance, to allow any costs as between the plaintiff and the defendant. *Hall* v. *Bushill*, 35 L. J., Ch. 381.

Policy of Insurance.]—The court will order a policy of insurance belonging to infants to be sold, notwithstanding an advantageous offer by tenant for life to keep it on foot, unless security to the amount of the principal be given. *Vickers* v. *Scott*, 1 Jur. 402.

5. Investment and Expenditure.

In Charity.]—A portion of the income of an infant's real estate ordered to be applied in charity. *Langton* v. *Brackenbury*, 2 Coll. C. C. 446 ; 15 L. J., Ch. 256 ; 10 Jur. 302.

In a time of general scarcity the receiver of a minor's estate authorised to lay out money in employing the poor tenantry. *Jackson* v. *Jackson*, 2 Hog, 238.

Application without Reference.]—Where the sum is small, the court will decide, without the expense of a reference, whether the application sought for is for the benefit of the infant. *Barnwall, Ex parte*, 1 Moll. 4.

Repairs.]—A reference is usual to ascertain if repairs to be done are for the benefit of an infant. *Hood* v. *Bridport*, 16 Jur. 560.

Trading Adventure.]—Trustee not answerable for having engaged the infant's name in an adventure, if he does not engage the property. But see *Morton Eden's case*, in the H. of L. *Wilkinson* v. *Stafford*, 1 Ves. Jun. 42.

Private Security.]—Trustees lending an infant's money on a private security responsible in case of failure of the security. *Holmes* v. *Dring*, 2 Cox, 1.

Trading.]—Where a trustee lays out an infant's money in his trade, the court will give an option for the infant, either to have interest or the profits of the trade. *Anon.*, 2 Ves. Sen. 630.

Judgment Security.]—The money belonging to a minor not allowed to remain out at interest on the security of a judgment. *Knox* v. *Knox*, 1 Hog, 117.

Insurance Money.]—A sum paid to guardian of an infant, tenant in tail, for building a copyhold tenement burnt down, but which had never been applied during the infant's life, held to belong to the succeeding remainderman in tail, subject to a deduction of interest upon a larger sum at which the loss was computed, such interest to belong to the personal representatives. *Rook* v. *Worth*, 1 Ves. Sen. 460.

Lease for Lives.]—An executor in trust for an infant of a lease for 99 years, determinable on three lives, on the lord's refusing to renew but for lives absolutely, changes the years into lives ; on the infant's dying under twenty-one and intestate, this is a trust for his administrator. *Witter* v. *Witter*, 3 P. Wms. 99.

Mortgage.]—This court will not lend out the money of an infant on mortgage. *Ridgways, In re*, 1 Hog, 309.

Court will not order reference whether it is advantageous to invest fund in mortgage ; practice being to lay out same in three per cent. consols. *Norbury* v. *Norbury*, 4 Madd. 191.

Petition of tenant for life whether it would be for benefit of infant tenants in remainder to transpose trust funds from consols to a mortgage security under a power, dismissed. *Barry* v. *Marriott*, 2 De G. & Sm. 491 ; 12 Jur. 1043.

—— **Reduced Interest.**]—Where the mortgagor offered to pay off unless a reduced rate of interest was taken, a reference was directed as to the value of the estate mortgaged, and if on ample security, it was ordered the money should remain at the reduced rate. *Hoey* v. *Hoey*, 2 Moll. 278.

Security Abroad.]—The court did not call in the property of an infant upon security in India, the master reporting it to be for his benefit that it should remain. *Sadler* v. *Turner*, 8 Ves. 617.

Executors.]—Executors, after a decree to account, lending personal estate upon mortgage, ordered to pay the same into court ; but the motion that they might be ordered to replace the amount by so much stock as the same would have purchased at the time of investment was to that extent refused. *Widdowson* v. *Duck*, 2 Mer. 494 ; 16 R. R. 206.

Conversion.]—Personal property of infant ordered to be laid out in land, though there were no directions in will for changing nature of it ; the estate to be conveyed in trust for him, his executors, &c., till twenty-one, and after to him and his heirs. *Ashburton* v. *Ashburton*, 6 Ves. 6 ; 5 R. R. 201.

An executor or overseer may lay out part of the personal estate in the purchase of lands in the infant's name ; but if he lends the money on a bad security, he must answer it out of his own pocket. *Terry* v. *Terry*, Pre. Ch. 273 : Gilb. 10.

The conveyancing counsel having certified that the title to a proposed purchase, "though not a good title of sixty years, was a safe holding one," and the purchase appearing in other respects desirable, it was sanctioned by the court. *Sheffield and Rotherham Ry., In re*, 1 Sm. & G. (App.) iv.

The court has often changed the nature of infant's estate for his convenience. Guardians and trustees may change the nature of an infant's estate, where it is manifestly for the infant's interest. *Inwood* v. *Twyne*, Amb. 419; 2 Eden, 153.

Infant entitled in remainder purchases her mother's jointure, and having attained twenty-one, receives one year's rent and dies:—Held, the purchase was to be considered real estate. *S. C.*, Amb. 417; 2 Eden, 148.

This court has no authority to alter the character of the property of an infant, and convert realty into personalty. *Field* v. *Moore*, 19 Beav. 176; 24 L. J., Ch. 161; 1 Jur. (N.S.) 33; 3 Eq. R. 215; 3 W. R. 98.

Upon an application to lay out part of an infant's money in land, if he dies before twenty-one, or disapproves of the purchase, the property will not alter. *Sergeson* v. *Sealey*, 2 Atk. 413; 9 Mod. 370. And see *Tullit* v. *Tullit*, Amb. 370.

—— **By Guardian.**]—Lands purchased by guardian for infant, during minority, considered as personalty. *Gibson* v. *Scudamore*, Dick. 45.

Timber Sold—Executory Devise.]—Timber was cut by order of the court, and for the benefit of the estate of an infant, equitable tenant in fee, subject to an executory devise over in the event of his dying under twenty-one. He died under twenty-one:—Held, that the proceeds of the sale of the timber were personal estate of the infant. *Dyer* v. *Dyer*, 12 L. T. 442; 13 W. R. 732.

Purchase out of Surplus Income.]—Trustees of an infant having saved 3,000*l.* out of the profits of his estate lay it out in a purchase of lands near, declaring the trust for the benefit of the infant, if he, when of age, shall agree to it. Infant dies within age; the trustees shall account to the infant's executors for the 3,000*l.*, but the profits of the land set off against the interest. *Winchelsea* v. *Norcliffe*, 1 Vern. 435.

Discharge of Incumbrances.]—In case of infant, court will order money to be laid out in the discharge of incumbrances, &c. *Grimstone, Ex parte*, Amb. 708.

—— **Assigning Mortgage.**]—Where infant is entitled to a personal estate, and to a real one encumbered, equity will direct the personal to go in discharge of incumbrances, yet will not order mortgage to be assigned to attend the inheritance, but to be considered as personal estate for the benefit of the infant. *Seys* v. *Price*, 9 Mod. 221.

—— **Next of Kin.**]—When the personal estate of an infant seised in fee of real estate was applied in payment of charges affecting his real estate, the infant having died under twenty-one:—Held, that the next of kin were entitled to those charges as part of his personal estate. *Dowling* v. *Belton*, Fl. & K. 462.

—— **Land Tax.**]—In the application of the personal estate of an infant tenant in tail, to redeem the land-tax, and in all cases the court will so guard the property of an infant that the conversion shall not change the nature of it, between the representatives. *Ware* v. *Polhill*, 11 Ves. 257, 278; 8 R. R. 144.

6. Account.

After Majority.]—Court retains its jurisdiction over property of ward after ward becomes of age, so long as property remains in court. *Austen* v. *Halsey*, 2 Sim. & S. 123, n.

Wrongful Possession.]—Infant may bring bill for an account of rents and profits against a person who keeps possession after death of the infant's ancestor. *Roberdeau* v. *Rous*, 1 Atk. 544.

Fund in Danger.]—An infant's bill, he being remainderman to personal property, merely stating the fund in danger, without any proof, entitles him to an account. *Singleton* v. *Singleton*, 2 Moll. 520.

From what Date.]—Where one in possession of lands belonging to an infant, if the infant, when he comes of age, makes out his title, he shall recover the profits in equity from the first accruing of his title. *Bennet* v. *Whitehead*, 2 P. Wms. 645.

Where any person enters upon an infant's estate, and continues in possession, equity will decree an account to be carried on after the infancy, unless the infant, being of age, has waived such account. *Morgan* v. *Morgan*, 1 Atk. 489.

If a father who has entered upon the estates of his infant children retain possession after the children attain twenty-one, as guardian and bailiff, an account will be directed from the time of entry. *Thomas* v. *Thomas*, 2 K. & J. 79; 25 L. J., Ch. 159; 1 Jur. (N.S.) 1106; 4 W. R. 135.

A party in possession, under a voidable deed, treated as bailiff, and made to account for the rents for more than six years before the filing of the bill. *Nanney* v. *Williams*, 22 Beav. 452.

And see *Wall* v. *Stanwick*, supra, col. 1375.

—— **Rent.**]—Where one tenant in common was an infant, and the other (the defendant) had been in occupation at the death of the infant's mother, the former tenant in common, and had continued in occupation:—Held, that the occupation of the defendant was an entry on the estate of the infant, and therefore that he was liable to account for rents and profits under 4 Anne, c. 16, although he had not received any rent, and that he must pay an occupation rent. *Pascoe* v. *Swan*, 27 Beav. 508; 29 L. J., Ch. 159; 5 Jur. (N.S.) 1235; 1 L. T. 17; 8 W. R. 130.

Action at Law.]—Where an infant brings a bill for the land, and to have an account of the mesne profits, the court may elect him to proceed at law, and retain the bill for the mesne profits. *Dormer* v. *Fortescue*, 3 Atk. 129, 130. And see *Drury* v. *Drury*, 1 Ch. Rep. 49; *Bennet* v. *Whitehead*, 2 P. Wms. 645; *Tilly* v. *Bridges*, Pre. Ch. 252, 517.

An infant shall have an account of profits against an intruder; but where a verdict has passed against his title, he shall have no account of profits until he has recovered at law. *Newburgh* v. *Bickerstaffe*, 1 Vern. 295.

Adverse Possession.]—A person who makes an adverse entry into, and takes an adverse possession of, an infant's estate, cannot be treated as the bailiff; nor can a bill for an account against him be sustained. *Hagley* v. *West*, 3 L. J. (o.s.) Ch. 63.

Though a person entering on the estate of an infant is treated in equity as his bailiff, the rule does not apply where the infant has never been in possession by himself, his guardian, or agent, and where the estate has been held by a title adverse to the infant. *Crowther* v. *Crowther*, 23 Beav. 305; 26 L. J., Ch. 702.

Held, that the plaintiff was not entitled to treat the defendant as bailiff, his entry, though made during infancy, being under an alleged agreement to purchase the plaintiff's interest in the estate. *Ib.*

Injunction.]—The jurisdiction which this court has to decree accounts against persons entering during minority is not taken away when the bill is not filed till the infant had attained twenty-one. Excepted case, in which an injunction was granted though not prayed for by the bill. *Blomfield* v. *Eyre*, 8 Beav. 250; 14 L. J., Ch. 260; 9 Jur. 717.

Possession by Several.]—Where it appears that several persons entered on and held the estate of an infant, one cannot be sued by the infant in equity as bailiff for an account of the rents and profits without making the others parties. *Wyllie* v. *Ellice*, 6 Hare, 505.

Ward of Court.]—The jurisdiction in infancy does not extend to order a person who had intermeddled with the minor's estate before the minor was made a ward of court to account, and therefore where a third person indebted to the estate of a minor, being ordered to account, refused, and was attached:—Held, that there is no authority to act by attachment against a person not in privity in the matter. *Brady, In re*, 1 Moll. 254.

Laches by Trustees.]—A. devises lands to trustees until debts are paid, and then to an infant and his heirs, defendant enters and levies a fine, and five years pass. Infant when of age brought an ejectment, but was barred because the trustees should have entered. Equity will relieve, and the infant in this case shall recover the mesne profits. *Allen* v. *Sayer*, 2 Vern. 368.

Where cestuis que trustent were infants, and the trustees, after the suit was established, allowed a balance to remain many years in the hands of bankers:—Held, that the trustees were liable. *Drever* v. *Mawdesley*, 18 L. J., Ch. 273; 13 Jur. 330.

Statute of Limitations.]—An infant who neglects to enter six years after he becomes of age, is barred by the Statute of Limitations from bringing a bill for an account of profits. *Lockey* v. *Lockey*, Pre. Ch. 518.

When opened.]—Solicitor who advanced money to infant, and acted as his confidential adviser, is a guardian to him, and an account settled, within a month after infant became of age, and without latter having any assistance, was opened, notwithstanding vouchers were delivered up. *Revett* v. *Harvey*, 1 Sim. & S. 502; 2 L. J. (o.s.) Ch. 39.

Unfair Bargain.]—If A. buy from B., a minor, under circumstances of distress, a reversion worth 40*l.* a year for 100*l.*, and sell it again in a few days for 200*l.*, equity will compel him to account to B. for the difference. *Spencer* v. *Chase*, 9 Mod. 29.

Practice—Motion.]—Executors not allowed on motion to account before the master; as account so taken would not be binding on the minors, no suit being depending to which they were parties. *Burke, In re*, 1 Ball & B. 74.

—— **Inquiry.**]—Upon a bill filed by an infant devisee for life, without impeachment of waste, except as to ornamental timber, for administration of the trusts, an inquiry was directed as to timber in the form adopted in *Tooker* v. *Annesley* (5 Sim. 235), excluding ornamental timber. *Consett* v. *Bell*, 1 Y. & C. C. C. 569; 11 L. J., Ch. 401; 6 Jur. 869.

Freeman—Election.]—Where the child of a freeman of London is to elect between the will and the custom, he is not obliged to elect until after the account taken. *Cowper* v. *Scott*, 3 P. Wms. 124, n.

D. MARRIAGE.

1. In General.

Canon Law.]—Though males at fourteen, and females at twelve, are capable of contracting marriage, yet, by the canons of 1603, it cannot be done without the consent of parents. *Smith* v. *Smith*, 3 Atk. 308.

Parties interested.]—In the case of the marriage of an infant, quære, how far parties having an interest that she should not be married are entitled to interfere. *Lee* v. *Hutton*, 14 Jur. 638.

The intended husband was allowed his costs of the proceedings. *Ib.*

Sanity.]—Jurisdiction to direct inquiry as to the marriage of an infant, whether of sound mind at the time, and whether for the infant's benefit that a commission should issue. *Sherwood* v. *Sanderson*, 19 Ves. 289; G. Cooper, 108; 13 R. R. 193.

Order not to Marry.]—Court took care of infant from her testamentary guardian, and ordered her not to marry without leave of court. *Tombes* v. *Elers*, Dick. 88. *And see cases*, supra, col. 1362.

Guardian Abroad.]—Application to approve of infant's marriage under 26 Geo. 2, c. 33, s. 12, testamentary guardian being abroad. *Blake* v. *Blake*, Dick. 459.

Approval by the Lord Chancellor of the marriage of a minor, whose guardians resided abroad, was made without a reference to the master. *Reibey, Ex parte*, 12 L. J., Ch. 436.

Act of Parliament.]—No instance of applying for an act of parliament for the marriage of an infant who has a money portion only. *Harvey* v. *Ashley*, 3 Atk. 613.

The reason for such applications in respect to real estate is, that the rights of infants shall not be bound by any agreement in relation to it, unless the husband shall have issue by that marriage. *Ib.*

Consent—Refusal by Father.]—The court has no power, under the act 4 Geo. 4, c. 76, to consent to the marriage of an infant, on the ground of the father refusing his consent from undue motives. *Colegrave, Ex parte*, 7 L. J., Ch. 236.

—— **Discovery.**]—A husband charged with procuring his marriage with a minor by falsely swearing that the consent of her parent had been given cannot be compelled to discover the facts relating to such charge upon an information under 4 Geo. 4, c. 76, s. 23, seeking the forfeiture of his interest in his wife's property. *Att.-Gen.* v. *Lucas*, 2 Hare, 566; 12 L. J., Ch. 506; 7 Jur. 1080.

—— **Evidence—Presumption of Validity.**]—On a question of legitimacy, there was in evidence a sentence of nullity of a marriage of a minor for want of her father's consent, and a statement in the parish register that the marriage took place by licence, with the consent of the mother. There was evidence that the sentence had been obtained by collusion between the husband and wife, and that the father did not disapprove of the match:—Held, fifty years after the date of the sentence of nullity, that the marriage ought to be presumed valid. *Harrison* v. *Southampton Corporation*, 4 De G. M. & G. 137; 22 L. J., Ch. 722; 18 Jur. 1; 1 W. R. 422.

Where a marriage of a minor was by licence, to which the consent of the father was requisite, his consent must be presumed, and this presumption is not upset by the register giving the mother as the consenting party. *Ib.*

Writ De Homine Replegiando.]—Writ de homine replegiando, against man running away with woman of weak mind and infant; on second day being married, husband and clergyman committed. *Ashton, Ex parte*, Dick. 23.

See Marriage of Ward of Court, supra, col. 1359.

2. SETTLEMENTS UNDER 4 GEO. 4, C. 76.

Purpose of Act.]—In settling the property of a minor under the Marriage Act (4 Geo. 4. c. 76), the court is bound to prevent the offending party from deriving any pecuniary benefit from the marriage, as far as may be without prejudicing the pecuniary interests of the innocent party, and of the issue of the marriage. Therefore the court refused its sanction to a general power of appointment being given to her, in case she should die before her husband; but the court approved of a power being given to her in case she survived her husband. *Att.-Gen.* v. *Lucas*, 2 Ph. 753; 18 L. J., Ch. 100; 12 Jur. 1011.

Held, also, that it was no objection to the settlement that a child dying in the lifetime of the father, after having attained a vested interest under its limitations, might bequeath such interest to the father. *Ib.*

In cases under the Marriage Act, when the property is settled by the court, the proper form of limitation comprises a general power to the wife of appointment by will, in default of children, without words to exclude the husband. *Att.-Gen.* v. *Read*, L. R. 12 Eq. 38; 24 L. T. 494.

Orders under that act as to settlements ought not to be made without the attorney-general appearing separately from the relator. *Ib.*

Where the husband incurs a forfeiture under the 4 Geo. 4, c. 76, s. 23, the court has no discretion to mitigate the penalty, but is bound to settle and secure all property, present and future, of the wife for the benefit of herself or the issue of the marriage. *Att.-Gen.* v. *Mullay*, 4 Russ. 329.

Where the husband alone incurs a forfeiture under the 4 Geo. 4, c. 76, s. 23, the court has no authority to order any settlement of the wife's property on the issue of the wife by any subsequent marriage. *Att.-Gen.* v. *Mullay*, 7 Beav. 351.

Under 4 & 5 Ph. & M.]—Forfeiture, by stat. 4 & 5 Ph. & M., on a woman marrying under sixteen, is during her husband's life and not during her own. *Ridley* v. *Wilson*, Amb. 73.

Marriage without Consent.]—An infant, beneficially entitled in fee, marries without the consent of her father. The father brings a bill against the husband and wife, and her trustees, that a provision might be made for her and her children out of these lands. Demurrer by the husband and wife allowed. *Micoe* v. *Powell*, 1 Vern. 39.

Reference—Limitations.]—On a fraudulent marriage of an infant tenant in tail in possession, subject to a term of years for securing a jointure, the court, being of opinion that while the jointure term lasted the title of the wife was equitable, ordered a reference for a proper settlement, but directed the settlement to be confined to the joint lives of the husband and wife, if the jointure term should so long continue, with liberty to apply as to a further settlement. *Wortham* v. *Pemberton*, 1 De G. & Sm. 644. *S. C.*, sub nom. *Newenham* v. *Pemberton*, 17 L. J., Ch. 99; 11 Jur. 1071.

False Affidavit as to Age.]—In order to sustain an information, under s. 23 of the Marriage Act, a false affidavit that a party is of full age is equivalent to a false affidavit that the necessary consent to a minor's marriage has been obtained. To sustain such an information it is not necessary that the minor was entitled at the time of the marriage to any property. *Att.-Gen.* v. *Severne*, 1 Coll. C. C. 313; 13 L. J., Ch. 399; 8 Jur. 595.

—— **Small Fund.**]—A man, by falsely swearing, obtained a licence for marriage with a woman under age, and married her. The wife was entitled to stock absolutely, and to a reversionary interest, expectant on her mother's death. The court declared the wife's fortune forfeited under the Marriage Act (4 Geo. 4, c. 76), and, having regard to the small amount of the fund, directed the fund to be transferred into court, and made a declaration as to the trusts of it. *Att.-Gen.* v. *Clements*, 40 L. J., Ch. 678; L. R. 12 Eq. 32; 24 L. T. 384.

Refusal to Execute Attachment.]—A writ of attachment for refusing to execute a settlement under the Infants' Marriage Act, ss. 19, 23, will not be issued until the settlement has been tendered personally for execution after service of the decree, and he has refused to execute it. *Att.-Gen.* v. *Wareing*, 28 W. R. 623.

Form of Pre-Nuptial Settlement.]—In an information under the Marriage Act, 1823, a pre-nuptial settlement having been made of the infant wife's property, judgment was directed

varying the form given by Seton, so as to follow the wording of ss. 23 and 24 of the Marriage Act, 1823. Head note in *Att.-Gen.* v. *Read* (L. R. 12 Eq. 38) explained. *Att.-Gen.* v. *Teather*, 43 L. T. 749; 29 W. R. 347.

Consent of Lord Chancellor.]—On the proposed marriage of the infant daughter of one who was non compos mentis, a petition was presented, under the stat. 4 Geo. 4, c. 76, s. 17, in order to obtain a licence. The petition was referred to the master; and the intended husband, by affidavit, stated that he had agreed to make a certain settlement. The master reported in favour of the marriage, and the report was confirmed. The parties did not avail themselves of the consent of the Lord Chancellor, but shortly afterwards married, under the 6 & 7 Will. 4, c. 85, without licence:—Held, that the proposal laid before the master amounted to a consent, which the court would enforce. *Cooke* v. *Fryer*, 1 Hare, 498; 11 L. J., Ch. 284; 6 Jur. 479.

3. SETTLEMENTS UNDER 18 & 19 VICT. C. 43.

Jurisdiction—Ward.]—Upon the marriage of two infants, one a ward of court, the court has no power to compel a settlement to be made by either of them before the 18 & 19 Vict. c. 43. *Field* v. *Moore*, 7 De G. M. & G. 691; 25 L. J., Ch. 66; 2 Jur. (N.S.) 145; 4 W. R. 187.

Post-Nuptial Settlement.] — 18 & 19 Vict. c. 43, extended by 23 & 24 Vict. c. 83, renders valid a post-nuptial settlement of an infant's estate made with the approbation of the court of chancery. *Powell* v. *Oakley*, 34 Beav. 575.

A post-nuptial settlement of an infant's property may be made with the sanction of the court under the Infants' Settlement Act, 1855. *Sampson and Wall, In re*, or *Wall, In re*, 53 L. J., Ch. 457; 25 Ch. D. 482; 50 L. T. 435; 32 W. R. 617—C. A.

The court has jurisdiction where a female infant has married under the age of seventeen, after she has attained that age, to direct a proper settlement of her property to be executed. *Phillips, In re*, 56 L. J., Ch. 337; 34 Ch. D. 467; 56 L. T. 144; 35 W. R. 284.

Extent of Act.]—The 18 & 19 Vict. c. 43, simply relieves infants from their incapacity, and gives no power to trustees or other persons to apply under it without the infant's consent. *Potter, In re*, L. R. 7 Eq. 484; 20 L. T. 355; 17 W. R. 347.

The court has no jurisdiction under the act over an infant who is of age to marry, unless he or she is previously a ward of court. *Ib.*

An infant cannot exercise a power over personal property (though authorised to do so by the instrument creating the power) which goes to defeat his own interest therein. *Armit, In re*, Ir. R. 5 Eq. 352.

The 18 & 19 Vict. c. 43, does not alter the legal status of the infant in respect of the alienation of the property or the exercise of a power under the trusts of the settlement. *Ib.*

Therefore where property was settled upon trusts to be declared by an infant, the court refused to transfer the funds to her appointee, under a deed-poll executed by her while under twenty-one. *Ib.*

Settlement not a Release to Trustees.]—A settlement made with the sanction of the court, on the marriage of an infant, of funds alleged to represent the infant's share under a will, does not operate as a confirmation of prior dealings by the trustees of the will, so as to preclude the cestui que trust from charging the trustees under the will with breaches of trust. *Zambaco* v. *Cassavetti*, L. R. 11 Eq. 439; 24 L. T. 770.

Form.]—In a settlement under the 18 & 19 Vict. c. 43, there ought not to be any limitation to collaterals, or any benefit conferred upon the guardian of the minor whose property is put in settlement. *M'Clintock, In re*, 10 Ir. Ch. R. 469.

—— **Construction.**]—The settlement of an infant's personal property gave an interest to the issue in the event of the husband surviving his wife, but none in the contrary event:—Held, first, that the issue could not in the latter event take by implication or construction. *Pringle* v. *Pringle*, 22 Beav. 631.

Held, secondly, that the husband had not by the settlement reduced the fund into possession. *Ib.*

Inquiry as to Propriety of Marriage.]—On a petition by a female infant under the 18 & 19 Vict. c. 43, praying a reference to approve of a proper settlement, the Lord Chancellor made the order without directing any inquiry as to the propriety of the marriage. *Dalton, In re*, 6 De G. M. & G. 201; 25 L. J., Ch. 751; 2 Jur. (N.S.) 1077; 4 W. R. 793.

The provisions of the act do not impose on the court any other duty than that of looking to the propriety of the settlement. *Ib.*

It is undecided whether the 18 & 19 Vict. c. 43, has relieved the court from inquiring into the propriety of the proposed marriage. But the court will make the reference where there is evidence of the propriety of the proposed marriage. *Strong, In re*, 26 L. J., Ch. 64; 2 Jur. (N.S.) 1241; 5 W. R. 107.

Reference to Chambers.]—A petition was presented under 18 & 19 Vict. c. 43, for a settlement in contemplation of the marriage of an infant of large fortune. The court directed the matter to be referred to chambers. *Olive, In re*, 8 L. T. 567; 11 W. R. 819.

When an intended husband was about to return to a post abroad, the court, on evidence of the desirability of the marriage, sanctioned the marriage, but directed a reference to chambers to approve the settlement forthwith. *Smith, Ex parte*, 22 W. R. 294.

"Property in Expectancy."] — An interest under a will, ambulatory at the date of the marriage settlement of an infant, but coming into operation during the marriage:—Held, to be "property in expectancy" within the meaning of s. 1 of the Infants' Settlement Act. *Johnson, In re, Moore* v. *Johnson*, 60 L. J., Ch. 499; [1891] 3 Ch. 48; 64 L. T. 696; 39 W. R. 509.

General Power of Appointment—Death of Infant under Twenty-One.]—Section 1 of the Infants' Settlement Act enables an infant, in exercising a general power of appointment for making a settlement upon his marriage, to make an absolute appointment so that, on the failure of the limitations of the settlement, the property will become his own. In the event of the death of an infant under twenty-one, s. 2 of the act does not

render the appointment void, except in the case of an infant tenant in tail. *Scott, In re, Scott* v. *Hanbury*, 60 L. J., Ch. 461 ; [1891] 1 Ch. 298 ; 63 L. T. 800 ; 39 W. R. 264.

4. AGREEMENTS FOR SETTLEMENTS.

By Parents.]—Agreements before marriage on behalf of infants, by parents and guardians, binding on infants. *Ainslie* v. *Medlycott*, 9 Ves. 19 ; 7 R. R. 135.

By Feme Covert.]—Feme, an infant, can in no case be bound by contract relative to her estate during her coverture. *Stamper* v. *Barker*, 5 Madd. 157.

An infant, by articles executed previously to her marriage, covenanted to settle her real estate. After she came of age, and during her coverture, she executed a settlement in pursuance of the articles, but did not levy a fine :—Held, that she was not bound either by the settlement or by the articles. *Brown* v. *M'Clintock*, 7 Ir. Eq. R. 347.

Articles upon marriage of feme infant tenant in quasi tail, covenanting to settle her estate when of age, not binding upon the remainderman, she dying before twenty-one. *Lecky* v. *Know*, 1 Ball & B. 210.

A covenant by an infant and her intended husband, in articles, to settle the descended estate on the issue of the marriage, is not in itself an alienation of the estate, and, therefore, does not withdraw it from the claims of the ancestor's creditors in a suit subsequently instituted by them. Whether a settlement executed pursuant to such articles after the institution of such suit would have that effect, quære. *Pimm* v. *Insall*, 1 Mac. & G. 449 ; 1 Hall & Tw. 487 ; 19 L. J., Ch. 1 ; 14 Jur. 357. Affirming 7 Hare, 193.

Money bequeathed to executors to accumulate till a niece attained twenty-one, and then to pay to the niece for her separate use. The niece married under twenty-one, and afterwards executed a settlement of this property, and joined her husband in the grant of an annuity secured on the legacy. She afterwards attained twenty-one :—Held, that the niece was entitled to have the legacy and accumulations for her separate use. *Johnson* v. *Johnson*, 1 Keen, 648 ; 6 L. J., Ch. 306.

Execution by one Party—Waiver.]—One by articles covenants, in consideration of his intended wife's conveying her lands to him and his heirs when she came of age, to settle certain lands of his own. After marriage the husband settles his lands mentioned in the articles, and recites the settlement to be in performance of the articles ; but never requires her to convey her land to him. The wife is a party to and executes this settlement. After the husband's death she enters on the settled lands. This settlement is a waiver by the husband of the proposed conveyance by the wife, and she shall hold as well her own estate as also the lands settled. *Lucy* v. *Moore*, 4 Bro. P. C. 343.

By marriage articles it was agreed that personal estate of the intended wife, a minor, and her contingent interest in a freehold estate, should be settled upon certain trusts, under which the husband took a life interest, and the wife, on failure of the trusts for the issue of the marriage, had a power of appointing the personalty by will. The personalty was afterwards duly transferred to the trustees of the articles. The issue of the marriage died, and the trusts for the issue failed. The wife died, having by will appointed the personalty to some of her relatives. Afterwards her interest in the freehold estate vested in possession, and went to her heir, no fine having ever been levied to confirm the articles :—Held, that as the husband knew that his wife was an infant, and as there was no settlement executed, nor were the articles recognised by her after twenty-one, the real estate was not bound by them ; and that the husband could not be entitled to any compensation out of the appointed personalty, the real and personal estate not having been conveyed and assigned upon the trusts of the articles through the negligence of the husband. *Campbell* v. *Ingilby*, 1 De G. & J. 393 ; 26 L. J., Ch. 654 ; 5 W. R. 837.

By a marriage settlement, made whilst the intended wife was an infant, the husband covenanted to assign to trustees certain property to which she was entitled to her separate use :—Held, that the settlement was inoperative. *Waring, In re*, 21 L. J., Ch. 784 ; 16 Jur. 652.

Partial Execution.]—Previously to marriage in 1790, M. A. F., an infant tenant in common in tail, under a settlement dated 1767, executed an indenture settling her share upon her husband for life, with remainder to herself for life, with remainder to the issue of the marriage. M. A. F., when a widow, but still an infant, married C. F. Later on the real estate was sold and vested in trustees, who, by indenture dated 1842, declared that they would stand possessed of M. A. F.'s share of the stock upon the trusts of the deed of 1790. Neither M. A. F. nor C. F. was a party to the deed of 1842. M. A. F. died in 1845, C. F. in 1849 :—Held, that the indenture of 1790 had no effect upon M. A. F.'s interest, she being under age when it was executed ; that the indenture of 1842 not having been executed by M. A. F., the presumption must be that the property remained by way of resulting trust, according to the trusts of the original settlement, and that M. A. F.'s interest in the stock was the same as her interest in the real estate, i.e. an estate tail ; and the stock was ordered to be paid to her personal representative. *Fozard's Trust, In re*, 1 K. & J. 233 ; 3 W. R. 219. See *S. C.*, 24 L. J., Ch. 441.

Whether, if M. A. F. had put her share of the purchase money into the hands of her trustees, it might not have been held that the representative of an only child of M. A. F. by her first marriage was entitled, quære. *Ib.*

—— **Reduction into Possession.**]—An infant entitled, under a will, to a reversionary interest in residuary personalty expectant on the death of a life annuitant, executed marriage articles, agreeing, when of age, to settle all her interest under will on the trusts of the articles. She attained her majority. She did no act to confirm the articles, but always refused so to do. The trustee of the articles was also an executor of the will. As executor he retained in his hands the surplus interest arising from the expectant share of the infant. As trustee of the articles he lent some of the trust moneys to the husband, on the security of a mortgage from him. The husband and wife jointly petitioned the court in respect of the trust accounts, and the wife signed a receipt for interest on the mortgage money. The husband died, and after his death the wife gave the trustee of the articles a receipt for other supposed arrears of interest on the mortgage

money, assuming it to be her trust moneys under the articles. The mortgage was called in. The annuitant died, and the residuary personalty then became divisible:—Held, that as to the surplus interest and the mortgage money there had been a reduction into possession during the husband's life, and that they were subject to the articles. *Rawlins* v. *Birkett*, 25 L. J., Ch. 837; 4 W. R. 795.

Part of the reversionary interest consisted of the purchase money of real estate which had been sold, and of real estate ordered to be sold, but not sold. The purchase money was in court:—Held, that she was entitled to the purchase money absolutely, and to an equitable fee in the unsold realty, independent of the articles. *Ib.*

Dissolution of Marriage.]—A woman, married during her infancy, was deserted by her husband and obtained a dissolution of the marriage. Under articles of settlement, personal estate belonging to her was held on trust for her absolutely after the death of her husband in her lifetime. She never assented to the settlement:—Held, that she was entitled to have the whole fund paid or transferred to her. *Swift* v. *Wenman*, 39 L. J., Ch. 336; L. R. 10 Eq. 15; 22 L. T. 194; 18 W. R. 480.

Trust for Next of Kin.]—Covenant by husband that the wife's real and personal property should be settled upon trust for himself for life, then for her for her life, and then, in default of issue, upon trust for her next of kin. The property was duly vested in the trustees. The husband died, and there was no issue of the marriage:—Held, that the trust for the next of kin was not binding against the wife. *Gibbs* v. *Grady*, 41 L. J., Ch. 163; 20 W. R. 257.

Specific Performance.]—By articles an infant and her husband covenanted to assign a reversionary interest in trust funds, in trust, for her and her husband, and the children of their marriage. A bill for specific performance, filed by the children whilst the fund remained outstanding, was dismissed. *Borton* v. *Borton*, 16 Sim. 552; 18 L. J., Ch. 219; 13 Jur. 247.

Personal Estate — Consent of Infant.] — Articles, on the marriage of a female infant, recited that all the real and personal estate to which she might be entitled should be settled, and the husband covenanted, "in case she would voluntarily consent thereto, but not otherwise," that he and she would settle the same:—Held, that the consent applied only to real estate, and that the personal estate must be settled, though the wife refused to consent. *Daniel's Trust, In re*, 18 Beav. 309.

When a Fair Settlement.]—To bind an infant, the marriage settlement must be fair and reasonable, and not tend to deprive her of everything. *Williams* v. *Williams*, 1 Bro. C. C. 152.

Infant, to express his consent, joins in a settlement by a woman in contemplation of marriage with him; he is bound thereby, if on fair consideration, and no fraud. *Strathmore (Countess)* v. *Bowes*, 1 Ves. Jun. 28; 1 R. R. 76.

Chattels Real.]—Articles of settlement of chattels real of infant on marriage will bind her and husband; and although no settlement be made pursuant to articles, wife is not entitled to any interest by survivorship. *Trollope* v. *Linton*, 1 Sim. & S. 477; 2 L. J. (o.s.) Ch. 3.

Who bound by Covenants.]—An agreement by husband and wife, an infant, in an ante-nuptial settlement, for the settlement by the husband and wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband. *Smith* v. *Lucas*, 18 Ch. D. 531; 45 L. T. 460; 30 W. R. 451.

A male infant marries an adult female, who, by settlements, covenants that her estate shall be settled: he is bound by her covenant. *Slocombe* v. *Clubb* or *Glubb*, 2 Bro. C. C. 545.

A marriage settlement, the husband being adult and the wife a minor, is binding on the former, though not on the latter. *Cave* v. *Cave*, 15 Beav. 227.

—— **Voidable by Infant.**]—Marriage articles executed by an adult and an infant, there being no settlement under the Infants' Settlement Act, nor any afterwards executed, though voidable by the infant, are binding on the adult. *Smith's Trusts, In re*, 25 L. R., Ir. 439.

Acts in Fraud of Settlement.]—A female infant is not bound by an agreement to settle her real estate, if she does not accede to it when of age and after coverture, but the husband shall never be permitted to aid her in defeating it, nor is her act during coverture effectual. *Durnford* v. *Lane*, 1 Bro. C. C. 106. S. P., *Milner* v. *Harewood (Lord)*, 18 Ves. 277.

Effect of an agreement, on marriage of a female infant, to settle her real estate. It would be a fraud upon the husband's contract if he were to consent to a disposition of the estate by his wife calculated to defeat the settlement. *Blake, Ex parte*, 16 Beav. 463.

After-acquired Property.]—An infant married without any settlement executed, but a draft had been prepared which contained a covenant to settle her future property. On payment out of court to the trustees of a post-nuptial settlement, the court directed that a covenant similar to that in the draft should be indorsed on the post-nuptial settlement. *Hoare, In re*, 7 L. T. 523; 11 W. R. 181.

5. Ratification and Repudiation of Settlements.

General Rule — After-acquired Property.]—Ratification of a covenant made during infancy, consists in recognising the covenant as binding, not in making a new covenant, or a new disposition of the property comprised in the covenant. *Harris* v. *Wall* (1 Ex. 122) and *Mawson* v. *Blane* (10 Ex. 206), followed. *Hodson's Settlement, In re, Williams* v. *Knight*, 63 L. J., Ch. 609; [1894] 2 Ch. 421; 8 R. 346; 71 L. T. 77; 42 W. R. 531.

The disability of coverture does not preclude a married woman from affirming a covenant entered into by her while a spinster and an infant. *Wilder* v. *Pigott* (22 Ch. D. 263) and *Greenhill* v. *North British and Mercantile Insurance Co.* (3 R. 674) followed. *Ib.*

Infants' Relief Act, 1874.]—The Infants' Relief Act, 1874, does not apply to a marriage settlement executed by an infant; but such a settlement is, as against the infant, voidable only.

Jones, Ex parte (18 Ch. D. 122), explained. *Duncan* v. *Dixon*, 59 L. J., Ch. 437; 44 Ch. D. 211; 62 L. T. 319; 38 W. R. 700.

Accepting Jointure or Pin-money.]—An infant is bound in a court of equity by a marriage contract, especially if she accept pin-money, or after her husband's death a jointure under the contract. *Smith* v. *Low*, 1 Atk. 489.

Partial Accession.]—Partial accession at the age of twenty-one, to a settlement by a female infant, an election to abide by the whole. *Milner* v. *Harewood* (*Lord*), 18 Ves. 277.

Interest of an infant, not affected by the recital of a deed made during infancy. *Id.* 274.

Female infant not bound by agreement to settle her freehold estate on marriage, without an option when twenty-one to refuse; but her heir bound under the circumstances; the settlement confirmed by her repeated acts and fines. *Id.* 259.

Lunatic.]—An infant, upon her marriage, executed a settlement of two reversionary interests in personalty. While she was widow one of the funds fell into possession, and was, by her direction, paid to the trustees of the settlement, upon the trusts thereof. Before the second fund fell into possession she had become a lunatic:—Held, that she must be taken to have confirmed the settlement in toto, and that the second fund was subject to the trusts thereof. *Davies* v. *Davies*, 39 L. J., Ch. 343; L. R. 9 Eq. 468; 22 L. T. 505; 18 W. R. 634.

Agreement in Writing.]—An infant, prior to marriage, wrote to his future wife saying he would make her a present of a portion of his property, viz. seven specified houses, which would bring her in 200*l.* a year and make her "happy for life." He subsequently came of age, married, and executed a post-nuptial settlement which did not refer to the agreement, by which he settled nine houses, including the seven, on his wife for life, remainder to himself for life, remainder to the wife in fee:—Held, that there had been no ratification in writing of the agreement, as required by 9 Geo. 4, c. 14, and that the settlement was bad as against a purchaser from the husband. *Trowell* v. *Shenton*, 47 L. J., Ch. 738; 8 Ch. D. 318; 38 L. T. 369; 26 W. R. 837—C. A.

By Deed.]—An infant feme covert entitled to property for her separate use, executed a post-nuptial settlement. Subsequently, when of age, she executed a deed confirming the settlement. She is precluded from attempting to set the settlement aside. *Merryweather* v. *Jones*, 4 Giff. 499; 10 Jur. (N.S.) 290; 10 L. T. 62; 12 W. R. 524.

Election—Post-nuptial Settlement.]—A case of election may arise where a lady marries while an infant, and after she becomes of age joins in a settlement which includes property of her husband, property of her father, and property in which her father has a life interest, and she has an absolute interest in reversion, and she becomes discovert, and then claims the reversionary property independently of the settlement. *Codrington* v. *Codrington*, 45 L. J., Ch. 660; L. R. 7 H. L. 854; 34 L. T. 221; 24 W. R. 648.

Appointment of New Trustee.]—By an ante-nuptial settlement the wife, a minor, covenanted to settle after-acquired property. After attaining twenty-one the husband and wife by deed appointed a new trustee of the settlement. Subsequently the wife acquired property under a will:—Held, that the appointment of a new trustee, in accordance with the usual power, by a married woman did not show her intention to confirm the settlement. *Haywood* v. *Tidy*, 63 L. T. 679.

Joint Tenancy—Severance—Cæterorum Grant.]—Where on the marriage of a female infant her interest as one of several joint-tenants in a reversionary property is settled, the settlement is valid and effectual until avoided, and operates to sever the joint-tenancy. *Smith* v. *Lucas* (18 Ch. D. 531) considered. *Burnaby* v. *Equitable Reversionary Interest Society*, 54 L. J., Ch. 466; 28 Ch. D. 416; 52 L. T. 350; 33 W. R. 639.

The lady, in exercise of a power given by the settlement, appointed all her property to her husband absolutely and appointed him executor:—Held, that the husband could make a good title to the wife's interest without any cæterorum grant. Held also, that the husband's title was sufficiently clear to be forced upon a purchaser. —*Ib.*

Reversionary Interest.]—By a marriage settlement, the wife being an infant, personal property was assigned by the husband and wife to trustees upon the usual trusts. There was a covenant by the husband that he and his wife would, so soon as she should attain twenty-one, convey and assign real and personal property to which she was entitled. There was an agreement to settle the wife's after-acquired personal property. The wife (a week after she attained twenty-one) and her husband executed a deed, which she acknowledged, by which she assigned all the personal property expressed to be assigned by the settlement which had not become vested in possession, and conveyed property purported to be conveyed by the settlement upon the trusts thereof. At the date of the settlement she was contingently entitled to a reversionary interest in personal estate. It fell into possession, and it was by the direction of the wife and her husband invested in the names of the trustees:—Held, following *Barrow* v. *Barrow* (4 K. & J. 409) and *Smith* v. *Lucas* (18 Ch. D. 531), that the wife could during her coverture elect to confirm the settlement, and that she had by her acts elected. *Wilder* v. *Pigott*, 52 L. J., Ch. 141; 22 Ch. D. 263; 48 L. T. 112; 31 W. R. 377.

The wife having become of unsound mind, if she had not elected the court would have made an election on her behalf, it having jurisdiction to bind the equitable interests of lunatics, not so found by inquisition, when it appears to be for their benefit. *Jones* v. *Lloyd* (L. R. 18 Eq. 265) followed. *Ib.*

—— **Consent Decree.**]—By a settlement the intended husband and wife (a minor) agreed to convey to trustees, as soon as possible, funds to which the wife was contingently entitled in reversion, and the husband agreed to bring certain property into settlement. After the husband's death, in a suit relating to property agreed to be settled by him, in which the widow, as administratrix, was a defendant, a decree was made by consent by which part of the property was paid to the trustees:—Held, a confirmation by the widow of the settlement. The widow

married again; and the reversionary funds fell into possession, and upon a petition by the husband and wife an order was made that the wife's funds be carried over to an account entitled the "Account of the settlement made on the first marriage." *White* v. *Cox*, 45 L. J., Ch. 685; 2 Ch. D. 387; 34 L. T. 418.

On a suit by the second husband to have the settlement declared void against him and the children of the second marriage:—Held, that the presentation of the petition, followed by the order of the court, amounted to a confirmation by second husband of the settlement. *Ib.*

—— **Annuity.**]—In a marriage settlement, the father of the lady (a minor) covenanted to pay an annuity to his daughter during life, and after her death to her husband, she covenanting that the share to which she might become entitled under a will should be settled upon the trusts of the settlement. She never formally ratified the settlement, but regularly received the annuity:—Held, that she had ratified the settlement by her acts, and that the fund under the will was bound by the trusts of the settlement. *Smith, In re*, 38 L. T. 466.

Repudiation—Within what Time.]—Semble, that a settlement made upon marriage of the property of an infant, with sanction of court, may be afterwards repudiated by the infant coming of age and, if a female, surviving her husband. *Ashton* v. *M'Dougal*, 5 Beav. 56; 11 L. J., Ch. 344; 6 Jur. 447.

On the marriage of a female infant, her reversionary interests in choses in action were settled under the court. She afterwards contracted subsequent marriages, but no further settlement was executed. Part of the reversionary interests fell into possession during the first coverture, and part during the second, and were transferred to the trustees:—Held, that the wife having survived, and not having called for a transfer of the fund, must be deemed to have acquiesced in and adopted it, as it was for her interest to do so, and that her second husband was bound by it. *Ib.*

Married Women's Property Act, 1882.]—Any property of a woman married after the Married Women's Property Act, 1882, which would have been bound, apart from the act, by an assignment of the husband alone in a settlement, is still bound by such assignment under s. 19, notwithstanding s. 2, which makes the property of a woman married after the act her separate property. *Hancock* v. *Hancock* (38 Ch. D. 78) applied and followed. *Stevens* v. *Trevor-Garrick*, 62 L. J., Ch. 660; [1893] 2 Ch. 307; 3 R. 468; 69 L. T. 11; 41 W. R. 412.

What is a Reasonable Time.]—A female infant executed a marriage settlement of a reversionary interest in real estate. The interest fell into possession in 1890, and the wife then received payments in respect of income from the trustees of the will under which she was entitled:—Held, that the wife was entitled to repudiate, and that a reasonable time to repudiate is when the question arises whether anything is to be received under the settlement. *Jones, In re, Farrington* v. *Forrester*, 62 L. J., Ch. 996; [1893] 2 Ch. 461; 3 R. 498; 69 L. T. 45.

An infant's settlement being voidable becomes binding if not repudiated within a reasonable time after the settlor's majority. In determining what is a reasonable time the fact that the property did not fall into possession till some years after such majority, or that the settlor was imperfectly acquainted with the terms of the settlement, cannot be taken into consideration. *Edwards* v. *Carter*, 63 L. J., Ch. 100; [1893] A. C. 360; 1 R. 218; 69 L. T. 153; 58 J. P. 4.

—— **Compensation.**]—By a marriage settlement the husband's property was settled on the husband for life, remainder to the wife (a minor) for life, for her separate use, without power of anticipation during any coverture, with trusts in remainder for the issue. The wife's property was settled on the wife during the joint lives of the parties, for her separate use, without power of anticipation, with trusts for the issue. The husband and wife covenanted to settle the wife's after-acquired property on the same trusts as the wife's other property. The settlement was not executed under the Infants' Settlement Act. The wife was entitled to certain reversionary interests. She also took under the settlement certain interests as to which she was not restrained from anticipation. There was issue of the marriage. The husband obtained a decree nisi for divorce. Before the decree was made absolute the wife brought an action claiming that her covenant was inoperative. After decree absolute the plaintiff married again. The plaintiff had not confirmed the settlement as regarded certain reversionary interests still outstanding:—Held, that as regarded these interests the plaintiff's covenant was inoperative, but that she was put to her election, and that if she elected not to be bound by her covenant she must compensate, out of any benefit she took under the settlement, those whom she disappointed by her repudiation. This order, however, was not to apply to the income of the husband's property during the plaintiff's present coverture, nor to the income of the wife's property during such portion of the plaintiff's present coverture as the defendant should live:—Held, further, that the plaintiff had not already made her election by bringing the action, but must elect within one month from the judgment. *Hamilton* v. *Hamilton*, 61 L. J., Ch. 220; [1892] 1 Ch. 396; 66 L. T. 112; 40 W. R. 312. And see *Codrington* v. *Codrington*, supra, col. 1395.

Agreement to assign Wife's Property to Trustee.]—The plaintiff's husband, who married when he was seventeen, agreed in writing before the marriage, and in consideration of the same, to assign all her property to a trustee for her sole and separate use. At the time of the marriage the plaintiff was possessed of leasehold property in her own right, and of other leasehold property in trust for her son by a former marriage, and the defendant, her agent, received the rents both before and after the marriage. Immediately after the last marriage the plaintiff was deserted by her husband, and she obtained a protection order, under 20 & 21 Vict. c. 85, s. 21, protecting all her earnings and property acquired since the desertion. The action was brought by the plaintiff without her husband (still an infant) for the rents received by the defendant after the marriage. The husband made no claim to any of the rents, but the defendant refused to pay them to the plaintiff:—Held, that the agreement to assign was void as against the infant husband. *Kingsman* v. *Kings-*

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Held, by Lord Selborne, L.C., and Baggallay, L.J., that the agreement being void against her husband she could not recover the money received from the property which belonged to her absolutely. *Ib.*

Held, by Brett, L.J., that she could, since the husband had made no claim, and therefore the defendant could not set up the husband's right as an answer to the action. *Ib.*

Held, also, that the protection order did not apply, but that the plaintiff was entitled to sue alone and to recover the money received from the property of which she was trustee. *Ib.*

6. Payment out of Court.

Feme Covert.]—The court declined taking the consent of a married woman who was a minor to the payment out of court of money to which she was entitled. *Stubbs* v. *Sargon*, 2 Beav. 496 ; 3 Jur. 1118.

The court will not take the consent of a married woman, who is under age, to the payment to her husband of money to which she is entitled. *Abraham* v. *Newcombe*, 12 Sim. 566 ; 6 Jur. 433.

A fund in court belonging to an infant married woman will not be paid out to her husband, as she cannot waive her equity to settlement. *Angibau, In re* (15 Ch. D. 228), noticed. *Shipway* v. *Ball*, 50 L. J., Ch. 263 ; 16 Ch. D. 376 ; 44 L. T. 49 ; 29 W. R. 302.

—— **Consent.**]—The court will take the consent of a married woman, though a minor, to the payment to her husband of a sum to which she is entitled. *Gullin* v. *Gullin*, 7 Sim. 236.

On the marriage of an infant feme, a settlement was made of funds in court to which she was entitled. On her attaining twenty-one a petition was presented for payment to the trustees :—Held, that the consent of the lady in court or by commission was necessary. *Day* v. *Day*, 11 Beav. 35.

—— **To Solicitor.**]—An infant was entitled on her attaining her majority to a share of a fund in court. The court declined to order the share to be paid out a month before majority to her solicitor, but gave liberty to apply in chambers for payment, on a certificate of the chief clerk that she had become entitled. *Sothern, In re*, 9 L. T. 534.

E. Advancement and Satisfaction.

1. In General.

What is Proper.] —The father is the only judge of what is a proper advancement for his child. *Cook* v. *Arnham*, 3 P. Wms. 285.

A parent's duty to provide for all his children will extend to posthumous ones. *Wallis* v. *Hodson*, 2 Atk. 116.

What is.] —Advancement is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy before the time fixed by the trust instrument for their obtaining the absolute interest in a portion or a whole of that to which they would be entitled. (Per Cotton, L.J.) *Aldridge, In re, Abram* v. *Aldridge*, 55 L. T. 554—C. A.

Absence of Express Words — Power whether inferred.]—In the absence of express words authorising the payment, by way of advancement, of part of the corpus of an estate to a person who, under the trust instrument, can never become absolutely entitled to a share of the corpus, the court will not infer a power to the trustees to advance a sum out of the corpus from the mere fact that the instrument contains a power of advancement simpliciter. *Ib.*

Power of, exercisable with Consent of Life Tenant—Bankruptcy.]—Trust of half income of fund to J. for life, and after his death in trust for W. (an infant), empowering the trustees to raise any part not exceeding one-half of W.'s share for his advancement, subject to the consent in writing of J. :—Held, that J.'s power of consenting was not extinguished by his bankruptcy, but could not be exercised without the sanction of his trustee in bankruptcy acting under the direction of the court of bankruptcy. *Cooper, In re, Cooper* v. *Slight*, 27 Ch. D. 565 ; 51 L. T. 113 ; 32 W. R. 1015.

Son's Wages Satisfied by Legacy.] —A son, placed by his father in business, accounted to his father for all profits ; having made no demand for wages during his father's life, was held not entitled as a creditor after his father's death, or if he had a demand it was satisfied by a legacy to a greater amount. *Plume* v. *Plume*, 7 Ves. 258.

Payment of Son's Debt.]—A father voluntarily paid a debt due from his son, and the father died insolvent :—Held, that there was no debt from the son to the father's estate. *Graham* v. *Wickham*, 31 Beav. 478.

Son's Wages Received by Father.] — Father receives his child's earnings while living with him, and becomes bankrupt ; the child, by agreement, admitted a creditor for a particular sum to avoid an inquiry. *Macklin, Ex parte*, 2 Ves. Sen. 675.

Father-in-Law—Debt not satisfied by Legacy.] —A legatee, son-in-law to the testator, was held entitled to his legacy discharged from debts due by him to the testator, and a debt for which the testator was his surety upon evidence, from the testator's accounts, letters, and memorandums, in his handwriting. *Eden* v. *Smith*, 5 Ves. 341.

—— **Debt Secured by Mortgage.**]—A father-in-law, who paid a mortgage debt secured on his son-in-law's property and took a receipt from the mortgagee, in which the mortgagee agreed to reconvey the property when required :—Held, not to have shown an intention to exonerate the property. *Fenwick* v. *Potts*, 8 De G. M. & G. 506.

Advances, how brought into Account.]—In administering the estate of an intestate who has made advances to his children, the inquiry as to advances should follow the words of the Statute of Distributions. *Ennis, In re, Waterton* v. *Ennis*, 43 L. T. 748 ; 28 W. R. 885.

A husband directed his trustees to pay the income of one moiety of his residuary estate to his widow during her life, and to divide the other moiety between his children in equal shares, as tenants in common. Advances were made by

the testator to children after the will:—Held, that the advances could only be brought into account for the benefit of the children among themselves, and not for the benefit of the widow. *Meinertzhagen* v. *Walters*, 41 L. J., Ch. 801; L. R. 7 Ch. 670; 27 L. T. 326; 20 W. R. 918.

—— **Direction by Testator.**]—A testator having directed an allotment of his residuary estate into shares among his children, recited that he had made provisions by advancement for some of them, and proceeded to direct that "such advances should be brought into hotchpot," adding a declaration of the principle on which the money was to be brought into hotchpot upon a statement of figures and calculation of the amount of advancement, and of his residuary property:—Held, that the calculation of the testator was only an illustrative example of his meaning, and that the bringing into hotchpot should be according to the legal meaning of that term. *Maclaren* v. *Stainton*, 30 L. J., Ch. 723; 7 Jur. (N.S.) 715; 4 L. T. 715; 9 W. R. 908.

A testator divided his property between his son and married daughters, and he declared that the debts due to him from his son and his sons-in-law should be "paid or accounted for to his executors," before his children should receive any part of his estate. By a codicil he cut down his son's interest to a life estate, and gave interests in share to his wife and children:—Held, that the son was only to bring the amount of his debts into hotchpot as regarded his two sisters. *White* v. *Turner*, 25 Beav. 505.

Trust to convert, and after the death or second marriage of his wife to hold the proceeds for his child or children living at that time, and the issue then living of his child or children dying before that period, such objects to take as tenants in common according to the stocks. His real estate was to be considered as converted from his death, and it was declared that no child, to whom or to whose husband he should have paid any portion in his lifetime, should participate without bringing the portion so paid into hotchpot. On the marriage of one of his daughters before the will, the testator covenanted to stand seised of a freehold house to her use, her heirs and assigns for ever. She died leaving issue:—Held, that the hotchpot clause could not be extended to the issue of the testator's children, so that the value of the house given to his daughter was not to be deducted from the share of her issue. *Hewitt* v. *Jardine*, L. R. 14 Eq. 58; 26 L. T. 546.

A testator gave his residuary estate in trust for sale, and to stand possessed of the proceeds in trust for his children, nominatim, in equal shares, including F. and J.; and after reciting that he had advanced 4,000*l.* to F. and 500*l.* to J., he declared that "neither of my said sons, nor any of my children who shall receive any sum for their advancement, shall be entitled to any part of my residuary estate without bringing the said sums of 4,000*l.* and 500*l.*, and all other sums so given, with interest thereon at 5*l.* per cent. per annum from the times of advancing the same into hotchpot." By a codicil the testator revoked the provision made in favour of J., thereby causing a lapse of J.'s one-sixth of the residue:—Held, that the codicil must be read as if it expressly declared a trust of the lapsed share for the testator's wife and children according to the Statute of Distributions; and accordingly that the hotchpot clause applied to the shares taken by the children under the codicil, but did not apply to the widow so as to increase her share under the codicil. *Stewart, In re, Stewart* v. *Stewart*, 49 L. J., Ch. 763; 15 Ch. D. 539; 43 L. T. 370; 29 W. R. 275.

Devise in Shares.]—A. having seven children makes an executor in trust, and devises to each child one-seventh of his personal estate; one of the children dies in A.'s lifetime, and one of the six surviving children has been advanced; yet this child shall take his full share of the seventh part, without bringing what he had received before into hotchpot. *Cowper* v. *Scott*, 3 P. Wms. 124.

Statute-barred Debts or Advances.]—A testator directed his residuary estate to be divided amongst his six children, with a clause that any debt owing to him at his decease by any of his children should be considered as part of his residuary estate. One of his sons owed him a debt, but part of it was barred by the Statute of Limitations:—Held, that the whole must be paid out of his share, and that the clause amounted to a hotchpot clause. *Rose* v. *Gould*, 15 Beav. 189; 21 L. J., Ch. 360.

—— **Deduction by Executors.**]—A husband by will gave his property to his wife for life, and after her death equally between his children, subject to a proviso that if, at the period of distribution, B. "should be indebted to any of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share." B. had borrowed from one brother 100*l.*, and other sums from another brother. Nearly all these debts had become barred by the statute:—Held, that the trustees were authorised to deduct from B.'s share all the debts, though barred by the statute. *Poole* v. *Poole*, L. R. 7 Ch. 17; 25 L. T. 770; 20 W. R. 133.

Where Father had no Title to Property advanced.]—The court will supply a defective conveyance in favour of children; but there is no case where the court would decree satisfaction out of assets, if the father had no title to the thing he conveys to his child. *Saltern* v. *Melhuish*, Amb. 251.

Breach of Trust—Following Trust Funds—Advance by Father to Son.]—A father obtained control over the funds, subject to the trusts of a settlement under which his wife and he took successive life interests with remainder to his two sons. He realised the funds, and treated the proceeds as his own property. He made to his sons certain advances which were held not to be a satisfaction of his liability to the sons in respect of the trust funds. The advances to one of the sons comprised a sum of 4,000*l.* dock stock which had been purchased with a sum of 2,885*l.*, part of the proceeds of the trust funds. The father, his wife, and son were all dead. There was nothing to show that the son was aware that there had been any dealing with the trust funds, or out of what money the dock stock had been purchased; and the correspondence which passed on the occasion of the advance showed that the intention was that the father should make it out of his own money, and that the son's share under the settlement was not to be dealt with:—Held, that the son was not to be taken as having to the extent of the 2,885*l.* received

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his share of the trust funds, and the father's estate was accountable for that sum equally with the remainder of the proceeds of the trust funds. *Crichton* v. *Crichton*, 65 L. J., Ch. 491; [1896] 1 Ch. 870; 74 L. T. 357—C. A.

Law in Scotland.]—The English rule against double portions to children does not obtain in Scotland. *Johnstone* v. *Haviland*, [1896] A. C. 95.

And see PORTION—WILL.

2. BY PARENT IN NAME OF CHILD.

Presumption in Equity.]—Purchase in the name of another is a trust for the party who pays the consideration, except by a parent in the name of his child, which is presumed an advancement; the presumption capable of being rebutted, but does not give way to slight circumstances. *Finch* v. *Finch*, 15 Ves. 43; 10 R. R. 12.

When a father purchases property with his own money, and takes a conveyance in the name of his son, the law presumes it to be an advancement, and not a trust. Those who allege a trust are bound to prove it; and the evidence for that consists mainly, if not exclusively, of contemporaneous circumstances. *Christy* v. *Courtenay*, 13 Beav. 96.

Purchase by a father in the name of his son an advancement. *Grey* v. *Grey*, Finch, 338; 1 Ch. Ca. 296; 2 Swanst. 594; 19 R. R. 150. S. P., *Mumma* v. *Mumma*, 2 Vern. 19.

Eldest Son.]—If a father purchases land in the name of his eldest son, this shall be an advancement, and not a trust, though the father had been in possession and had received the rents and profits. *Grey* v. *Grey*, 1 Ch. Ca. 296; Finch, 338; *Scroope* v. *Scroope*, 1 Ch. Ca. 27; *Elliot* v. *Elliot*, 2 Ch. Ca. 231, where this was said to be the constant rule; but Lord Chancellor, in that case, said that where a parent made a purchase in the name of an unadvanced child, and where in the name of one already advanced, in the former case it should be considered an advancement, and in the latter a trust for the parent. See *Shales* v. *Shales*, 2 Freem. 252, where this rule is said to have been so settled before the Statute of Frauds, and it is stronger since; and in *Redington* v. *Redington*, 3 Ridgw. P. C. 181, it was said by Fitzgibbon, Ch., that the rule laid down in *Grey* v. *Grey*, supra, and also in *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111, and in *Taylor* v. *Taylor*, 1 Atk. 386, has this strong additional circumstance in the two latter cases, that parol evidence was there held admissible on the part of the advanced son to rebut a claim of trust. Bridgm. Ind.

A father, having provided for his eldest son, but not for the rest, takes a security for the proceeds of an estate, sold in the name of himself and eldest son:—Held, a trust for the father's personal representatives. *Pole* v. *Pole*, 1 Ves. sen. 76.

—— **Dower.**]—A. purchases lands in his eldest son's name, and puts him into possession, and the son falling sick, takes a declaration of trust from him, and after the son's recovery he continues in possession. The son marries and dies, and the father gets a conveyance from his youngest son. The eldest son's wife shall have dower in these lands. *Bateman* v. *Bateman*, 2 Vern. 436.

Son already Advanced.]—Where there is no clear proof of a trust between father and son, the law will never imply a trust. If a son is married in his father's lifetime, and by him fully advanced, there a purchase by a father in the name of a son may be a trust for the father; but where the son is not advanced but in part, it must be taken as an advancement for the son. *Redington* v. *Redington*, 3 Ridgw. 176.

The presumption that a voluntary transfer by a father into a son's name is a gift, is independent of any consideration of the son's need of advancement, or of the relative means of the father and son; and the circumstance that the father is very old, and the transfer is made from his name by the son acting under a power of attorney, does not tend to rebut the ordinary presumption. *Hepworth* v. *Hepworth*, 40 L. J., Ch. 111; L. R. 11 Eq. 10; 23 L. T. 388; 19 W. R. 46.

A grandfather settled 1,000*l.* on each of his granddaughters, the children of his only son, and afterwards he transferred all the property which he possessed into the name of his son. He died at the age of ninety-four, having resided the last ten years with his son, a man of considerable property:—Held, that the transfer to the son operated as an absolute gift to him. *Ib.*

Younger Son—Joint Tenants.] — A purchase made in the name of a younger son, the heir cannot maintain it a trust for the father. *Stileman* v. *Ashdown*, 2 Atk. 480.

When a father takes an estate in it to himself for life, with remainder to his son in fee, as the father has the profits for life he is liable to the creditors. *Ib.*

In the judgment of Lord Hardwicke, cases have gone full far enough in favour of advancements. *Ib.*

Purchase in the son's name, though the possession continued in the father, has been held in advancement of the son, because the father is the natural guardian during minority. *Ib.*

Purchase in the names of father and son, as joint tenants, is no advancement to the son; for, till a division, the father has possession of the whole, and even after it a moiety, besides the chance of the other moiety by survivorship. *Ib.*

Possession by Father.]—A father purchases lands in his son's name, then eighteen years of age; the father continued in possession till his death. This shall be an advancement for the son. *Taylor* v. *Taylor*, 1 Atk. 386.

Purchase in Name of Trustee.] — Father buys an estate in the name of his younger son and of a trustee; it shall be taken as an advancement. So, though a reversion be settled on the younger son expectant on the mother's death. *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111.

Deed Executed by Son.]—A deed of conveyance by a father to a son was executed by both father and son, but was kept by the father, and found among his papers when he died. It was registered by him nine months after its date, he being an attorney. The father received the profits of the estate and made new leases, to which the son assented. The son occasionally

received money from tenants, which the father allowed credit for:—Held, that the deed being originally an advancement, none of these circumstances affected the son's title. *Alleyne* v. *Alleyne*, 8 Ir. Eq. R. 493; 2 Jo. & Lat. 544.

Practice—Petition.]—Lands bought by a father in the name of a son held not to amount to an advancement; but the Lord Chancellor declined to make an order to that effect on the petition of the father, though founded on the certificate of the master under s. 38 of the Trustee Act, 1850. *Collinson* v. *Collinson*, 3 De G. M. & G. 409.

Voting Qualification.]—A conveyance of property by a father to his son to give him a qualification to vote is not invalid, but is a bounty. *May* v. *May*, 33 Beav. 81.

A voluntary conveyance, for conferring a qualification under the Bedford Level Act, by a father in favour of his son, was executed and registered, but never communicated to the son, who died. The legal estate was outstanding in a mortgagee:—Held, that the father was entitled to have the property comprised in the deed conveyed to him. *Childers* v. *Childers*, 1 De G. & J. 482; 26 L. J., Ch. 743; 3 Jur. (N.S.) 1277; 5 W. R. 793.

Out of Settlement Funds.]—Where A. invested some of the funds, subject to the trusts of his settlement, in the purchase of real estate, and added some money of his own:—Held, that it was an advancement to the parties entitled under the settlement. *Ouseley* v. *Anstruther*, 10 Beav. 461.

Lease by Lord of Manor.]—Lord of manor (his tenants refusing to renew) makes a lease of the premises to his daughter for ninety-nine years, and afterwards sells the manor to J., who has notice of the lease, but has security that the daughter when at age should surrender. Daughter decreed to have the benefit of the lease. *Jennings* v. *Selleck*, 1 Vern. 467.

Copyholds.]—Where a father and two sons, A. and B., were successive lives in a copyhold, wherein, by custom, person first named might dispose of the whole interest, and upon marriage of A., it was agreed that the father should have power to appoint, during life of A., and widowhood of his intended wife; father having afterwards obtained a new grant for lives of C., a third son, and A. and B., by will made after death of C., in which no mention is made of copyhold, gives residue of his personal estate to B.:—Held, that B. was not thereby entitled to copyhold. *Rumboll* v. *Rumboll*, 2 Eden, 15.

Copyhold granted to A., and B. his wife, and C. his younger son, to take in succession for their lives, and the life of the survivors; the purchase-money was all paid by A.; C. is not a trustee of his life interest for A., but takes it beneficially as an advancement from his father. *Dyer* v. *Dyer*, 2 Cox, 92; 2 R. R. 14.

One seised of a copyhold for the joint lives of himself and his brother afterwards surrenders it, and takes a new grant for the joint lives of himself, the brother, and one of the surrenderor's sons:—Held, that the latter, who survived, was entitled to the copyhold as an advancement. *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; 12 L. J., Ch. 22; 6 Jur. 942.

A father purchased a copyhold, and was admitted thereto to hold during the lives of his children, A., B. and C. successively. B., after the death of the father and of A., got admitted:—Held, that by the form of the grant, the father had made an advancement to his sons, who were therefore entitled beneficially. *Jeans* v. *Cooke*, 24 Beav. 513; 27 L. J., Ch. 202; 4 Jur. (N.S.) 57; 6 W. R. 175.

W., tenant by copy of court roll for his life, took, according to the custom, a grant of the reversion to C. and D., his sons, for the term of their lives, in trust for W., "as sole purchaser":—Held, that C. and D. were trustees of the reversion for W. *Keats* v. *Hewer*, 10 Jur. (N.S.) 1040; 11 L. T. 209; 13 W. R. 34.

—— **Entireties.**]—A. purchases copyhold estate, and takes the surrender to himself and his wife and daughter, and their heirs; the husband and wife (as one person) take a moiety by entireties, and the daughter the other moiety; the husband mortgages it and dies; void for the whole, and no relief in equity. *Back* v. *Andrew*, 2 Vern. 120; Pre. Ch. 1.

—— **Surrender to Use of Will.**]—Tenant in possession procured a grant of the copyhold to son in remainder, and at same time surrendered it to use of his will:—Held, not an advancement, and son trustee only. *Prankerd* v. *Prankerd*, 1 Sim. & S. 1; 24 R. R. 142.

Consols.]—Consols invested by a father in the names of his two daughters:—Held, under the circumstances, to form part of his estate, and not to be an advancement to them. *Bone* v. *Pollard*, 24 Beav. 283.

—— **Settlement.**]—Consols were vested in the trustees of a marriage settlement. The husband directed the bankers who received the dividends and paid them to him, to invest an additional sum of 2,000*l.* consols in the names of the same trustees, so that they might receive the dividends as before. The bankers paid the dividends of the aggregate fund to the husband during his life. No notice was given to the trustees of the fresh investment:—Held, that the 2,000*l.* became subject to the trusts of the settlement, as an augmentation of the trust fund. *Curteis, In re*, 41 L. J., Ch. 631; L. R. 14 Eq. 217; 26 L. T. 863.

Stock—No Trust Declared.]—A. directed his agents to invest part of his balance in their hands in the purchase of stock, in the names of himself and his wife, in trust for his infant son. The agents made the purchase in the joint names, but without any trust expressed. A. allowed the stock to remain without any trust being declared, and received the dividends down to his decease:—Held, that the stock formed part of his assets. *Smith* v. *Warde*, 15 Sim. 56; 15 L. J., Ch. 105; 9 Jur. 981.

—— **Dividends Paid to Son.**]—A father transferred a sum of stock from his own name into the joint names of his son and of their banker, to receive their dividends; and he told the banker to carry the dividends to the son's account:—Held, first, that the son was entitled to the stock absolutely; secondly, that a codicil to the father's will, executed after the transfer, could not be read to qualify or explain the effect of the transaction. *Crabb* v. *Crabb*, 1 Myl. & K. 511; 3 L. J., Ch. 181.

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—— **Dividends Received by Father.**]—Purchase of stock by father in the name of the son, the father continuing to receive the dividends under a power from the son:—Held, after his death to be an advancement. *Sidmouth* v. *Sidmouth*, 2 Beav. 447; 9 L. J., Ch. 282.

Shares—Calls Paid by Father.]—A father having purchased shares, some in his own name, some in the name of his son, and having for some years paid the calls upon them:—Held, that it was a trust for the father. *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.

—— **Director's Qualification.**]—A father made his eldest son, who was living near him, and was married, a liberal annual allowance. He also took shares in three companies in his son's name, the number of shares being more than sufficient for a director's qualification. The son became a director of these companies, and received the fees as director, but voluntarily transmitted the dividend warrants on the shares to the father. On the father's death the three lots of shares were found in envelopes, two of the envelopes bearing the words "belonging to me":—Held, that the shares were taken in the son's name merely for the purpose of qualifying him as a director; that the presumption of advancement was rebutted; and that the son held the shares as trustee. *Gooch, In re, Gooch* v. *Gooch*, 62 L. T. 384.

Purchase in Trustees' Names—13 Eliz. c. 5.]—An investment of money in the purchase of stock, in the names of trustees, upon trust for the children of the settlor, he not having at the time sufficient property, besides the money so invested, to pay his debts, is void under the 13 Eliz. c. 5, because by the 1 & 2 Vict. c. 110, s. 12, the effect of such a settlement would be to delay, hinder, or defraud the creditors of the settlor. *Barrack* v. *M'Culloch*, 3 K. & J. 110; 26 L. J., Ch. 105; 3 Jur. (N.S.) 180; 5 W. R. 38.

—— **1 Jac. 1, c. 15, s. 5.**]—Stock purchased by father, afterwards a bankrupt, in name of his son, an infant, and a trustee is within the mischief of 1 Jac. 1, c. 15, s. 5. *Brown* v. *Bellaris*, 5 Madd. 53.

Insurance on Son's Life.]—A father effected a policy in the name and on the life of his son, in which he had no insurable interest. The son died intestate and the father took out administration, and the insurance company paid the money assured by the policy to him:—Held, that as between the father and the estate of the son, the father was entitled to retain the money for his own benefit. *Worthington* v. *Curtis*, 45 L. J., Ch. 259; 1 Ch. D. 419; 33 L. T. 828; 24 W. R. 221.

Cheque.]—A father placed a cheque for 900*l.* in the hands of his infant son, and said, "I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it." He then locked up the cheque, and died a few days afterwards:—Held, that there was neither a perfect gift to, nor a valid declaration of trust in favour of, the infant. *Jones* v. *Lock*, 11 Jur. (N.S.) 913; 14 W. R. 140.

Advance by Sister—Bond by Father.]—On the marriage of A., his sister advances him 600*l.*, and A. procures his father to give her a bond for the amount, payable at a month after his death. A. pays his sister interest during his father's lifetime:—Held, a debt on the estate of the father, not to be indemnified by A. *Hill* v. *Ballard*, 1 Ves. Sen. 77.

Payment of Son's Debts—"Advancement by Portion."]—A gift was made by a father to enable the son to pay a debt:—Held, on the death of the father intestate to be an "advancement by portion" of the son, within s. 5 of the Statute of Distributions. The opinion expressed by Jessel, M.R., in *Taylor* v. *Taylor* (L. R. 20 Eq. 155), dissented from. *Blockley, In re, Blockley* v. *Blockley*, 54 L. J., Ch. 722; 29 Ch. D. 250; 33 W. R. 777.

Loan to Stock Farm—Interest.]—A father borrowed and advanced to his son 200*l.*, to enable him to stock a farm. The father subsequently paid off the lender without taking any acknowledgment from the son, except that he received interest from him for some years:—Held, that there was a debt due from the son to the father. *Milnes* v. *Sherwin*, 33 W. R. 927.

Contract by Son—Payment by joint and several Notes of Father and Son.]—W. entered into an agreement with C. to purchase a business, part to be paid in cash and the balance to be secured by joint and several promissory notes of W. and his father. By his will the father divided his residuary estate into fifths, to be held upon trust for his five children, but W.'s share was settled, and the testator declared that before any of his sons should participate under the trusts of the will they should repay all sums advanced by him in his lifetime; but if they should be unable to repay such advances, they should be treated as part of their shares. W. had no means of his own. The cash payment and the amount due on the first promissory note were paid by the father in his lifetime. After the father's death W. assigned all his property for the benefit of his creditors, who released him from his debts saving their rights against sureties. C. proved under the deed for the balance of the purchase-money, and he recovered the residue from the father's estate:—Held, first, that all the sums paid by the father or his executors were debts due from W. to the father's estate. Secondly, that the sums recovered from the father's estate after his death were not within the clause in the will relating to advances, but that the sums paid by the father in his lifetime were and ought to be set off against the corpus of W.'s share. Thirdly, that as to the former sums, the executors might elect whether they would recover against W. upon the agreement for indemnity arising out of the contract of suretyship, in which case they might retain W.'s life interest in his share in satisfaction, or whether they would stand in the place of C.; but that in the latter event the release given by C. to W. would be effective as between the executors and W. *Whitehouse, In re, Whitehouse* v. *Edwards*, 57 L. J., Ch. 161; 37 Ch. D. 683; 57 L. T. 761; 36 W. R. 181.

Illegitimate Child.]—Deputation procured by father for a natural son, on security of his estate, held to be for son's own benefit. *Beckford* v. *Beckford*, Lofft, 490.

A person transferred consols and stock into

the names of his illegitimate daughter and her husband, and their two eldest children, and by parol declarations, declared the investment to be for the benefit of all his daughter's children who should attain twenty-one. He afterwards transferred long annuities into his own name, jointly with the names of his illegitimate daughter and her two eldest children, and made a parol declaration that he did not intend to part with the control over this stock, and he disposed of it by a codicil to his will:—Held, after the death of the two eldest children under twenty-one, that two surviving children who had attained twenty-one were entitled to the consols and stock, and that the long annuities passed by the testator's codicil. *Kilpin* v. *Kilpin*, 1 Myl. & K. 520.

By Mother—Person in loco parentis—Presumption.]—A son (the defendant) had joined as surety with the intestate (his mother) for loans for her own purposes, and he claimed as administrator to retain out of the assets a sum sufficient to repay these loans with interest. He had not repaid them, although he was personally liable to do so. The defendant was engaged in farming, and the intestate made him small advances to assist him in his business, or for his maintenance. The intestate took no acknowledgment for these moneys. The chief clerk allowed the defendant's claim, but disallowed the set-off claimed by the plaintiffs (creditors of the intestate):—Held, that the moneys advanced to the defendant by the intestate (who was in loco parentis at the time) to provide for his necessities, were presumably gifts to him, and accordingly the plaintiff's set-off could not be allowed. *Orme, In re, Evans* v. *Maxwell*, 50 L. T. 51.

An investment of stock by a mother in the joint names of herself and of a child, is an advancement of the child. If it can be shown from the relationship between the parties that the purpose of the transaction was to benefit the child, it is immaterial whether the person is the father or the mother, or even someone standing in loco parentis. *Sayre* v. *Hughes*, 37 L. J., Ch. 401; L. R. 5 Eq. 376; 18 L. T. 347; 16 W. R. 662.

—— **Son Acting as Solicitor.**]—A son acting as his mother's solicitor, with her consent, lent 2,500*l.* belonging to her, upon a bond conditioned for payment to himself absolutely of the amount thereby secured, without any declaration of trust, except a memorandum whereby the son acknowledged that he held 2,500*l.*, and undertook to pay the interest thereof to his mother during life. The son died in his mother's lifetime:—Held, that the relation of solicitor and client subsisting between the son and mother excluded the ordinary presumption in favour of a gift, and threw the burden of proof upon the executors; and the court declared the son's executors to be merely trustees for the mother. *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.

—— **Rule in Equity.**]—There is no obligation in equity on a mother to make a provision for her child, as in the case of a father; and therefore, when a mother makes a purchase in the name of her child, or in the joint names of herself and her child, that does not of itself afford the presumption of advancement. A sum of money borrowed by a widowed mother for her son's benefit:—Held, upon the evidence, to be a loan from the mother to the son. The doctrine of presumption of advancement explained. *Bennet* v. *Bennet*, 10 Ch. D. 474; 40 L. T. 378; 27 W. R. 573.

S. transferred stock into the names of her three infant children jointly with her own, solely to prevent another party obtaining the same. The court declared that the children were trustees jointly with her, and that she was absolutely entitled to the fund. *Stone* v. *Stone*, 3 Jur. (N.S.) 708.

A lady, living apart from her husband, purchased out of her separate estate stock in the names of her son and daughter. The lady died. The son became lunatic. The daughter petitioned for a transfer of the stock to her as executrix. The court ordered the transfer without requiring a bill to be filed. *De Visme, In re*, 33 L. J., Ch. 332: 9 L. T. 666: 12 W. R. 140—L. JJ.

Semble, the doctrine that a purchase in the name of a child will, in the absence of evidence to the contrary, be presumed to be an advancement, does not apply where the purchase is made by a mother. *Ib.*

Godmother—Intention to Benefit.]—The plaintiff, a widow, transferred consols into the joint names of herself and the defendant, her godson, with the express intention that the defendant in the event of surviving should have the consols for his own benefit, but that she should have the dividends during her life. The first notice the defendant had of the transaction was a letter from the plaintiff's solicitors, claiming to have the fund re-transferred to the plaintiff:—Held, that the legal title of the defendant as a joint tenant of the stock was complete. A transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate when informed of the transfer. *Standing* v. *Bowring*, 55 L. J., Ch. 218; 31 Ch. D. 282; 54 L. T. 191; 34 W. R. 204—C. A.

Held, further, that the plaintiff could not claim a re-transfer on equitable grounds, as she did not intend to make the defendant a trustee for her except as to the dividends. *Ib.*

Grandfather.]—If a grandfather takes a bond in the name of his grandchildren, their father being dead, this shall be deemed an advancement, for by the death of their father the grandchildren are under the immediate care of the grandfather. *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.

Grandmother buys an annuity in the grandchild's name; child's father gives the grandmother a bond to repay the sum if the child dies before the grandmother, who receives the income and keeps the tally; the grandchild making no claim; this no trust for the grandchild. *Lloyd* v. *Read*, 1 P. Wms. 607.

3. By Persons in Loco Parentis.

Presumption.]—**Son-in-Law.**—The delivery of money by a person to another to whom the former has placed himself in loco parentis is presumed to be a gift, and the burden of proof lies upon any party who contends that it is a loan. *Cox* v. *Bennett*, 18 W. R. 519.

T. encouraged B., who was engaged to be married to T.'s daughter, to leave his place, and made him an allowance. T. handed over to B. 5,000*l.* for the purpose of purchasing a share in a business and entering a partnership, which B.

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accordingly did:—Held, that T. had placed himself in loco parentis to B.; and the 5,000*l.* held accordingly to be a gift. *Ib.*

Adopted Child.]—Where the plaintiff invested money in the name of his wife's nephew, whom they had adopted as their child:—Held, to be intended for his advancement. *Currant* v. *Jago*, 1 Coll. C. C. 261; 8 Jur. 610.

Niece.]—A purchase of stock by an aunt in the name of a niece held to be for the benefit of the latter, the evidence showing that such was her intention. *Beecher* v. *Major*, 13 W. R. 1054.

Nephew—Unpaid Purchase-money.]—Where a testator (who had adopted his nephew) contracted for the purchase of a warehouse for him, paid part of the purchase-money, caused his nephew's name to be inserted in the agreement, and induced him to sign the agreement, on his representation that the purchase was for his nephew's benefit, and died leaving the balance of the purchase-money unpaid, the court directed it to be paid out of the assets. *Skidmore* v. *Bradford*, L. R. 8 Eq. 134; 21 L. T. 291; 17 W. R. 1056.

Brother—Shares.]—Railway shares were bought by A., in the name of his younger brother, in regard to whom A. stood in loco parentis, and to whom A. gave on some occasions the dividends:—Held, no advancement, there being no evidence of a present intention to benefit. *Forrest* v. *Forrest*, 34 L. J., Ch. 428; 11 Jur. (N.S.) 317; 11 L. T. 763; 13 W. R. 380.

Grandchild.]—A testatrix, both before and after she made her will, purchased stock in the names of herself and the son of her daughter-in-law. By her will she gave the residue of her estate to the daughter-in-law for life, and after her death to the son and the daughter of the daughter-in-law:—Held, that the stock was a gift to the son of the daughter-in-law. *Fowkes* v. *Pascoe*, 44 L. J., Ch. 367; L. R. 10 Ch. 343; 32 L. T. 545; 23 W. R. 538.

Held, that the testatrix had not placed herself in loco parentis to the son of her daughter-in-law or to the other residuary legatee, and that both these facts would have to be proved to make the gift an ademption of the residuary bequest. *Ib.*

Son-in-Law.]—Stock was transferred by a lady into the names of herself, her daughter, and her daughter's husband: the dividends were received by the son-in-law and paid over to the transferor during her life. The daughter pre-deceased her mother, and the son-in-law survived her:—Held, that the son-in-law was entitled to the stock. *Batstone* v. *Salter*, 44 L. J., Ch. 760; L. R. 10 Ch. 431; 33 L. T. 4; 23 W. R. 816.

Illegitimate Grandson—Copyholds.]—Where, by the custom of a manor, copyholds were held for lives successively, the legal tenancy being in the cestui que vie, the insertion, by the beneficial owner of such copyholds, of the name of an illegitimate grandchild to whom he had placed himself in loco parentis, as cestui que vie, is not sufficient to raise a presumption that such copyholds were given by way of advancement. *Tucker* v. *Burrow*, 2 H. & M. 515; 34 L. J., Ch. 478; 12 Jur. (N.S.) 485; 13 W. R. 771. *See cases*, supra, col. 1410.

4. Evidence of Intention.

Person to Benefit.]—The court will not act on the unsupported testimony of a person in his own favour. *Down* v. *Ellis*, 35 Beav. 578.

Receipt of Rent.]—A purchase of property by a father in the name of a son raises, primâ facie, a presumption in favour of an advancement, but this may be rebutted by evidence of acts of ownership of the father. *Stock* v. *McAvoy*, 42 L. J., Ch. 230; L. R. 15 Eq. 55; 27 L. T. 441; 21 W. R. 520.

When the father allowed a tenant to retain occupation at an increased rent without consulting his son, and during his life received the rent, and paid the outgoings:—Held, that this rebutted the presumption of an advancement. *Ib.*

Evidence of an intention to reserve successive life interests to the father and mother, is a distinct indication that no advancement is intended. *Ib.*

Will not Evidence.]—In a question of a father's intention in purchasing in the name of a child, his will is not evidence. *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; 12 L. J., Ch. 22; 6 Jur. 942.

Transfer under Misapprehension.]—The transfer (by a father) of stock into the joint names of himself and his child, is presumed to be an advancement; but this presumption may be rebutted by the evidence of the transferor, that no trust was intended, but that the transfer was made under a misapprehension of its legal effect. *Devoy* v. *Devoy*, 3 Sm. & G. 403; 26 L. J., Ch. 290; 3 Jur. (N.S.) 79; 15 W. R. 222.

Contemporaneous Acts.]—The evidence to rebut the presumption in the case of a purchase by a father in the name of a child, ought to be distinct and contemporaneous. *Jeans* v. *Cook*, 24 Beav. 513; 27 L. J., Ch. 202; 4 Jur. (N.S.) 57; 6 W. R. 175.

—— **Parol Evidence.**]—When a father purchases in the name of his child, his declarations of intention contemporaneous with the transaction itself are alone admissible to prove a trust. *Williams* v. *Williams*, 32 Beav. 370.

Parol evidence is admissible to prove that lands were purchased by a father in the name of his child, not as an advancement, but as a trustee. *Ib.*

A father purchased stock in his son's name, and the latter gave him a power of attorney to receive the dividends, which he did during his life:—Held, to be an advancement to the son, there being no evidence of contemporaneous acts; in such cases contemporaneous acts and declarations are admissible but not subsequent acts, though any such by the son may be so. *Sidmouth* v. *Sidmouth*, 2 Beav. 447; 9 L. J., Ch. 282.

A father, having purchased in the names of his sons a copyhold estate, which he afterwards demised by licence, the sons take as an advancement. To repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase. *Murless* v. *Franklin*, 1 Swanst. 13; 18 R. R. 3.

Parol evidence is admissible on the part of an advanced son, or his heir, to rebut a claim of trust, though improper against the legal opera-

tion of a deed. *Redington* v. *Redington*, 3 Ridgw. 182. S. P., *Taylor* v. *Taylor*, 1 Atk. 387; *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111.

Evidence of declarations, coupled with acts, admitted in a question whether a purchase by a father in his son's name was intended to be advancement or not. *Scawin* v. *Scawin*. 1 Y. & C. C. C. 65.

Parol evidence as to the intentions of a testator by the attorney who made the will also admitted on the same question. *Ib.*

Joint Deposit—Dividends.]—A father who had government stock, transferred all except a small portion into the joint names of himself and his son A. He also deposited moneys in a bank, in their joint names. Small purchases of stock in their joint names were made at intervals; and the joint deposits were made at intervals, to the father's death. The father during his life received all the dividends on the stock, and the interest on the deposit receipts. There was evidence that the father, before his death, refused to allow his son to meddle with the stock certificates and deposit receipts; evidence of testamentary intentions in favour of other children was also given:—Held, that there was an advancement for A. to the extent of the joint investments and deposits. *Fox* v. *Fox*, 15 Ir. Ch. R. 89.

Stock.]—Transfer of stock of an intestate into the name of himself jointly with that of another, accompanied with proof of his having said in his lifetime that it was his intention to give the other the stock at his death, and that he had transferred it for that purpose:—Held, to be sufficient proof of gift of such stock. *George* v. *Howard*, 7 Price, 646; 21 R. R. 775.

Securities — Memorandum after Deposit.]—Foreign and colonial securities were deposited by a father, in the joint names of himself and daughter; a memorandum was found among his papers, dated and signed by him fifteen months after the lodgment, directing the securities to be applied to a different purpose:—Held, not admissible in evidence to rebut the presumption of advancement. *O'Brien* v. *Sheil*, Ir. R. 7 Eq. 255.

An advancement by a father to his child is a gift which cannot be altered by subsequent declarations of the father. *Ib.*

Mortgage.]—D. advanced money on mortgage, which he took in the name of his son, A. The evidence showed that at the time D. said, if he did not alter his mind before his death, he might give the mortgage money to his son:—Held, that there was sufficient evidence to rebut the presumption of advancement, and the court ordered A. to assign the mortgage to his father. *Dumper* v. *Dumper*, 8 Jur. (N.S.) 503; 6 L. T. 315.

Purchase before and after Will.]—Where a testatrix both before and after she made her will, purchased stock in the names of herself and the son of her daughter-in-law, and by her will gave the residue of her estate to her daughter-in-law for life, and after her death to the son and daughter of the daughter-in-law:—Held, that the evidence of the son and his wife was admissible, and that it was sufficient to rebut the presumption. *Fowkes* v. *Pascoe*, 44 L. J., Ch. 367; L. R. 10 Ch. 343; 32 L. T. 545; 23 W. R. 538.

After Death of a Person Benefited.] — Money standing in the name of a married woman after her decease and that of her husband, was claimed by her mother on affidavit and proof that the dividends had been received by her with the assent of the daughter and her husband:—Held, that the claim of the mother was established. *Down* v. *Ellis*, 35 Beav. 578.

Application of Dividends.]—The dividends of stock purchased during coverture in the name of the wife by her husband, were by her applied for domestic expenses:—Held, that the presumption that the stock was a gift to the wife, was rebutted by the mode of dealing with the dividends. *Hoyes* v. *Kindersley*, 2 Sm. & G. 195.

Shares—Custody.]—Where sixty-four railway shares were purchased by A. in the name of his younger brother, and A. handed him the key of his strong box, and gave him all the shares therein, and he took out fourteen:—Held, that there was a good gift of the fourteen. *Forrest* v. *Forrest*, 34 L. J., Ch. 428; 11 Jur. (N.S.) 317; 11 L. T. 763; 13 W. R. 380.

Lease—Agreement to Purchase.]—N. took a lease in the name of his sister M. from S. He subsequently agreed to purchase from S., and an agreement was entered into. Subsequently a new agreement between N. and S. was prepared, and in this N. substituted the name of M. for his own, and M. signed the agreement, as also did S. N. died intestate. The purchase was subsequently completed; a conveyance was made to M., and she, as administratrix of N., was allowed credit for the purchase-money out of the assets of N.:—Held, that there was no evidence to rebut a resulting trust; that M. was the agent of N., with a right to be indemnified consistent with any beneficial interest belonging to her. *Nicholson* v. *Mulligan*, Ir. R. 3 Eq. 308; 17 W. R. 659.

Held, also, that her representative capacity, reconciling the two agreements, excepted the case from the doctrine admitting evidence to rebut a resulting trust. *Ib.*

Purchase of Farm and Stock.]—After a testator had made his will, giving his son a share in his residuary estate, he purchased for him farming stock, and placed him in a farm. The testator died, and the trustees of the will debited the son with a sum of money equal to the value of the farming stock:—Held, that on the authority of *Grave* v. *Salisbury* (*Earl*) (3 Bro. C. C. 425), and *Kirk* v. *Eddowes* (3 Hare, 509), the value of the farming stock must be deducted from the share of the son. *Turner, In re, Turner* v. *Turner*, 53 L. T. 379.

5. HOTCHPOT CLAUSE—PROVISO FOR DEDUCTION OF ADVANCE.

Part Advance.]—Where money is expressed to be given in part of a portion, though of small amount, yet it is an advancement, and must be brought into hotchpot. *Morris* v. *Burroughs*, 1 Atk. 403.

Life and Reversionary Interests.]—Life and reversionary interests must be brought into hotchpot under the usual hotchpot clause. *Eales* v. *Drake*, 45 L. J., Ch. 51; 1 Ch. D. 217; 24 W. R. 184. And see *Williamson* v. *Jeffreys*, 18 Jur. 1071.

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Deed of Gift—Sale.]—A deed of gift by father to son, whereby the father purports to deprive himself of everything which he has, cannot be supported as an advancement. *Hughes* v. *Seanor*, 18 W. R. 108.

A deed purporting to be a sale cannot be supported as an advancement. *Ib.*

Portion — Annuity.]—Husband by marriage settlement secures a portion for daughters; there is one daughter; the husband marries again; leaves issue by the second wife, and dies intestate; if the daughter lives till the portion is due, it is an advancement pro tanto, and must be brought into hotchpot as to the other issue. *Edwards* v. *Freeman*, 2 P. Wms. 435.

An annuity settled by a father upon a child, to commence after the father's death, is an advancement pro tanto, and must be brought into hotchpot. *Ib.*, 442.

A provision for a child by a father, though contingent, yet when the contingency happens, is an advancement pro tanto. *Ib.*

Annuity.]—By a deed of separation the husband covenanted to pay an annuity of 200*l.* to his daughters during their respective lives. The husband survived his wife, and died intestate:—Held, that so much of the annuities as were paid during their father's lifetime were not advancements; and that the value of each annuity must be estimated as at the death of the intestate, and the amount brought into hotchpot. *Hatfeild* v. *Minet*, 47 L. J., Ch. 612; 8 Ch. D. 136; 38 L. T. 629; 26 W. R. 701.

Under power to Advance.]—Bequest of residue to A. for life, with power thereout to advance her son, and a gift after A.'s death of the residue to A.'s children equally:—Held, that the amount advanced to A.'s eldest son was not to be taken into account in the ultimate division. *Upjohn* v. *Upjohn*, 15 Beav. 152.

Power to Appoint—Unappointed Fund.]—A. gave a fund to four persons in such shares, &c., as B. should appoint, and in default equally. He directed that such persons should bring into hotchpot the amount of the advances he might make in his life:—Held, that the hotchpot clause operated only on the unappointed fund, if any. *Brockiehurst* v. *Flint*, 16 Beav. 100.

Legacy—Share of Residue.]—A father directed his trustees to pay his son 3,000*l.* and to invest 28,000*l.* upon trusts for his children ultimately. The testator directed his residue to be divided after the termination of a life estate amongst his children, and the will provided that any money advanced to his children and not repaid at his death should be set off against their share of the residue. The testator's son was indebted to him for advances in a sum nearly equal to his share of the residue:—Held, that the legacy to the son was not to be set off against his debt, but was to be paid immediately. *Smith* v. *Crabtree*, 6 Ch. D. 591; 25 W. R. 824.

A testator directed his trustees to secure 1,500*l.* to his daughter for life, and to her children in fee; but with a proviso that payment in his lifetime should go in satisfaction of the gift. She received 1,000*l.* from the testator, and pre-deceased him:—Held, that the 1,000*l.* must be deducted from the 1,500*l.* *Hutchison* v. *Skelton*, 2 Macq. H. L. 492.

Advance, how Deducted.]—A testator, who had lent money to his son J., bequeathed his residuary estate to J. and his other children equally for life, with remainder over to their children, and declared that neither of his children should receive anything until they should have accounted for any sum lent by him to them. The testator afterwards agreed to accept a composition on his debt, which was not paid at his death:—Held, that the son's debt was not to be deducted from his children's interest. *Silverside* v. *Silverside*, 25 Beav. 340.

Trust to convert and after death of wife to hold the proceeds for his child or children living at that time, and the issue then living of his child or children dying before that period, such objects to take as tenants in common according to the stocks. His real estate was to be considered as converted from his death, and it was declared that any portion paid to a child in his lifetime should be brought into hotchpot. On the marriage of a daughter before the will, the testator covenanted to stand seised of a freehold house for her use. She died leaving issue:—Held, that the hotchpot clause could not be extended to the issue of the testator's children, so that the value of the house was not to be deducted from the share of the daughter's issue. *Hewitt* v. *Jardine*, L. R. 14 Eq. 58; 26 L. T. 546.

Estate to be brought into Hotchpot.]—A father directed that in the division of his property an estate belonging to one of his children should be brought into hotchpot. After the will he acquiesced in the sale of this estate and the settlement of the proceeds:—Held, that the condition was not waived, and that the estate must be brought into hotchpot. *Middleton* v. *Windross*, 42 L. J., Ch. 555; L. R. 16 Eq. 212; 21 W. R. 822.

Advance to carry on Business.]—A., by a settlement, gave to son "a like sum of 5,000*l.*, payable, &c., after my decease, from which provision shall be deducted any sum that I may advance for him to enable him to carry on his business." A. entered into a guarantee for 2,000*l.* for the firm of which his son was a partner. A. was compelled to pay that sum:—Held, that this was an advance to the son to enable him to carry on his business, and that the son could only claim the balance of the 5,000*l.* after deducting the sum thus advanced. *Berry* v. *Morse*, 1 H. L. Cas. 71.

Advance not Completed at Death.]—A. bequeathed funds to a daughter, and declared, that in case he should make any advance to the husbands of his daughters, which should not have been repaid at his death, such advance must be brought into hotchpot:—Held, that money agreed to be paid for a business sold by the testator to a son-in-law, was not an advancement, the testator having died before the money was due. *Auster* v. *Powell*, 1 De G. J. & S. 99; 9 Jur. (N.S.) 421; 8 L. T. 73.

The proof of a debt, and receipt of a dividend by the testator, under the bankruptcy of his son-in-law, did not operate as an extinguishment of the debt. *Ib.*

The debt, less the amount of the dividend,

was an advance within the meaning of the clause. *Ib.*

Mortgage Assigned by Father.]—A., before the marriage of his son, stated in a letter to the father of the intended wife, "I will give C. one-third of my business, and at my death he will have half the business and a child's share of what property I may be worth." The father in his lifetime assigned a mortgage to the son, to take effect at the father's death, with a power of revocation reserved to the father, which he did not exercise. He also advanced other property to others of his children at different periods. By his will he left C. "one shilling in full of all claims in reference to my property, having already given to him what I consider fair and reasonable;" he directed his debts to be paid, and divided his property among his widow and other children:—Held, that by the letter the father contracted a debt payable out of the assets which he left at his death, but that the son was bound to bring into account and give credit for the value of the mortgage. *Keays* v. *Gilmore*, Ir. R. 8 Eq. 290; 22 W. R. 465.

Held, also, that the other children were not bound to bring into account the advancements made to them. *Ib.*

Construction—Advance of Money during Lifetime—Descent of Lands after Death.]—By a settlement it was provided that if the husband should, during his life, advance or pay any money for the advancement of any child of the marriage, or in case any lands or tenements, money, goods, or chattels should descend or come by or from him unto any such child, then such moneys and chattels, and the value of such lands should be accounted as part or in full of the portion provided by the settlement:—Held, that the advances and payments should be construed advances and payments made inter vivos, perfected in the lifetime of the husband; and that the lands, &c., should be confined to matters not perfected until after his death: that property which during the coverture accrued to the husband and wife, and was settled upon them for their lives with remainder to their children, as they or the survivor of them should appoint, was not property to be accounted for, as part of their portion, by the children to whom it was appointed: that a leasehold house assigned by the husband in his lifetime to one of the children for his more comfortable maintenance, did not affect the share of such child: and that an advance by the husband in his lifetime to a daughter for the purpose of apprenticing her son—the share of such daughter having been settled with remainder to her children—did not affect the share of such daughter of the trust fund. *Douglas* v. *Willes*, 7 Hare, 318.

Advances Before and After Will.]—A. gave to three of his sons, T., J. and P., legacies of 500*l.*, and directed that neither of his sons to whom he should have advanced any sums of money in his lifetime should be entitled to receive his legacy without bringing such sums into hotchpot. The residue he divided between his four sons, C., T., J. and P., and his daughter. The father had advanced to C., before the will, 500*l.*, 170*l.*, and 58*l.*, and to T., after the will, 500*l.* and 380*l.*:—Held, that the advances to C. should not be taken into account, but that the sum of 500*l.* to T. was a satisfaction of his legacy, and the 380*l.* advanced after the will must be deducted from his share of the residue. *Peacock, In re, Owen* v. *Peacock*, L. R. 14 Eq. 236; 27 L. T. 472.

A husband gave the residue of his estate to trustees to pay the income of one moiety to his wife, and to divide the other moiety equally among his children. Subsequently to his will, the testator advanced sums to children:—Held, that the widow was entitled to the income of a moiety of the actual residue only, but that the children must account for the sums advanced to them by the testator in his lifetime. *Meinertzhagen* v. *Walters*, 41 L. J., Ch. 801; L. R. 7 Ch. 670; 27 L. T. 326; 20 W. R. 918.

When a testator, who, before his will, made advances to his sons, for some of which he took security, declared by his will, "in case I shall at any time during my life" advance any sum, the sums so advanced shall be brought into hotchpot:—Held, that the words did not necessarily imply futurity, and that the advances made before the will must be accounted for. *Davies* v. *Atkinson*, 23 L. T. 41; 18 W. R. 1016.

Gift.]—Upon the marriage of one of his daughters the testator said that he would buy his son-in-law's snuff-box, and at the same time gave him with one hand 1,000*l.* in bank notes, and with the other hand took the snuff-box. He afterwards made his will, by which he gave each of his daughters, for her separate use, 1,000*l.*, but provided that in case any of his daughters should, during his life, have received, by way of marriage portion or advancement, 1,000*l.*, such daughter should not receive the legacy:—Held, that the daughter was entitled to the legacy. *M'Clure* v. *Dawson, or Evans*, 29 Beav. 422; 30 L. J., Ch. 295; 7 Jur. (N.S.) 204; 3 L. T. 870; 9 W. R. 428.

Debt Due to Child.]—A father being indebted to the trustees of his daughter's settlement upon a covenant contained in the settlement of his daughter, by will directed his estate, after payment of debts, to be divided amongst his children equally; but if the net produce of his estate exceeded 40,000*l.*, then his sons were to have one-twentieth part more than the daughter; and he declared that the moneys due on the covenant should be taken in satisfaction pro tanto of the daughter's share, and should be brought into hotchpot. It was found that, if the moneys due upon the covenant were not to be brought into account for the purpose of distribution, but were to be treated as a debt, the estate would be under 40,000*l.*:—Held, that the moneys due upon the covenant must be brought into account, and that the sons were therefore entitled to one-twentieth more than the daughter. *Fox* v. *Fox*, 40 L. J., Ch. 182; L. R. 11 Eq. 142; 23 L. T. 584; 19 W. R. 151.

Evidence of.]—A testator by will declared for the information of his trustees that the amount or values expressed in his ledger and entered on the twenty-first page and signed by him and dated, were the only advancements either by way of gift or loan made by him to his children. The twenty-first page of the ledger was not admitted to probate. The sums entered therein were not in all instances the true amounts received by the children:—Held, that the will must be read as if the entries in the ledger were incorporated into it, and that

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the entries were conclusive for the purposes of the will. *Quihampton* v. *Going*, 24 W. R. 917.

A father gave his residuary estate upon trust for his two sons and four daughters equally, and declared that all sums he had then advanced, or should thereafter advance, to either of his children, which should appear in any account in his handwriting, or which should be shown in any other manner, should be taken in full for or in part of his or her share in the trust estate. Subsequently to his will the testator advanced to one of his sons 1,575*l.*, and to the other 1,560*l.* He afterwards wrote letters to each of them stating that it was his intention to make a present to them of sums of 640*l.* and 650*l.*, part of the 1,575*l.* and 1,560*l.* respectively, and requiring them to send him promissory notes for the balance :—Held, that these letters were not admissible in evidence to vary the operation of the proviso contained in the will, and that the sums of 640*l.* and 650*l.* must be brought into account by the sons. *Smith* v. *Confer*, 47 L. J., Ch. 878 ; 9 Ch. D. 170 ; 27 W. R. 149.

By a settlement on the marriage of a daughter 4,000*l.* was secured to her on her father's bond, to produce 200*l.* per annum, and he agreed to allow 150*l.* per annum besides. In his account books he for many years treated the 150*l.* per annum as a debt, but for some few years preceding and up to his death he entered it in his books as an advance. By will he bequeathed a legacy to his daughter and her husband and children, and declared, that "inasmuch as he had already advanced and might during his lifetime advance, for the use of his daughter or her husband, sums of money over and above what was secured to her and them by their marriage settlement, such advances with interest at 5 per cent. should be retained and deducted from the legacy ;" and he directed that his "books of account should be conclusive evidence of the accounts and of the balances therein mentioned to be due and owing to him." He bequeathed the residue of his property between four of his sons. By a codicil he directed how the interest on the legacy was to be paid, "first deducting what had already been advanced :"—Held, that the 150*l.* per annum agreed to be paid to the testator's daughter was not an advance, and ought not to be deducted from the legacy. *Hargreaves* v. *Pennington*, 34 L. J., Ch. 180 ; 10 Jur. (N.S.) 834 ; 10 L. T. 857 ; 12 W. R. 1047.

Testator directed that "all sums of money which I have already advanced or covenanted to pay or may hereafter advance to my children as will appear in a statement in my handwriting, shall be brought into hotchpot." An unattested document signed by the testator and enumerating the advances made to his children was found among his papers :—Held, that this was admissible as primâ facie, but not as conclusive, evidence of the advances made. *Whately* v. *Spooner*, 3 K. & J. 542.

For Proviso for Deduction of Advances in Case of Portions.]—*See* PORTION.

6. INTEREST ON ADVANCES.

From what Time.]—Interest at 4 per cent. directed to be computed on advancements made by a father to his children from the time when the father's property was divisible amongst them. *Andrewes* v. *George*, 3 Sim. 393.

A father gave to several of his children real estates, and bequeathed his residuary personal estate to all, with a direction that their portions should be equal, and to that end that those to whom he had given the real estates should respectively take them on account of their shares at the estimated values mentioned in his will. The executor absconded with the personal estate, but after many years a considerable part was recovered :—Held, that the amount recovered must be treated as consisting of a principal sum, with interest thereon at 4*l.* per cent. per annum from the testator's death ; that the devisees of the real estates must bring into account their estimated values as part of the principal ; and that, the shares of principal having been thus ascertained, the part apportioned as interest must be divided between them in proportion to those shares. *Ackroyd* v. *Ackroyd*, L. R. 18 Eq. 313.

—— **Option to take Business—Accumulations.**]—The testator directed that if his eldest son elected to take his business he should be debited with the estimated value thereof in the division of his residuary estate. He gave the residue to trustees upon trust to convert, pay annuities, and accumulate the surplus income till his youngest child attained twenty-one, when the funds were to be divided between the children and the issue of deceased children as tenants in common per stirpes. The trustees had power to make advances to the children, such sums to be taken in part satisfaction of their shares of the trust premises. The eldest son took the business, and the second son received advances :—Held, that the eldest son was not liable till the period of distribution to pay interest on the value of the business. Held further (dissentiente Rigby, L.J.), that the second son was not liable till the period of distribution to pay interest on his advances. *Dallmeyer, In re, Dallmeyer* v. *Dallmeyer*, 65 L. J., Ch. 201 ; [1896] 1 Ch. 372 ; 73 L. T. 671 ; 44 W. R. 375—C. A.

A father, after bequeathing a share of mixed residue to one of his sons, stated that he had advanced 2,550*l.* to the son, and directed his executors to deduct that sum from the share :—Held, that the son was chargeable with interest at 4*l.* per cent. on the sum from the death of his father. *Field* v. *Seward*, 5 Ch. D. 538.

At what Rate.]—A testator gave his residuary estate to trustees in trust for sale, and to stand possessed of the proceeds in trust for his six children, nominatim, in equal shares, including two sons, F. and J. ; and after reciting that he had already advanced 4,000*l.* to F. and 500*l.* to J., he declared that "neither of my said sons shall be entitled to any part of my residuary estate without bringing the said sums of 4,000*l.* and 500*l.*, with interest thereon at 5*l.* per cent. per annum from the times of advancing the same respectively, into hotchpot." By a codicil the testator revoked the provision made by his will in favour of his son J., thereby causing a lapse of J.'s one-sixth of the residue :—Held, that the codicil must be read as if it expressly declared a trust in the executors of the lapsed share of residue for the wife and children according to the statute of distributions ; and accordingly that the hotchpot clause applied to the shares taken by the children under the codicil. *Stewart, In re, Stewart* v. *Stewart*, 49 L. J., Ch. 763 ; 15 Ch. D. 539 ; 43 L. T. 370.

The 4,000*l.* and 500*l.* advanced to F. and J. respectively, together with interest at 5 per cent. up to the testator's death, and interest at 4 per

cent. on the aggregate amount in each case from the death, were therefore ordered to be brought into hotchpot in ascertaining their shares of residue. *Ib.*

In the absence of any direction by a testator to the contrary, advancements to his children on account of their portions bear no interest up to his death, but from his death they bear interest at 4 per cent. *Ib.*

Statute-barred Debts.]—A husband by will gave his property to his wife for life, and after her death equally between his children, subject to a proviso that if, at the period of distribution, B. "should be indebted to any of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share." B. had borrowed from one brother 100*l.*, and had borrowed other sums from another brother. Nearly all these debts had, before the time of distribution, become barred by the statute:—Held, that the trustees were authorised to deduct from B.'s share all the debts, though barred by the statute, but that the intention of the testator was to put advances by brothers and sisters on the same footing as advances by himself, and that interest, therefore, ought not to be deducted. *Poole* v. *Poole*, L. R. 7 Ch. 17; 25 L. T. 770; 20 W. R. 133.

Where Life estate given.]—A testator gave his residuary estate to his widow for life, with remainder to his children equally, with a proviso for bringing into hotchpot all sums advanced to any of them during his lifetime. The testator made advances to some of his children:—Held, that the advanced children must bring their advances into hotchpot, with interest at 4 per cent. per annum up to the distribution of the estate: such interest to be computed from the death of the widow. *Rees, In re, Rees* v. *George*, 50 L. J., Ch. 328; 17 Ch. D. 701; 44 L. T. 241; 29 W. R. 301. And see *Hilton* v. *Hilton*, L. R. 14 Eq. 468, infra, col. 1429.

7. Satisfaction of Debt to Child by Advance Inter Vivos.

Marriage Portion—Legacy due to Child.]—Father having to pay a legacy to his daughter, gives her a greater sum on marriage, and no demand of the legacy, though knowledge of it. This held a satisfaction, and the husband not entitled. *Seed* v. *Bradford*, 1 Ves sen. 501.

Implied satisfaction of a debt from a father to his child by a marriage portion of a greater amount. *Chave* v. *Farrant*, 18 Ves. 8.

—— **Knowledge of Debt not Necessary.**]—A provision by a father, on the marriage of his daughter, of a greater sum than he owes her, is in general to be deemed a payment of the debt, and it is not necessary that there should be an express stipulation to that effect, or to show that the husband knew of the debt. *Hayes* v. *Garvey*, 2 Jo. & Lat. 268; 8 Ir. Eq. R. 90.

Where a fund in trust for the father for life, remainder to his son and daughter, was sold out by the father, who, on the marriage of the daughter, settled funds of much larger amount on her:—Held, to be presumed in satisfaction of her interest, and that such presumption was not affected by the ignorance or knowledge of her husband as to the rights of his wife. *Plunkett* v. *Lewis*, 3 Hare, 316. And see *S. C.*, 13 L. J., Ch. 295; 8 Jur. 682.

Where Father retains Legacy due to Child.]—The doctrine of satisfaction does not apply to a gift by a father to his daughter, when he had in his hands, by permission of the executor, a legacy bequeathed to the daughter by the executor's testator. *Acheson* v. *Fair*, 2 Con. & L. 208; 3 Dr. & War. 512.

A legacy of 150*l.* given to the daughter of A., which was paid A., and who after gave her 1,000*l.* portion, settled a church lease on her, and maintained her and her husband fourteen years, yet held no satisfaction. *Chidley* v. *Lee*, Pre. Ch. 228.

Assumption of Son's Debt by Father.]—The assumption by a father of a debt due from his son to a partnership, in which the father and the son were partners, was deemed an advancement of a portion to a less amount, to which the son would have been entitled upon the father's death. *Ansley* v. *Bainbridge*, 1 Russ. & M. 657.

Father Administrator durante minore ætate.]—A father, administrator, durante minore ætate of his daughter, who was executrix and the residuary legatee of her grandmother's estate, agreed, that when she married plaintiff she should have 800*l.*, which, in the settlement, was called a portion. Lord Hardwicke directed that the father's representative should account for his personal estate as to the 800*l.* only, and interest at 4*l.* per cent. from the marriage. *Wood* v. *Briant*, 2 Atk. 521.

Debt by Brother to Sister.]—A. being indebted, as his father's executor, to the trustees of his sister's marriage settlement, settled on her and her children a sum to a larger amount:—Held, that this was not a satisfaction of the debt. *Drewe* v. *Bidgood*, 2 Sim. & S. 424; 4 L. J. (O.S.) Ch. 33.

8. Release or Bequest of Debt due from Child to Parent.

Person in loco parentis.]—The court will hold a debtor liberated from his obligation to pay a debt which once existed, and from which he has not been discharged by any testamentary instrument, where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one in loco parentis, or is part of a family arrangement. *Peace* v. *Hains*, 11 Hare, 151; 17 Jur. 1091.

What amounts to.]—4,500*l.* was advanced by A., a widow, to her son B., but no security or acknowledgment was executed by B. No interest was directly paid, but an allowance covenanted to be paid to B. by A. was set off against the interest, which, at 4 per cent., came to the same amount. A. made a codicil, containing a declaration that the 4,500*l.* was due and owing from B., and that his appointment as executor was not to have the effect of cancelling the debt. A further codicil was made, revoking the appointment of B. as executor, but confirming the will and codicils in all other respects. Subsequently A. wrote to B. as follows: "You must know when I gave you the money I never could intend it as a loan, but as an absolute gift; and I hope you will live many years to enjoy it":—Held

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that this letter being written under a misapprehension of the nature of the original transaction, and being inconsistent with the previous conduct of the parties, did not discharge the debt thereby created. *Knapp* v. *Burnaby*, 8 W. R. 305.

—— **Promise to Bequeath Debt.**]—C., being indebted to his mother, and being under an obligation to execute a security to her, refused to do so. The mother then promised to bequeath the debt to her son if he would execute the security. This was done, but the mother died without having bequeathed the debt:—Held, that the promise to bequeath could not be enforced in equity, and that the debt formed part of the mother's estate. *Luxmore* v. *Clifton*, 17 L. T. 460; 16 W. R. 265.

—— **Destruction of Securities.**]—Destruction by father of securities given by sons:—Held, under circumstances, an advance and release of debts thereby secured. *Gilbert* v. *Wetherell*, 2 Sim. & S. 254; 3 L. J. (O.S.) Ch. 138.

—— **Trustees not to Enforce Bonds.**]—Testator bequeathed his residuary estate in trust for son and daughter equally, and declared that certain sums which he had lent to his son should be deducted from his share of the residue, and that certain sums which he had lent to C., his daughter's husband, on bonds, should be taken and allowed in account as part of her share: and, if the balance should appear to be against C., the trustees were to refrain from putting the bonds in force against him, and to take a security from him for payment of the balance by instalments:—Held, that C. was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue. *South* v. *Williams*, 12 Sim. 566; 11 L. J., Ch. 410; 6 Jur. 332.

Debt Incurred after Will.]—Testator gave to his son "all sum and sums of money due to me, from him, on bond or bonds, or any other security." The son was indebted to testator by bond at the will, and afterwards became indebted to him by another bond. The bequest does not include the subsequent bond. *Smallmen* v. *Goolden*, 1 Cox, 329.

—— **Codicil.**]—A testator, reciting that there was due to him from his son 1,440*l.* or thereabouts, secured to him by bills or notes, released his son from payment of any interest up to the time of his death, and directed that he should have time for payment of the principal: after he made a codicil not containing any reference to the release. At the will the son was indebted to his father in 1,400*l.*, and between the will and codicil that sum was paid off and a subsequent advance of 1,291*l.* was made:—Held, that the release of interest was equivalent to a specific legacy of the interest on the debt due at the date of the will; that the legacy had been adeemed, and that the release did not extend to the interest on the subsequent debt due at the date of the codicil. *Sidney* v. *Sidney*, 43 L. J., Ch. 15; L. R. 17 Eq. 65; 29 L. T. 569; 22 W. R. 101.

A., after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid moneys, with the securities then in the testator's custody relating thereto, and also released him from all claims in respect of the aforesaid moneys, "and all other moneys due from him" to the testator. By a codicil the testator released the son from another specified debt:—Held, that the will must be construed as speaking from the death of the testator; and that the son was released from the repayment of money advanced to him by his father between the date of his codicil and of his death. *Everett* v. *Everett*, 47 L. J., Ch. 367; 7 Ch. D. 428; 38 L. T. 580; 26 W. R. 333.

No Mention of Debt.]—A testator, who had advanced money to his son, bequeathed him a legacy without making mention of the debt:—Held, that the loan balance must be set off against the legacy. *Smith* v. *Smith*, 3 Giff. 263; 31 L. J., Ch. 91; 7 Jur. (N.S.) 1140; 5 L. T. 302.

Principal and Interest on Promissory Notes.]—Executors of a testator, who was surety upon promissory notes drawn by his son, borrowed 4,000*l.* to take up the notes, and stop proceedings by the creditors to obtain payment:—Held, that the share, to which the son was entitled as one of the residuary legatees under his father's will, was bound, as against subsequent mortgagees, to repay to the trustees the principal due upon the notes and the interest upon the amount for which they were originally drawn. *Willes* v. *Greenhill*, 30 L. J., Ch. 808; 9 W. R. 217.

Life Interest to be Retained to pay Debt.]—The testator gave his residuary personal estate to trustees, and directed the income to be paid to his son and other persons during their joint lives; and that on the decease of his son, "the share of the income of the said residuary estate to which he would from time to time, if living, be or become entitled," was to be paid to his wife for life; and on the decease of the survivor, "such a part or share of the principal as his said son would, if then living, from time to time, for the time being, be entitled to of the income," was to be for the children of his said son. In another part of his will the testator, reciting that he had advanced his son 284*l.* 10*s.*, declared that it should be treated as a debt due by him, and that his executors were to retain the same out of the share of his son of the income of the residuary estate. The son survived the testator, but died before his share of income sufficed to satisfy the 284*l.* 10*s.*:—Held, that the executors were to retain the balance out of the income given to the wife. *Knight* v. *Sterry*, 18 Jur. 928.

F. MAINTENANCE.

1. In General.

When Allowed.]—The court will not direct money to be paid out to an infant executrix, but will refer it to the master to inquire whether there are any debts or legacies, and to consider of a maintenance. *Campart* v. *Campart*, 3 Bro. C. C. 195.

Maintenance for a child can be charged only out of the interest of its fortune. *Beasley* v. *Magrath*, 2 Sch. & Lef. 35.

Maintenance will be allowed where child has

a vested interest in principal and interest. *Stretch* v. *Watkins*, 1 Madd. 253.

—— **Account.**]—Where the court is satisfied that the fund is clear, maintenance will be allowed pending the account to the residuary legatee. *Warter* v. ——, 13 Ves. 92.

If, on voluntary settlement by father, an account is directed for the child, maintenance to be deducted. *Williamson* v. *Cadrington*, 1 Ves. sen. 517.

—— **Legacy—Interest.**]—In the case of a legacy to a child, let the testator give it how he will, and the child has no other provision, the court will give interest by way of maintenance: for it will not presume a father to leave a child destitute. *Heath* v. *Perry*, 3 Atk. 102.

The presumption that a legacy given by a person in loco parentis to an infant on his attaining twenty-one, carries interest by way of maintenance in the meantime, is rebutted if the testator makes any other provision for such maintenance. *George, In re*, 47 L. J., Ch. 118; 5 Ch. D. 837; 37 L. T. 204; 26 W. R. 65—C. A.

No Provision in Settlement.]—Where by a marriage settlement a portion is provided for a daughter and the portion vested in the daughter in the lifetime of the mother, it was decreed to be raised by a sale, with reasonable maintenance in the meantime, though no maintenance is provided by a settlement. *Staniforth* v. *Staniforth*, 2 Vern. 460.

Where an infant recovers by a decree of the court, the court may allot the infant a maintenance, though no provision in the trust for that purpose. *Englefield* v. *Englefield*, 2 Vern. 236.

Accumulations.]—Maintenance will not be allowed out of funds which, by the will, are to accumulate and be laid out in the purchase of lands to be entailed on the minor, with remainder over. *Shaw* v. *M'Mahon*, 8 Ir. Eq. R. 584.

An allowance out of a residue which was directed to be accumulated, for a legatee between the time when the legatee attained full age and the time for distribution. *M'Dermott* v. *Keely*, 3 Russ. 264; 4 L. J. (O.S.) Ch. 102.

Maintenance for infant out of produce of residue of personal estate, interest being to accumulate. *Mole* v. *Mole*, Dick. 310.

—— **Death of Infant.**]—Property was bequeathed in trust for an infant, with a gift over in case of his death under twenty-one. The trustees accumulated the income not required for maintenance. The infant died under twenty-one:—Held, that the accumulations of income to the time of the death of the infant belonged to the infant. *Buckley's Estate, In re*, 52 L. J., Ch. 439; 22 Ch. D. 583; 48 L. T. 109; 31 W. R. 376.

Compulsory Sale of Devised Lands.]—Devise of lands to the use of A. for life, with remainder to the use of the children of A., as tenants in common in tail, with benefit of survivorship, with remainders over. The lands were purchased under an act of parliament, and the interest of the children ascertained without reference to the value of the estate of A., and the amount was paid into the bank. The court refused to order the dividends to be paid for the maintenance of the children of A. *Whitehead, Ex parte*, 2 Y. & J. 243.

Tenant for Life.]—Tenant for life being not otherwise provided for, is as against the remainderman entitled to maintenance. *Burges* v. *Mawbey*, Turn. & R. 174; 24 R. R. 9.

For what Children.]—A direction for maintenance, in general terms, not restrained by the bequest of the capital in terms limited to those living at the date of the will. *Freemantle* v. *Taylor*, 15 Ves. 363.

Younger Brother.]—If a younger brother have a provision under settlement, and lived with the elder, whose estate is charged with his portion, he shall have an allowance for his maintenance out of the interest due. *Boycot* v. *Cotton*, 1 Atk. 556.

Incumbrances.]—The present income of a minor's property was insufficient to keep down the interest of the incumbrances: but the property being sufficient for the discharge of all the incumbrances, the court gave the minor maintenance. *Corkers, In re*, 3 Jo. & Lat. 377.

Legacy by Father.]—Where maintenance is allowed, it is always paid out of the child's estate, and never deducted out of a legacy left by a father to a child. *Jeffreys* v. *Jeffreys*, 3 Atk. 123.

Order of Court—Death of Trustee.]—By an order of the court the income of property belonging to a female minor was directed to be paid for her maintenance to her mother. The mother married again and the income was paid till the daughter attained twenty-one, though one of the trustees had died:—Held, by the Master of the Rolls, that the whole income ought to be treated as having been properly applied, and this was affirmed on appeal, but the court was of opinion that the order for maintenance had come to an end only on the marriage of the mother. *Smith* v. *Brown*, 48 L. J., Ch. 694; 10 Ch. D. 377; 40 L. T. 374; 27 W. R. 588—C. A.

Agreement as to.]—A separation deed contained a covenant that the husband would pay the whole expense of the education, maintenance and support of their children, all of whom should be and remain in the custody of the husband:—Held, that this was a general covenant on the part of the husband to maintain the children at all times, and therefore he was responsible, notwithstanding they were of age, and were not under his custody. *De Crespigny* v. *De Crespigny*, 9 Ex. 192; 2 C. L. R. 404; 23 L. J., Ex. 27; 2 W. R. 75.

Repayment to Child.]—Although, where trustees advance to a father the interest of his infant son's fortune, the court may, in a proper case, hold it a due application of such interest towards the maintenance and education of the child, yet, if the money was paid and received by the father as an advance for his own purposes, the court will enforce payment to the child of the sums advanced by the trustees. *Culbertson* v. *Wood*, Ir. R. 5 Eq. 23; 19 W. R. 260.

Allowances for.]—Circumstances under which allowances will be made for maintenance,

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Arrears—Interest.]—Interest not given upon arrears of maintenance. *Mellish* v. *Mellish*, 14 Ves. 516; 9 R. R. 335.

Charging Property with.]—The court has jurisdiction to charge reversionary property of infants with money for their maintenance, even where some of the infants may not ultimately become entitled in possession. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency. *De Witte* v. *Palin*, L. R. 14 Eq. 251; 26 L. T. 825; 20 W. R. 858.

The court refused to declare that sums advanced by a father for the benefit of his infant son were a charge on property to which the son would become entitled only in the event of his attaining twenty-one. *Tanner*, *In re*, 53 L. J., Ch. 1108; 51 L. T. 507.

—— **Real Estate.**]—On an application by an infant for maintenance, the court has jurisdiction, without suit, to charge the expenses of his past maintenance and the costs of the application on the corpus of a freehold estate to which he is entitled in fee. *Howarth*, *In re*, 42 L. J., Ch. 316; L. R. 8 Ch. 415; 28 L. T. 54; 21 W. R. 449.

Where two infants were entitled to successive estates tail in remainder after the life of their father, which life estate had been sold under his bankruptcy: the court refused to allow a yearly sum for their maintenance to be borrowed on the security of a mortgage or charge on the real estate. *Hamilton*, *In re*, 55 L. J., Ch. 282; 31 Ch. D. 291; 53 L. T. 840; 34 W. R. 203—C. A.

So also where the tenant for life was willing to release her life estate so as to give the first tenant in tail an estate in possession, and to join in the necessary deeds. *Howarth*, *In re* (supra), distinguished and doubted. *Cadman* v. *Cadman*, 55 L. J., Ch. 833; 33 Ch. D. 397; 55 L. T. 569; 35 W. R. 1—C. A.

Powers of Trustees.]—Trustees were given powers of maintenance out of the income of land, but no estate thereon was devised to them:—Held, that they took no implied estate, but had implied powers of entry and revocation of uses sufficient to enable them to execute the power of maintenance. *Dean* v. *Dean*, 60 L. J., Ch. 553; [1891] 3 Ch. 150; 65 L. T. 65; 39 W. R. 568.

—— **Jurisdiction of Court to Control.**]—A female infant was entitled contingently to a fund. The trustees had power to "apply all or any part" of the income for her maintenance and education. On a summons in the matter of the infant:—Held, that the court had no jurisdiction on a summons in the matter of an infant to make any order for payment by trustees or other persons. *Lofthouse*, *In re*, 54 L. J., Ch. 1087; 29 Ch. D. 921; 53 L. T. 174; 33 W. R. 668—C. A.

Whether the court could control the discretion of the trustees as to the amount for maintenance so long as such discretion was honestly exercised, quære. *Ib.*

—— **Child assigning Interest.**]—A testator directed his trustees to apply the income of his estate "in and towards the maintenance, education and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed them to divide his estate equally among all his children then living:—Held, that no child of the testator was entitled prior to the attainment of twenty-one by the youngest, to the payment of any part of the income, and that the trustees were entitled to apply the income for the maintenance of the children in their absolute discretion; that H., to whom one child had assigned all his interest under his father's will, had no interest in the income. *Coleman*, *In re*, *Henry* v. *Strong*, 58 L. J., Ch. 226; 39 Ch. D. 443; 60 L. T. 127—C. A.

On Ill-treatment by Father.]—Order for a guardian and maintenance for infants upon ill-treatment by their father. *Whitfield* v. *Hales*, 12 Ves. 492.

Mother's Separate Estate.]—Children have no right in law or in equity, during the life of their mother, to be maintained out of her separate estate, while their father is living. *Hodgens* v. *Hodgens*, 4 Cl. & F. 223.

Mother, married to a second husband, not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes. *Billingsley* v. *Critchet*, 1 Bro. C. C. 268.

Where father is not of ability court will allow maintenance for children, though mother has a competent separate estate. *Haley* v. *Bannister*, 4 Madd. 275; 20 R. R. 299.

Advances by Mother.]—When a mother made advances to a son during his minority, and not with the intention of claiming as a creditor:—Held, that there was no debt due to her for maintenance. *Cottrell*, *In re*, *Joyce* v. *Cottrell*, 41 L. J., Ch. 70; L. R. 12 Eq. 566; 25 L. T. 405; 19 W. R. 1076.

Held, also, that to support a claim by a mother for maintenance during a period after the son attained majority, there must have been a contract. *Ib.*

Amount Mother entitled to.]—The allowance to which a mother, who has maintained her orphan child, is entitled, out of the accumulations, is limited to what she has actually expended upon such maintenance, and the allowance ought to be paid out of that part of the child's fortune which it would have been most for the benefit of the child, if living, to have applied for that purpose. *Brain* v. *Knott*, 1 Ph. 572; 14 L. J., Ch. 440; 9 Jur. 979.

A widow and her children being entitled to personal property, the court directed that the widow maintaining the children in a proper manner the income should be paid to her during the infancy of the children, or until further order. *Crockett* v. *Crockett*, 1 Hare, 451; 11 L. J., Ch. 279; 6 Jur. 531.

Illegitimate Child.]—A testator constituted his widow guardian of his two children (one being the child of another woman), and he gave her 4,000*l.* "to be used for her own and the children's benefit, as she should, in her judgment and conscience, think fit." This gave the widow a discretion as to the application of the income which the court would not control, if bonâ fide exercised. The maternal relations of the boy

removed him from the widow's custody. The widow married again, and appointed one-eighth of the capital to the boy, and the remainder to her own child. The court directed 30*l.* a year to be allowed out of the income of the 4,000*l.* for his education. *Hart* v. *Tribe*, 19 Beav. 149.

Mother excluded from Guardianship.]—A testator by his will expressly excluded his wife from the guardianship of his children, and directed that if she should attain possession of them, the provision he had made for their maintenance should cease, and he appointed his executors their guardians. The widow forcibly removed one of the daughters from a school and took the child abroad. The court ordered an account of the testator's estate to be taken, but referred it to the master to inquire into the alleged misconduct of the mother, and ordered all proceedings under the decree to be stayed till the report was made. *Arnott* v. *Bleasdale*, 4 Sim. 387.

One Guardian allowed to receive Money—Voucher of Expenditure.]—H. and C. were trustees and executors of a will, and guardians of the testator's daughters. The daughters during their infancy were maintained by C., and H. allowed him to receive the income for that purpose. After they attained majority judgment was given for administration of the testator's estate, in which the usual accounts of the personal estate were directed, and an inquiry how and by whom each of the daughters was maintained during infancy, and what was proper to be allowed and to whom:—Held, on appeal, that H., as trustee, was not discharged by mere evidence of payment of the income to C., his co-guardian, but that under the inquiry, H. was not bound to vouch the items of expenditure; and if it was shown that C. had properly maintained and educated the children, the sum proper for that purpose would be allowed against the balance found due on the account, without vouching the details of the application. *Evans, In re, Welsh* v. *Channell*, 53 L. J., Ch. 709; 26 Ch. D. 58; 51 L. T. 175; 32 W. R. 736—C. A.

Trust to Accumulate—Mode of Distribution.]—A father, after directing that his trustees should carry on his business till his youngest child should attain twenty-one, and should then sell his business if not previously sold, and directing the sale and conversion and investment of his estate, and giving an annuity to his wife, empowered his trustees to apply "the whole or so much as they shall think fit of the annual income as a common fund for the maintenance, education and bringing up or otherwise for the benefit of my several children till the youngest shall attain twenty-one, in such manner as my trustees shall judge expedient, accumulating the surplus income in aid of the common fund, and the income and accumulation shall follow the destination of the capital whence the same shall have arisen." The capital of the estate was directed to be divided equally amongst all the children who attained twenty-one, or being daughters married under that age. The youngest child had attained twenty-one, and the trustees having applied portions of the income, for the maintenance and benefit of the children, and accumulated the rest:—Held, that the proper mode of distribution was to divide the whole accumulated fund equally among the children, they giving credit for sums allowed for maintenance with interest. *Hilton* v. *Hilton*, L. R. 14 Eq. 468.

And see TRUST AND TRUSTEE.

2. How Payable.

a. Out of Capital.

General Rule.]—Court rarely breaks in upon the capital for the mere purpose of maintenance, though frequently done for advancement. *Walker* v. *Wetherell*, 6 Ves. 474.

General rule, that trustee shall not break in of his own authority upon the capital of infant's fortune. *Ib.*, 473.

The case in which maintenance may exceed income, is where there was a reasonable expectation that the fortune would be greater than it turned out to be. *Kilbee* v. *Sneyd*, 2 Moll. 235.

By Trustee.]—Trustees may, in a case of necessity, break in upon the capital of a trust fund, for the maintenance or for the advancement of infant children, even where there is a gift over in the event of their dying under twenty-one. *Tibbs, In re*, 17 W. R. 304.

Trustees applied a part of the capital belonging to infants, who had been left destitute, for their benefit. They were allowed the amount. *Prince* v. *Hine*, 26 Beav. 634.

By Executor.]—When the act done by the executor in breaking in upon the capital of infant's fortune for advancement is such as the court would have authorised, it will be sustained. *Carmichael* v. *Wilson*, 3 Moll. 79.

—— **Reference to Master.**]—Where a father has deserted his children, and is not of ability to maintain them, the court orders a reference to the master to inquire whether it will be for the benefit of the infants that a certain sum should be raised out of property to which they are absolutely entitled under a will; and upon the master's report, and with the consent of the executors, the court will order the sum to be raised. *England, In re*, 1 Russ. & M. 499.

Small Fund.]—The whole of a small legacy and accumulations were paid out of court to an infant's solicitor for past maintenance and future advancement; any balance to be paid to infant on his attaining majority. *Welch, In re*, 23 L. J., Ch. 344; 2 W. R. 310.

The shares of infants not exceeding 20*l.* each, ordered to be paid to the person maintaining them, upon his undertaking to apply the same for their maintenance. *Farrance* v. *Viley*, 21 L. J., Ch. 313.

An infant's property being very small, 29*l.* maintenance ordered out of the principal without a reference. *Green, Ex parte*, 1 J. & W. 253.

So interest of 1,200*l.* the property of three infants. *Dudley, Ex parte, Ib.*, 254, n.

—— **Apprenticeship.**]—100*l.* devised to an infant payable at twenty-one, and if he dies before, then it is devised over, and the interest for the child's maintenance. The trustee lays out 20*l.* for placing out the child as apprentice, and the child died under twenty-one. This 20*l.* allowed. *Franklin* v. *Green*, 2 Vern. 137.

—— **Outfit.**]—An infant's share, a residue of

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small amount, ordered to be paid to his father as an outfit and passage to India. *Clay* v. *Pennington*, 8 Sim. 359; 6 L. J., Ch. 183.

—— **Out of Legacy.**]—A legacy of 10*l.* to an infant for mourning may be directed to be paid to the father, he undertaking to apply it for the benefit of the infant. *Ker* v. *Ruxton*, 16 Jur. 491.

Money expended for maintenance and education, shall be allowed out of a small legacy given to an infant, though it breaks into the principal; otherwise, where the legacy is considerable. *Barlow* v. *Grant*, 1 Vern. 255.

Direction as to Fund.]—Where testator directs that the income shall be applied in maintenance, and the income is insufficient, the court will in some cases direct payment out of the capital of his personalty. *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

—— **"Out of the Share."**]—When a settlor directed maintenance from fourteen to twenty-one to be allowed by trustees "out of the share" of each child in 6,000*l.*, to which each would be entitled on attaining the latter age, and there was no direction for the payment of interest on that fund:—Held, that the maintenance for each child must come wholly out of the capital of the share of that child in the 6,000*l.* *Cusack* v. *Jellico*, 22 W. R. 344.

—— **Contingent Share.**]—Order made that executors be at liberty to apply certain small sums, part of the capital of the residuary shares bequeathed by a father to his infant children, towards their maintenance, though the shares did not vest till the children came of age. *Chambers, Ex parte*, 1 Russ. & M. 557.

Gift of income of residuary personalty, the capital to be paid at twenty-five, with survivorship, and a gift over and direction to apply, out of the personal estate, a sufficient sum, for maintenance:—Held, not to justify an application of capital. *Evans* v. *Leach*, 2 Jur. 758.

Father bankrupt—Legacy by Grandfather.]—A., after his brother's bankruptcy, took the children and maintained them:—Held, that his executrix could not retain the sums expended for maintenance out of a legacy given to the children by their grandfather. *Worthington* v. *M'Craer*, or *M'Craw*, 23 Beav. 81; 26 L. J., Ch. 286; 5 W. R. 124.

Held, also, that she could retain the premium paid by A. to apprentice one of his nephews out of a legacy, to which the nephew was contingently entitled. *Ib.*

Tenant for Life—Consent.]—When a settlement contained no provision as to maintenance, and an infant was entitled contingently on attaining twenty-one, the court directed a portion of the corpus to be raised for maintenance with the consent of the tenant for life, who was restrained from anticipation. *Robinson, In re*, 19 L. T. 81; 16 W. R. 1106.

A fund vested in trust to pay the interest to one for life, and after death to her children. The court refused, with the consent of the mother, to advance any part of the principal for the maintenance of the minor. *Walker* v. *Walker*, 11 Ir. Eq. R. 329.

Tenants in Tail.]—The court ordered advances out of capital for the maintenance of children entitled to the income, and as tenants in tail, to the capital, to their mother. *Nottley* v. *Palmer*, 11 Jur. (N.S.) 968; 13 L. T. 647; 14 W. R. 170.

Accumulations—Rent paid.]—Maintenance out of the principal of minor's fortune composed chiefly of accumulated interest, refused. But rent paid for minors in order to save the costs of an ejectment, allowed out of principal. *Key, Ex parte*, 1 Ball & B. 405.

For Emigration.]—Part of principal in court, advanced towards enabling infants to emigrate with their guardian. *Clarke, In re*, 17 Jur. 362.

Reversionary term—Portions.]—The court does not favour raising portions or maintenance out of a reversionary term, and when the term fell into possession, and the portion was raised, refused to charge the difference between the sum annually allowed for maintenance, and the sum charged. *Clinton* v. *Seymour*, 4 Ves. 440.

—— **Mortgage of.**]—Settlement of real estate gave a term to trustees to raise a portion for daughter, and in the meantime, 300*l.* per annum, for her maintenance, to be raised either by rents and profits, or by sale or mortgage. Bill prayed a mortgage of the reversion for the maintenance, but the court strongly inclined against it. *Pierpoint* v. *Cheyney*, Pre. Ch. 583; 1 P. Wms. 488.

Reversion never mortgaged to raise maintenance where the mother was able to keep the child. *Ib.*

—— **Charged on Property.**]—The court has jurisdiction to charge reversionary property of infants with money for their maintenance, even where some of the infants may not ultimately become entitled in possession. A security approved, with a provision for restoring the money by means of an insurance against the contingency. *De Witte* v. *Palin*, L. R. 14 Eq. 251; 26 L. T. 825; 20 W. R. 858.

Where an infant is contingently entitled and there is nothing in the instrument to warrant maintenance, the court can only direct it when the infant is one of a class entitled, with the consent of those entitled in remainder. *Arbuckle, In re*, 14 L. T. 538; 14 W. R. 535.

Where an only child was contingently entitled, and the parties entitled in remainder were infants:—Held, that no maintenance could be ordered; but a reference to chambers ordered, to effect an insurance on the chance of the infant dying under twenty-one, and thus provide maintenance out of the accumulations. *Ib.*

The court refused to declare that sums advanced by a father for the benefit of his infant son were a charge on property to which the son would become entitled only in the event of his attaining twenty-one. *Tanner, In re*, 53 L. J., Ch. 1108; 51 L. T. 507.

Semble, the court has no jurisdiction to make such a charge, and the only proper form of order in such a case is that in *Arbuckle, In re* (supra). *Ib.*

—— **Mortgage of Policy.**]—Where an infant was contingently entitled on attaining twenty-

one or marriage, the court sanctioned a scheme for the payment of past and future premiums on a policy against the death of the infant before twenty-one or marriage, and for the payment of past and future maintenance of the infant, such payments to be secured by a mortgage on the policy, and a charge upon the infant's contingent interest. *Bruce, In re*, 30 W. R. 922.

—— **Past Maintenance.**]—Sum directed to be raised for past and future maintenance of an infant, and to be a charge upon his estate, both present and future. *Allen, In re*, 14 Jur. 324.

—— **Freehold Property.**]—On an application by an infant for maintenance, the court has jurisdiction, without suit, to charge the expenses of his past maintenance and the costs of the application on the corpus of a freehold estate to which he is entitled in fee. *Howarth, In re*, 42 L. J., Ch. 316; L. R. 8 Ch. 415; 28 L. T. 54; 21 W. R. 449.

b. Future and Contingent Interests.

i. *Before Conveyancing Act*, 1881.

General Rule.] — The principle is, that wherever children have a common interest in a fund, the income of the fund may be applied to their maintenance. *Haley* v. *Bannister*, 4 Madd. 280; 20 R. R. 299.

The case in which the court has given maintenance has been where the fund being given to the children with survivorship among them, their interests and the chance of taking the whole as survivor were equal, and no other person interested. *Kebble, Ex parte*, 11 Ves. 604; 8 R. R. 250.

Maintenance allowed to infants out of a fund in which they had only contingent interests. *Prater* v. *Prater*, 6 L. J. (o.s.) Ch. 90.

Legacy, "when" and "as."]—Maintenance ordered where legacy is given to children "when" and "as" they attain twenty-one, with survivorship in case of any dying under that age, and if all die the legacy to cease. *Lambert* v. *Parker*, G. Cooper, 143; 14 R. R. 224.

Legacy to a child, at twenty-one. It shall have interest in meantime, especially where no maintenance is provided for it. *Anon.*, 2 Vent. 346. S. P., *Rennesey* v. *Parrot*, 1 Ch. Ca. 60; *Harvey* v. *Harvey*, 2 P. Wms. 21.

Devise of Residue.]—Devise of residue of real and personal estate to children at twenty-one or marriage; all the children are entitled to maintenance during their minorities. *Brown* v. *Temperley*, 3 Russ. 263.

Term for Portions.]—By a settlement a term was limited to trustees for raising 3,000*l.* for daughters' portions, payable at eighteen or marriage. The estate was devised to S., one of the daughters being married and of the age of twenty:—Held, that she must have maintenance till the portion became due, and from thence interest at 5 per cent. till paid. *Greenhill* v. *Waldoe*, Pre. Ch. 367; Gilb. Eq. Rep. 31.

Interest as Maintenance.]—Legacy to child payable at future day. Maintenance allowed though no direction as to interest. *Chambers* v. *Goldwin*, 11 Ves. 2; 8 R. R. 61.

Devise to an infant at twenty-one, with accumulation in the meantime, with similar limitations, in case of his death under twenty-one, to his sisters. The father being dead and his wife married, maintenance was decreed, without an inquiry whether it was for the benefit of the infants. *Greenwell* v. *Greenwell*, 5 Ves. 194.

The extension of rule as to giving interest by way of maintenance is disapproved. See *Ib.*, 199, a. note.

Direction for Accumulation.]—Maintenance allowed against a direction for accumulation, only where it is for the benefit of the infants, the chance of surviving being equal, and no other interest to be defeated. *Errat* v. *Barlow*, 14 Ves. 202; 9 R. R. 273.

After attaining Twenty-one.]—Interest on a contingent legacy or share of residue is only given for maintenance where the father would if living be obliged to maintain the child during infancy, and not where that obligation would not arise. *Breeds, In re*, 45 L. J., Ch. 191; 1 Ch. D. 226; 24 W. R. 200.

Where a testator provided maintenance for his daughters until they should attain twenty-one, and bequeathed them a share of residue contingently on their attaining twenty-five:—Held, that maintenance could not be granted to daughters who had attained their majority. *Ib.*

Legacies to infants to be paid to them at their respective ages of twenty-three years, and if they should die before, their legacies to sink into the residue. These legacies do not carry interest, and no maintenance can be allowed. *Deserambes* v. *Tomkins*, 1 Cox, 133.

—— **Increased Maintenance.**]—Devise to pay annual maintenance till grandchildren attained twenty-five, and to accumulate the surplus income to form part of his residuary personal estate; and to divide the income amongst his grandchildren when they attained twenty-five, with benefit of survivorship on any of them dying under twenty-one without leaving a child that should attain twenty-one. A petition for an increase of maintenance was dismissed. *Turner* v. *Turner*, 4 Sim. 430.

Insurance Policy—Bonus.]—A life policy of assurance was settled on A., the husband, for life, remainder to the children at twenty-one, remainder in default as wife should appoint. Wife appointed to husband, and died leaving one infant child. After her death a bonus became payable on the policy. The court directed payment of the bonus to A., for maintenance of the child, on condition that A. gave up his life interest under the settlement. *Hays, Ex parte*, 3 De G. & Sm. 485; 18 L. J., Ch. 441; 13 Jur. 762.

Grandchildren — Limitation over.] — Maintenance not allowed upon legacies to grandchildren at twenty-one with interest, though the father was not of ability to maintain them, the legacies being given over in the event of death under twenty-one. *Errington* v. *Chapman*, 12 Ves. 20. And see *Buckworth* v. *Buckworth*, 1 Cox, 30.

Residuary bequest in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate, and in case of the death of all before the time of payment, over to their mother absolutely. There

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being several children, the court directed maintenance, taking the consent of the mother. *Cavendish* v. *Mercer*, 5 Ves. 195 ; 5 R. R. 25.

Consent—Of Next of Kin.]—Maintenance will not be given in respect of a contingent legacy, although there be no gift over, without the consent of the next of kin. *Cannings* v. *Flower*, 7 Sim. 523 ; 5 L. J., Ch. 8.

—— **Of Remaindermen.**]—Residuary bequest, payable at twenty-one or marriage, or to the issue of those dead, with survivorship and accumulation till the time of payment, and a limitation over, absolutely, in case of the death of all. The father, being unable to maintain his children, maintenance was directed by the court, taking the consent of the persons to whom the property was given over. *Fendall* v. *Nash*, 5 Ves. 197, n.

—— **Of Legatee Over.**]—Maintenance will not be allowed out of legacies to children given over in case of their death under twenty-one, without the consent of legatee over. *Fairman* v. *Green*, 10 Ves. 48.

Testator directed the interest of his residue to be paid to his wife for the maintenance of herself and her children, until the death of her father, when it was to be accumulated for the children, and the testator directed his residue and the accumulations to be transferred to his children when the youngest attained twenty-one, with benefit of survivorship on their dying under twenty-one, and without issue, and a limitation over. The court refused to allow maintenance out of the residue, although the legatees over consented. *Kime* v. *Welfitt*, 3 Sim. 533 ; 31 R. R. 211.

Income Exchanged for Annuity.]—A fund was limited to children to vest at twenty-one. The income of their prospective shares to be applied for their maintenance at the discretion of the trustees. The children become entitled to annuities from a society, during their respective minorities, on the condition of payment to the treasurer of all their property. The vice-chancellor appointed the mother guardian, and directed the income of the infant children's respective shares to be paid to her, with liberty to her to pay the same to the treasurer of the society. *Osborne's Settlement, In re*, 2 W. R. 85.

Property Held in Trust.]—Trustees may, under 23 & 24 Vict. c. 145, s. 26, apply for maintenance the income of property held on trust for the infant contingently on attaining twenty-one. *Cotton's Trusts, In re*, 45 L. J., Ch. 201 ; 1 Ch. D. 232 ; 33 L. T. 720 ; 24 W. R. 243.

When a fund was bequeathed upon trust for all the children of A. who should attain twenty-one in equal shares, and if there should be but one such child, then for that child, and A. died leaving one infant child :—Held, that the income of the fund might be applied in the maintenance of the child. *Ib.*

—— **Powers of Trustees.**]—Though 23 & 24 Vict. c. 145, s. 26, enables trustees to apply for an infant's maintenance out of income to which the infant is contingently entitled, it does not enable them so to apply income to which the infant never can become entitled at all. *George, In re*, 47 L. J., Ch. 118 ; 5 Ch. D. 837 ; 37 L. T. 204 ; 26 W. R. 65.

Interest of Legacy.]—Maintenance out of interest of legacy to grandchild when youngest should attain twenty-one, refused. *Lomax* v. *Lomax*, 11 Ves. 48 ; 8 R. R. 84.

—— **Appointment of Trustees.**]—Legacy to B., to be paid when he attains twenty years, and trustees for the infant appointed : bill filed for interest on the ground of the appointment of trustees, dismissed. *Roberts* v. *Williams*, 3 Jur. 973. And see *Chambers, Ex parte*, 1 Russ. & M. 557.

ii. *Since Conveyancing Act*, 1881.

Contingent Legacy.]—Trustees cannot, under s. 43 of the Conveyancing Act, 1881, apply the income of an infant's contingent legacy for the benefit of the infant, unless the income will go along with the capital of the legacy if and when such capital vests. *Judkin's Trusts, In re*, 53 L. J., Ch. 496 ; 25 Ch. D. 743 ; 50 L. T. 200 ; 32 W. R. 407.

Bequest of Residue — Property held in Trust.]—A testatrix bequeathed "the residue of my money" to an infant :—Held, that the residue being ascertained, the executor would hold the residue in trust for the infant within s. 43 of the Conveyancing Act, 1881, and would be entitled to apply the income for the infant's maintenance, as provided by that section. *Smith, In re, Henderson-Roe* v. *Hitchins*, 58 L. J., Ch. 860 ; 42 Ch. D. 302 ; 61 L. T. 363 ; 37 W. R. 705.

Apportionment—Two Funds.]—Property bequeathed upon trust to pay the income to R., an infant, during her life, with remainders over. R. attained twenty-one :—Held, that the accumulations of income during her minority belonged to her absolutely. *Wells, In re, Wells* v. *Wells*, 59 L. J., Ch. 113 ; 43 Ch. D. 281 ; 61 L. T. 806 ; 38 W. R. 327.

A fund bequeathed to R. for life if she attained twenty-one, and there was an express power to apply the income for maintenance. Another fund was bequeathed, by the same will, upon trust to pay the income to R. during her life :—Held, that the past maintenance of R. was primarily payable out of the former fund, that being most for her benefit. *Ib.*

"Contrary Intention"—Accumulations—Vested Life Interest.]—Property comprising a share of residue was devised in trust to pay the income to an infant for life, remainder to such of her children as should attain twenty-one, and in default then over. There was no express maintenance or accumulation clause :—Held, that the infant took a vested interest ; and that as this had been expressly given by the instrument the testator had expressed a "contrary intention" within s. 43, sub-s. 3, of the Conveyancing Act, 1881 ; consequently that section did not apply, and she was entitled to the accumulations. *Wells, In re, Wells* v. *Wells* (supra), approved. *Humphreys, In re, Humphreys* v. *Levett*, 62 L. J., Ch. 498 ; [1893] 3 Ch. 1 ; 2 R. 436 ; 68 L. T. 729 ; 41 W. R. 519—C. A.

A testator gave a fund on trust for all the children of A. equally, who being sons should attain twenty-one, or being daughters should

attain twenty-one, or marry, with benefit of survivorship amongst them, and he directed his trustees to accumulate the income of the shares, and to pay the same as and when their presumptive shares should become payable under the previous trust :—Held, that the will did not express a "contrary intention" within the meaning of s. 43 of the Conveyancing Act, 1881, and that the trustees might at their discretion apply the income of the trust fund towards the maintenance of the infants. *Thatcher's Trusts, In re*, 53 L. J., Ch. 1050 ; 26 Ch. D. 426 ; 32 W. R. 679.

Section 43 of the Conveyancing Act, 1881, does not authorise the allowance of maintenance where, apart from the act, the infant, on attaining twenty-one, would only be entitled to the legacy without interest. *Dickson, In re, Hill* v. *Grant*, 54 L. J., Ch. 510 ; 29 Ch. D. 331 ; 52 L. T. 707 ; 33 W. R. 511—C. A.

Intermediate Income.]—W. by will gave his residuary estate in trust for his grandchildren—sons, at twenty-one, or daughters, at twenty-one or marriage, as tenants in common :—Held, that the income belonged to such of the grandchildren as had attained twenty-one at the time when the income accrued, to the exclusion of those who were then still infants ; that such infants would not be entitled to any back income on attaining twenty-one ; and that no maintenance could be allowed for such infants under s. 43 of the Conveyancing Act, 1881. *Dickson, In re* (29 Ch. D. 331), applied. *Jeffery, In re, Burt* v. *Arnold*, 60 L. J., Ch. 470 ; [1891] 1 Ch. 671 ; 64 L. T. 622 ; 39 W. R. 234.

A testator specifically devised scheduled property, "whether real or personal," upon trust for his daughter for life, and after her decease for her children—sons at twenty-one, daughters at that age or marriage ; he then devised and bequeathed his residuary real and personal estate to his trustees, as to a moiety thereof, upon the trusts before declared concerning the specifically devised freeholds. The scheduled property comprised freeholds only. The daughter died leaving two infant children :—Held, that the rule in *Genery* v. *Fitzgerald* (Jacob, 468) applied under this will both to the scheduled and residuary gifts, and that the infants were contingently entitled to the income, since their mother's death, of the specifically devised freeholds, and of one moiety of the residuary estate ; consequently, s. 43 of the Conveyancing Act, 1881, applied, and that the trustees had power to resort to the intermediate income for maintenance. *Burton's Will, In re, Banks* v. *Heaven*, 61 L. J., Ch. 702 ; [1892] 2 Ch. 38 ; 67 L. T. 221.

Infants contingently entitled to a share of residue can be allowed maintenance out of the income thereof until one of them attains a vested interest. *Jeffrey, In re* ([1891] 1 Ch. 675), and *Burton's Will, In re* ([1892] 2 Ch. 38), considered. *Adams, In re, Adams* v. *Adams*, 62 L. J., Ch. 266 ; [1893] 1 Ch. 329 ; 3 R. 222 ; 68 L. T. 376 ; 41 W. R. 329.

Where under a will members of a class who are infants are entitled to shares in property contingently upon attaining twenty-one, those members who by attaining that age have acquired a vested interest, take (as between them and the infant members) a vested interest in only aliquot shares of the capital corresponding to the total number of members of the class ; and are entitled only to shares of the income corresponding to their respective vested shares in the capital. Maintenance can therefore, under s. 43 of the Conveyancing Act, 1881, be allowed to the infant members of the class out of the shares of income to which such infants respectively are contingently entitled. *Burton's Will, In re, Banks* v. *Heaven* (supra), approved : *Jeffery, In re, Burt* v. *Arnold* (supra), approved in *Adams, In re, Adams* v. *Adams* (supra), overruled. *Holford, In re, Holford* v. *Holford*, 63 L. J., Ch. 637 ; [1894] 3 Ch. 30 ; 7 R. 304 ; 70 L. T. 777 ; 42 W. R. 563—C. A.

Where under a will property is left to a class (capable of increase), contingently on the members attaining twenty-one, the accrued surplus income belongs to the adult members absolutely, and to the infant members contingently, and, therefore, maintenance can under s. 43 of the Conveyancing Act, 1881, be allowed to the infant members out of the shares of income to which such infants are contingently entitled. *Jeffery, In re, Burt* v. *Arnold* (supra), reconsidered ; *Holford, In re, Holford* v. *Holford* (supra), followed. *Jeffery, In re, Arnold* v. *Burt*, 64 L. J., Ch. 830 ; [1895] 2 Ch. 577 ; 13 R. 857 ; 73 L. T. 332 ; 44 W. R. 61.

—— **Fund set Apart.**]—A testator bequeathed a sum of 4,000*l.* Victoria stock, in trust for such of his granddaughters as should survive him and attain twenty-one, in equal shares :—Held, following *Medlock, In re* (55 L. J., Ch. 738), that the legacy being segregated and vested in trustees for the object of the gift when the contingency happened, the granddaughters, on attaining twenty-one, would be entitled to the intermediate income, and therefore that s. 43, sub-s. 1, of the Conveyancing Act, 1881, as interpreted by *Dickson, In re* (supra), applied, and the trustees had power to allow maintenance out of the income. *Guthrie* v. *Walrond* (22 Ch. D. 573), distinguished ; dictum of Jessel, M.R., in *Lang* v. *Ovenden* (16 Ch. D. 694), corrected and explained. *Clements, In re, Clements* v. *Pearsall*, 63 L. J., Ch. 326 ; [1894] 1 Ch. 665 ; 70 L. T. 682 ; 42 W. R. 374.

—— **Tenant for Life and Remainderman.**]—Where a fund consisting of leaseholds has been severed from the rest of a testator's estate for the benefit of a tenant for life and remaindermen, the income accruing between the death of the tenant for life and vesting in the remainderman goes to the remaindermen, contingently on their attaining vested interests in the corpus. Trustees may, therefore, under s. 43 of the Conveyancing Act, 1881, allow maintenance out of such income to infant remaindermen whose interests will not vest until twenty-one. *Furneaux* v. *Rucker* (W. N. 79, 135) discussed and questioned ; *Kidman* v. *Kidman* (40 L. J., Ch. 359) ; *Medlock, In re, Ruffle* v. *Medlock* (55 L. J., Ch. 738), and *Clements, In re, Clements* v. *Pearsall* ([1894] 1 Ch. 665), followed and applied. *Woodin, In re, Woodin* v. *Glass*, 64 L. J., Ch. 501 ; [1895] 2 Ch. 309 ; 12 R. 302 ; 72 L. T. 740 ; 43 W. R. 615—C. A.

—— **Gift by Parent to Child.**]—The provisions of s. 43 of the Conveyancing Act, 1881, as to maintenance, must be read into the will of a testator dying after the act. The rule that a legacy given by a parent to an infant, impliedly carries interest from the death, by way of maintenance, is not displaced by the fact that adult

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children are named with infant children in a several gift. The rule is equally applicable where there is a discretionary power in trustees to raise a part of the interest of the legatee and apply the same for his "advancement, preferment, or benefit." The discretionary power of maintenance conferred by s. 43 of the Conveyancing Act, 1881, does not affect the rule. A general gift of residue in which adult and infant children share, is not, by reason of the same statutory provisions, a separate fund set apart for the maintenance of an infant, so as to render the rule inapplicable. *Moody, In re, Woodroffe* v. *Moody*, 64 L. J., Ch. 174; [1895] 1 Ch. 101; 13 R. 13; 72 L. T. 190; 43 W. R. 462.

c. Where Several Funds.

Benefit of Infant.]—Where two several funds by distinct persons are given for infant's maintenance, his interest alone must determine which fund is first applicable. *Foljambe* v. *Willoughby*, 2 Sim. & S. 165; 25 R. R. 178.

Where there are two funds applicable to maintenance, that which is most beneficial to the infant will be primarily liable. *Lucas* v. *King*, 8 L. T. 623; 11 W. R. 818.

The absence of a direction to accumulate the income of one of the funds is not sufficient to show an intention to prefer the one to the other. *Ib.* And see *Wells, In re*, supra, col. 1435.

—— **Direction to Accumulate.**]—A female infant was entitled on attaining twenty-one or marriage to a portion out of estates of which her brother was tenant in tail, and to be maintained out of the rents in the meantime; and she was also entitled on the happening of the same events to a sum of stock, and to be maintained out of the dividends in the meantime: subject to which the dividends were to be accumulated:—Held, that she must be maintained out of the rents, that arrangement being most beneficial to her. *Lygon* v. *Coventry (Lord)*, 14 Sim. 41.

A testator bequeathed to his son a legacy contingently on his attaining twenty-one. He also bequeathed his residuary real and personal estate on trust till his son should attain fifteen, for the maintenance of all his children, and subject thereto for accumulation at compound interest: the aggregate fund to be in trust for all his children contingently on their attaining twenty-one:—Held, that the infant was entitled to maintenance between attaining fifteen and twenty-one; and, the court selecting that mode which was most for the benefit of the infant, interest was declared to be payable on the legacy. *Martin* v. *Martin*, L. R. 1 Eq. 369; 14 W. R. 421.

3. Amount of.

a. In General.

General Rule.]—The rule is, that entire costs of maintenance shall not exceed the sum-total of interest of the capital of infant's fortune. *Carmichael* v. *Wilson*, 3 Moll. 80.

Mother Guardian.]—Order made without a reference, appointing the mother guardian of infant, and for the payment to her for maintenance of the interest on 1,000*l.* to which he was entitled. *Allsop, In re*, C. P. Cooper, 44; 7 L. J., Ch. 194.

Elder Brother.]—The court, in case of an elder brother, will direct the master to make a larger provision for him, that he may maintain the younger. *Lanoy* v. *Athol (Duke)*, 2 Atk. 447. S. P., *Petre* v. *Petre*, 3 Atk. 511.

Illegitimate Brother.]—Liberal maintenance made for an infant in regard to an illegitimate brother unprovided for. *Bradshaw* v. *Bradshaw*, 1 J. & W. 647.

Child Unborn.]—A special direction to the master to consider the birth of a child unprovided for, refused. *Burnet* v. *Burnet*, 1 Bro. C. C. 179. And see Dick. 602.

Parents Destitute.]—An increased maintenance out of the property of infants, for supporting their parents, who were in a state of destitution. *Allen* v. *Coster*, 1 Beav. 202; 9 L. J., Ch. 131.

Liberal allowance for maintenance where a guardian or father is in distressed circumstances. *Roach* v. *Garvan*, 1 Ves. sen. 160.

Suitable to Rank.]—Order made for liberal maintenance of a female infant, whose father was living, with a view to her being brought up in a manner suitable to her fortune. *Williams, Ex parte*, 2 Coll. C. C. 740.

Where the mother is the sole guardian of the heir to large estates the sum allowed the mother for the upkeep of establishment and education of the heir ought to be such sum as prudent guardians would allow to her "as mother." To decide what is a reasonable sum all the circumstances of each case must be considered; the governing consideration being what is for the interest of the heir. *Barnes* v. *Ross*, [1896] A. C. 625.

Large allowance for maintenance ordered under circumstances, but with reluctance. *Petre, Ex parte*, 7 Ves. 403.

Order made 450*l.* a year for maintenance, where infant's property exceeded 1,500*l.* a year. *Christie, In re*, 9 Sim. 643; 10 L. J., Ch. 79.

By Arrangement.]—The children of testator being respectively entitled to pecuniary legacies, in bank, and successively to the testator's house and stock-in-trade and equally to the residue, an offer of the executrix, the mother, to maintain the children without the fund in court upon the terms of being released from accounting for the profits of the business, which she continued to carry on from the death of the testator, on the consent of the pr. ami. and approval of the master, was decreed accordingly. *Drake* v. *Fortune*, 1 Moll. 201. And see *Anderton* v. *Yates*, 5 De G. & Sm. 202.

Small Fund—Dividends.]—Order made that part of a small sum of stock bequeathed to an infant should be sold to pay a debt incurred for necessaries, and that the residue of the stock should be transferred into court, and the dividends paid to his mother towards his maintenance *Swift, Ex parte*, 1 Russ. & M. 575.

Increased Amount.]—The court ordered a present allowance, and made a prospective provision for an increased allowance on entering the university, till twenty-one, a further order of the court to be applied for by the guardians. *Nunn* v. *Harvey*, 2 De G. & Sm. 301.

—— **Income Tax.**]—Where a certain sum was

allowed to a father for maintenance, the court, on the father's petition for an additional sum on account of the deduction of the income tax, refused to make an order to that effect. *Duffield* v. *Elwes*, 6 Jur. 1027.

—— **Master's Report Varied.**]—Where the master on reference reported that an infant was entitled as the heir-at-law to freehold estates, and that 100*l.* per annum would be a proper allowance for his maintenance, the court increased the allowance to 150*l.* per annum. *Heron's Minors, In re*, 3 Ir. Eq. R. 589.

Discretion of Trustees.]—Trustees were by deed authorised, if they thought fit, to apply the income of shares to which children were presumptively entitled towards the maintenance of the children, notwithstanding the father of the children might be of sufficient ability to maintain them:—Held, that the court would not control the discretion of the trustees. *Brophy* v. *Bellamy*, 43 L. J., Ch. 183; L. R. 8 Ch. 798; 29 L. T. 380.

—— **Unlimited Duration.**]—A testator by his will, after giving annuities, directed his trustees to accumulate the surplus income until the death of all his daughters, when the period of distribution was fixed; and the will contained a power of maintenance which was unlimited in duration of time, and expressed to be exercisable during the lifetime of the daughters. There was another trust for accumulation of surplus income not applied in maintenance:—Held, that the power of maintenance was unlimited; that there was not sufficient evidence of an intention to cut down the terms of the power of maintenance; and that the grandchildren were therefore entitled to have the income applied towards their maintenance. *Smeed, In re, Archer* v. *Prall*, 54 L. T. 929.

—— **Past Maintenance.**]—A testator gave a legacy to three children, or the survivor, who should attain twenty-one; but if all died under twenty-one there was a gift over. The will contained a direction to the trustees to apply such parts as they should think fit of the income of the legacy for the maintenance of the legatees:—Held, that the court had power to control the discretion of the trustees; and the court, in opposition to the trustees, directed that the whole income should be paid to the father for their maintenance, together with an equal amount for past maintenance. *Hodges, In re, Davey* v. *Ward*, 47 L. J., Ch. 335; 7 Ch. D. 754; 26 W. R. 390.

Allowance Exceeded.]—If a guardian expends more in maintenance than the sum allowed, the court will not make any reference as to such extra expenditure, unless a special case is made. *Rainsford* v. *Freeman*, 1 Cox, 417.

—— **Unnecessary Expenses.**]—Charges by trustees for money laid out in luxuries under colour of maintenance, and for money unnecessarily expended in pulling down and rebuilding a house, disallowed. *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

b. Where Express Trust.

Where Infants Absolutely Entitled.]—Increase of maintenance beyond that prescribed by the will, ordered, the infants being entitled to the fund absolutely among them. *Aynsworth* v. *Pratchett*, 13 Ves. 321.

What Amount Necessary.]—A direction to apply so much interest as might be necessary towards the maintenance of the testator's grandchildren, upon the decease of their respective mothers, the residue to accumulate, was confined to so much as should be actually necessary at the death of their mother. *Rawlins* v. *Goldfrap*, 5 Ves. 440.

Annuity.]—Testator bequeathed an annuity to his granddaughter, towards her maintenance, in such manner as his trustees should in their absolute discretion think fit, whether her father should be able to maintain her or not. The trustees made a very small payment on account of the annuity, and no provision for maintenance of the infant, who had been provided for by her father. The court declared that the father should receive the whole annuity, he undertaking to maintain her. *Stephens* v. *Lawrie*, 2 Y. & C. C. C. 87; 12 L. J., Ch. 71.

Definite Sum.] — Bequest for grandson at twenty-five with gift over and direction to apply a sum not exceeding 200*l.* per annum for his maintenance:—Held, that the presumption that the infant was entitled to interest on the fund was rebutted, and, the testator having fixed a definite sum for maintenance, the court would not exceed it. *May* v. *Potter*, 25 W. R. 507.

Testator gave his residuary estate to an infant, and directed 60*l.* a year to be allowed for his maintenance. The residue was of large amount, and the court from time to time considerably increased the maintenance. *Josselyn* v. *Josselyn*, 9 Sim. 63.

Discretion of Trustees.] — Where trustees having a discretion to apply what part they thought fit of an income of 800*l.* in the maintenance of an infant, had not exercised that discretion, and an allowance of 300*l.* was made by the party in possession of the fund, and this had been considerably exceeded by the plaintiffs in maintaining the infant, it was referred to the master, to inquire what was proper to be allowed to the plaintiffs for the maintenance of the infant. *Stopford* v. *Canterbury* (*Lord*), 11 Sim. 82; 4 Jur. 842.

Where the testator directed a certain provision for A. until sixteen, and then left it to his trustees to settle him in business, and provide for his maintenance out of the testator's property; on his attaining sixteen, the court referred it to the master to inquire what sums were to be allowed. *Kilvington* v. *Gray*, 10 Sim. 293.

Power to Appoint Sum—Interest on Portion.]—Infant entitled under a term to portion on twenty-one or marriage; and the estates were charged with the payment of such yearly sum, for her maintenance, not exceeding what the interest of her portion would amount to at such rate (not exceeding 5*l.* per cent.) as her father should appoint; and in default of appointment, then of such yearly sum, not exceeding the amount of interest aforesaid, as the trustees of the term should deem sufficient. The father died without having made any appointment:—

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Held, that the amount of her maintenance must be settled by the master. *Lygon* v. *Coventry* (*Lord*), 14 Sim. 41.

Freeman's Son.]—A freeman of London died intestate, leaving an infant son, who became entitled to his orphanage share of the personal estate, and also to other property. The infant was maintained by his mother:—Held, that the mother was merely entitled to be paid what she had expended, and that the amount was to be paid out of the orphanage share, that arrangement being for the infant's benefit. *Bruin* v. *Knott*, 12 Sim. 456; 1 Ph. 572; 14 L. J., Ch. 440; 9 Jur. 979.

Allowance beyond Provision in Will.]—Devise in trust to pay annual sums for the maintenance of grandchildren till they had attained twenty-five, and to accumulate the surplus income to form part of his residuary personal estate, and to divide the income of his estates amongst his grandchildren when they attained twenty-five, with benefit of survivorship. A petition for an increase of the maintenance was dismissed, the disposition of the property not being such as that the grandchildren must, of necessity, take the whole. *Turner* v. *Turner*, 4 Sim. 430.

—— **Trust for Accumulation.**]—Residue devised upon trust to pay two sums of 100*l.* yearly for maintenance of a grandson and granddaughter till twenty-five or till twenty-one or marriage, the residue of the income to be accumulated till the death of the widow, and then a sum to be paid to the grandson at twenty-five, and another sum to the granddaughter at twenty-one or marriage, and if she died before, the sum to fall into the residue. The court increased the allowances for the maintenance by 150*l.* and 120*l.* per annum respectively, to be paid out of the income and the accumulations thereof. But it was ordered that the trustees should hold the interests of the infants as a security for recouping to any person entitled thereto such sums of money as the increased sums of maintenance would have amounted to if accumulated as directed by the will. *Colgan, In re*, 51 L. J., Ch. 180; 19 Ch. D. 305; 46 L. T. 152; 30 W. R. 266.

Income insufficient—Charge on Property.]—Where an infant entitled under a will to maintenance, was allowed 100*l.* a year by the master, but the income was scarcely sufficient to pay other prior charges thereon; it was ordered that the trustees and executors should be at liberty, out of any funds in their hands, to pay the 100*l.* a year; and if the same should be insufficient, that what the guardians should pay for maintenance should form a charge upon his interest in the property. *Fentiman* v. *Fentiman*, 13 Sim. 171.

Settled Estates—Residence of Minor.]—Where a testator directs the payment of a sum of money, sufficient for the mere maintenance of a minor entitled to the settled estates, and manifests a clear intention that such minor shall reside at the principal mansion, such a sum will be directed to be paid out of the rents of the settled estates as will suffice to keep up the mansion as a residence for the minor. *Griggs* v. *Gibson, Maynard, Ex parte*, 21 W. R. 818.

c. Ability of Parent.

i. *In General.*

General Rule.]—"Maintenance" not equivalent to "interest" for the purpose of vesting a legacy; no maintenance shall be given when the parent is of ability to support the children. *Pulsford* v. *Hunter*, 3 Bro. C. C. 416.

Where a father is sufficiently competent, the court will give no direction with regard to an infant's maintenance. *Jackson* v. *Jackson*, 1 Atk. 515.

A parent must maintain his child, unless totally incapable, or from having many children he is very necessitous. *Butler* v. *Butler*, 3 Atk. 60.

Insolvency.]—To entitle the father of an infant legatee to maintenance, it is not necessary that he should be insolvent, but that he should not be in circumstances to maintain his child suitably to his expectation. *Buckworth* v. *Buckworth*, 1 Cox, 80.

—— **Consent of Persons entitled over.**]—Residuary bequest in favour of infant grandchildren, with survivorship, and accumulation, and a limitation over. The father, in consequence of bankruptcy, being unable to maintain his children, maintenance was directed by the court, taking the consent of the persons to whom the property was given over. *Fendall* v. *Nash*, 5 Ves. 197, n. S. P., *Cavendish* v. *Mercer*, 5 Ves. 195.

Legacy to Grandchildren.]—Maintenance not allowed upon legacies to grandchildren at twenty-one with interest, though the father was not of ability to maintain them, the legacies with the interest being given over. *Errington* v. *Chapman*, 12 Ves. 20.

Increased Allowance.]—When a sum has been allowed for maintenance on the ground of the father's inability to maintain them, the court will not grant a reference for an additional allowance without affidavit showing that the former allowance had become insufficient. *Gorton* v. *Vause*, 4 Jur. 4.

Father with some means.]—Where property of the value of 10,000*l.* per annum was to be accumulated, and to be laid out in purchase of lands for father for life and his sons in tail, with subsequent limitations over:—Held, that as the father was possessed of a moderate income, insufficient for the maintenance of his sons, to fit them for their positions, a sum of 2,700*l.* per annum should be allowed him for the benefit of the infants. *Havelock* v. *Havelock, Allan, In re*, 50 L. J., Ch. 778; 7 Ch. D. 807; 44 L. T. 168; 29 W. R. 859.

Maintenance, under the circumstances, given to a father, who had 6,000*l.* a-year of his own, and although no report of debts had been made. *Jervoise* v. *Silk*, G. Cooper, 52; 14 R. R. 215.

Order made for a liberal allowance for the maintenance of a female infant, whose father was living, with a view to her being brought up in a manner suitable to her fortune and expectations. *Williams, Ex parte*, 2 Coll. C. C. 740.

Where three children were entitled to a sum of 40,000*l.* equally, at twenty-one, and their

father's income did not exceed 500*l.* a-year, maintenance was allowed. *Barry* v. *Barry*, 1 Moll. 210.

Legacy to Infant — Apprentice.] — A father cannot apply a legacy left by a relation to his child, for his maintenance ; nor can he put him out apprentice with the money arising from the legacy. *Darley* v. *Darley*, 3 Atk. 399. And see *id.* 60, n.

Small Property.] — The interest of small legacies ordered to be paid to the mother for maintenance, upon her affidavit that the father was abroad in embarrassed circumstances. *Walker* v. *Shore*, 15 Ves. 122 ; 10 R. R. 41.

Dividends to which infants were entitled ordered, without a reference, to be paid to their father for their maintenance, the parties being poor and the property of small amount. *Payne* v. *Low*, 1 Russ. & M. 223.

Common Establishment.] — A daughter was entitled to one-fifth of some property, and her father to the remainder. She resided with, and was maintained by him, and he received the whole of the rents ; after his death, she claimed against his estate an account of one-fifth of the rents for twenty years. The court concluded that the common establishment had been maintained out of the mixed fund, and rejected the claim. *Trinder* v. *Smith*, 23 Beav. 554.

Second Marriage.] — Mother married to a second husband not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes. *Billingsley* v. *Critchet*, 1 Bro. C. C. 268.

Mother's separate Estate.]—Where father is not of ability court will allow maintenance for children, though mother has a competent separate estate. *Haley* v. *Bannister*, 4 Madd. 275 ; 20 R. R. 299.

After the death of the father :—Held, that maintenance was to be determined irrespective of the means of the mother to support them out of her own fortune. *Douglas* v. *Andrews*, 12 Beav. 310 ; 19 L. J., Ch. 69 ; 14 Jur. 73.

Father not to Benefit.]—The court will not give a direct benefit out of an infant's income to his father. *Stables, In re*, 21 L. J., Ch. 620.

A scheme by which an infant (whose father was living) was to be articled to a solicitor, and to live with an uncle residing in the same place, was approved of by the court ; and the uncle was appointed guardian to the infant, and to have an allowance out of his income. An allowance to the father, who lived at a distance, and was in very narrow circumstances, was refused. *Ib.*

ii. *Where Express Trust.*

Reference as to Ability.]—Where a legacy is given to infants at twenty-one, with a direction for maintenance out of the income during their minorities, and an ultimate limitation over the court, upon a petition for maintenance refused to dispense with the usual reference as to the father's ability. *Lucknow* v. *Brown*, 12 Jur. 1017.

Trust by will for all the children of A., when and as they shall severally attain sixteen, with direction for their maintenance ; maintenance was directed without regard to the father's ability. *Hoste* v. *Pratt*, 3 Ves. 730.

From what Time.]—Where the parent is reported not of ability, the sums allowed shall be only from the time of the report, not of the decree. *Hughes* v. *Hughes*, 1 Bro. C. C. 387.

Marriage Settlement.]—A father, if of ability, is not entitled to maintenance out of marriage settlement funds, which contained a power to apply the income for maintenance, unless it is clear that maintenance was to be allowed without reference to the ability of the father. *Thompson* v. *Griffin*, Cr. & Ph. 317 ; 5 Jur. 90.

—— **Appointment by Wife.**]—By a settlement, power was given to the wife to appoint a fund to her children, and it empowered the trustees to apply the income for maintenance, notwithstanding the husband might be of ability. The wife appointed the fund equally, and directed the income, during their minorities, to be paid to her husband for their maintenance. The children had other means of maintenance :—Held, that the court would apply a proper sum for the maintenance, and not necessarily the whole ; and a reference to chambers was directed to inquire how much ought to be allowed. *White* v. *Grane*, 18 Beav. 571 ; 23 L. J., Ch. 863 ; 2 W. R. 320, 328.

—— **Discretion of Trustees.**]—Trustees were authorised, if they thought fit, to apply the income of shares to which children were presumptively entitled towards maintenance, notwithstanding the father might be of ability to maintain them :—Held, that the court would not control the discretion of the trustees. *Brophy* v. *Bellamy*, 43 L. J., Ch. 183 ; L. R. 8 Ch. 798 ; 29 L. T. 380.

Personal estate settled, with a direction that after the wife's death the trustees should apply the income at their discretion for maintenance : —Held, that after the wife's death the husband, notwithstanding he was of ability, was entitled to require the whole or a sufficient part of the presumptive income to be applied for maintenance. *Stocken* v. *Stocken*, 4 Myl. & Cr. 95. Affirming 4 Sim. 152. *And see* 2 Myl. & K. 489 ; 7 L. J., Ch. 305 ; 2 Jur. 693.

—— **On Second Marriage.**] — Where the woman's fortune (on a second marriage) was settled to the use of herself for life, remainder to the children, making a provision for maintenance out of the interest of the fund, the court ordered an allowance to be made. *Mundy* v. *Howe* (*Earl*), 4 Bro. C. C. 223.

—— **Trust or Power.**]—By an ante-nuptial settlement, it was provided that until the capital should be transferable to any child, the trustees should receive the dividends upon trust, to apply the whole as they should think fit, for maintenance of such child :—Held, that this was a discretionary trust for maintenance, and not simply a power, and that the father was entitled to an allowance for past and future maintenance of his child, without reference to his ability. *Ransome* v. *Burgess*, 36 L. J., Ch. 84 ; L. R. 3 Eq. 773 ; 15 W. R. 189.

—— **Discretion not Exercised.**]—By a marriage settlement it was declared that the trustees should, after the death of the wife, apply the

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whole or such part as they should think fit of the income of the expectant share of any child for the maintenance of such child. The trustees paid the whole income to the husband without exercising any discretion as to its application to maintenance :—Held, that there was a discretionary trust equivalent to a power ; and as the trustees had not exercised any discretion, the estate of the husband must repay the whole income received. *Ransome* v. *Burgess* (L. R. 3 Eq. 773) disapproved. *Mundy* v. *Howe (Earl)* (4 Bro. C. C. 224) commented on. *Wilson* v. *Turner*, 52 L. J., Ch. 270 ; 22 Ch. D. 521 ; 48 L. T. 370 ; 31 W. R. 438.

Ante-nuptial Settlement.]—If, under a marriage contract, a fund has been settled upon trust for the children, at twenty-one, with a proviso that, till their shares become payable, the interest shall be applied towards their maintenance, the father is entitled to receive such interest for that purpose, without reference to his own ability. *Meacher* v. *Young*, 2 Myl. & K. 490.

—— **Right to be Recouped.**]—The doctrine, that where there is a fund subject to a trust for the maintenance of children, and the children are maintained by their father without any resort to the fund, the father is entitled to be recouped out of the accumulated income, only applies where the trust for maintenance is in an ante-nuptial settlement, which has a basis of contract to support it. *Kerrison's Trusts, In re*, 40 L. J., Ch. 637 ; L. R. 12 Eq. 422 ; 25 L. T. 57 ; 19 W. R. 967.

Discretionary Trust to Father.]—Devise to M. for life of property in trust to apply the same at his discretion towards the maintenance of his son D., the surplus to be accumulated, and to be applied for the benefit of D., or paid over to him as M. should think fit, and after the death of M., devise of the property and all accumulations not applied or paid over to D., to D. absolutely. M. who apart from this property was of ability to maintain D., received the rents of the property and maintained D. suitably :—Held, that M. was under the will entitled (notwithstanding his own ability) to apply so much of the income of the trust funds as he should think proper towards the maintenance and benefit of his son D. *Malcomson* v. *Malcomson*, 17 L. R. Ir. 69—C. A.

Infants' Shares not Determinable.]—By a marriage settlement trustees were directed after the death of both parents to apply as much as they should think fit of the income of each child's share for its maintenance, and accumulate the surplus. The shares could not be determined during the life of the father :—Held, that if the father was not of ability to maintain his children, there might be a reference in order that maintenance might be provided for them out of the trust fund. *Kekewich* v. *Langston*, 11 Sim. 291.

Son-in-law.]—Bequest to son-in-law in trust for the maintenance of his children by the testator's daughter ;—Held, that the son-in-law was entitled to apply the interest of the share for maintenance, notwithstanding he might be of ability. *Hawkins* v. *Watts*, 7 Sim. 199.

Power to Appoint for Maintenance.]—Two sums were vested in trustees on trusts for husband, wife, and children, with a joint power to husband and wife, or the survivor, to appoint the whole or any part of their dividends for maintenance. And it was declared that the trustees might apply the income, or a part, for maintenance as they thought proper :—Held, that the husband (who survived) was entitled to apply the income of the trust funds for the maintenance without reference to his ability. *Newton* v. *Curzon*, 16 L. T. 696.

Breach of Trust.]—Where trustees advance to a father the interest of his infant son's fortune, the court may, in a proper case, hold it a due application of such interest towards the maintenance of the child, though the father may have ample means of his own, yet if the money was paid by the trustees, and received by the father, as an advance for his own purposes, and was secured by a deed by the father to indemnify the trustees against the consequences of their breach of trust, the court will enforce repayment to the child of the sums advanced by the trustees. *Culbertson* v. *Wood*, Ir. R. 5 Eq. 23 ; 19 W. R. 260.

4. Past Maintenance.

a. In General.

General Rule.]—No allowance to a parent for maintaining an infant for the time past. *Hill* v. *Chapman*, 2 Bro. C. C. 231. S. P., *Simon* v. *Barber*, Taml. 22.

—— **Ability of Father.**] — Nor where the father had not been of ability, and although the will had expressly given the produce to the trustees for maintenance. *Andrews* v. *Partington*, 2 Cox, 223 ; 3 Bro. C. C. 60.

In Special Case.]—The court will not direct an inquiry as to the propriety of an allowance to the father for past maintenance unless a special case be made. *Bond, Ex parte*, 2 Myl. & K. 439 ; 4 L. J., Ch. 84.

Maintenance allowed for time past. *Sisson* v. *Shaw*, 9 Ves. 285 ; 7 R. R. 190. S. P., *Reeves* v. *Brymer*, 6 Ves. 425 ; *Sherwood* v. *Smith*, id. 454.

Debts incurred by Father.] — Maintenance allowed for the time past, the father being liable to debts he was obliged to contract in supporting minor and no fund to reimburse him. *Darlington, Ex parte*, 1 Ball & B. 240 ; 12 R. R. 21.

A father having sold property and borrowed money to enable him to maintain his child, a legatee, whose legacy was held to have vested, was allowed out of the legacy past maintenance to the extent of the sums so raised. *Parsons* v. *Peters*, 11 Jur. (N.S.) 150 ; 11 L. T. 501 ; 13 W. R. 214.

—— **Father Abroad.**]—Where an infant entitled to 290*l.* per annum had been maintained by his father, who had incurred a large debt for the purpose, and was unable any longer to maintain his son :—Held, that the father having resided out of the country, and being unable to apply to the court before, the court would grant a sum for past maintenance. *Carmichael* v. *Hughes*, 20 L. J., Ch. 396.

Income exceeded.]—Trustees directed to receive and pay the income of a fund for the maintenance of the children, and to pay and divide the fund and all accumulations among

the children at twenty-one. There was no express direction to accumulate. The father maintained the children at a larger expense than the income of the fund:—Held, that he was entitled to the accumulations of income for the past time, and the future income during the infancy of his children. *Birch* v. *Sumner*, 3 Jur. (N.S.) 712.

Grandchildren.] — Maintenance decreed to grandchildren for time past, though no direction given in will. *Collis* v. *Blackburn*, 9 Ves. 470.

—— **Annuity.**]—Annuity bequeathed to granddaughter towards her maintenance as his trustees should in their absolute discretion think fit. The trustees made a very small payment on account of the annuity, and made no provision for maintenance. The court declared that the father who had maintained the infant should receive the whole annuity for the time past till further notice; he undertaking to maintain her. *Stephens* v. *Lawrie*, 2 Y. & C. C. C. 87; 12 L. J., Ch. 71.

Trustees' Discretion.]—Where trustees having a discretion to apply what part they thought fit of an income of 800*l.* in the maintenance of an infant, had not exercised that discretion, and the persons who brought up the infant expended in her maintenance considerable sums, it was referred to the master, to inquire what was proper to be allowed for the maintenance of the infant from her becoming entitled to the fund. *Stopford* v. *Canterbury* (*Lord*), 11 Sim. 82; 4 Jur. 842.

Maintenance allowed for the time past under particular circumstances, a power to the trustees to apply dividends for maintenance, and by the death of the trustees, or their not acting, their discretion not having been exercised, an inquiry was directed whether it would have been proper in the trustees to apply any and what part of the dividends. *Maberly* v. *Turton*, 14 Ves. 499.

Charge on Infant's Estate.]—Sum directed to be raised for past and future maintenance of an infant, and to be a charge upon his estate, both present and future. *Allen, In re*, 14 Jur. 324. And see *Howarth, In re*, supra, col. 1433.

Rents—Costs of Suit by Guardian.]—Where a father not of ability to maintain his daughter, had, as her guardian, received the rents of her property, but had maintained her, and had spent a considerable sum in a suit relating to her property, which ended beneficially for her, but of which her estate had to bear the costs:—Held, that he was entitled to retain the rents, by way of allowance for his expenditure on her behalf. *Wright* v. *Vanderplank*, 8 De G. M. & G. 133; 2 K. & J. 1; 25 L. J., Ch. 753; 2 Jur. (N.S.) 599; 27 L. T. 91; 4 W. R. 410.

Order for Maintenance—Death of Trustee.]—By an order of the court, trustees of a will were directed to pay the income of property to which an infant was entitled to her mother for maintenance. One trustee died, and the mother married again; but the whole income was still paid to her. It was shown that the daughter had been well educated, and that her social position had been improved by her mother's marriage, and that the income, so far as not expended on herself personally, had been applied towards the expenses of the stepfather's establishment, of which she had the benefit:—Held, that the allowance of the whole income for maintenance would, under the circumstances, have been sanctioned by the court if applied to, and that the whole income ought, therefore, to be treated as having been properly applied, and that the order for maintenance had come to an end only on the marriage of the mother. *Smith* v. *Brown*, 48 L. J., Ch. 694; 10 Ch. D. 377; 40 L. T. 374; 27 W. R. 588—C. A.

Trust in part Valid—Discretion of Trustees.]—W. by will gave the residue of his personal estate to trustees upon trust to apply the income for the maintenance, education, and benefit of the children of A. until they respectively attained twenty-three and to accumulate the residue, and upon certain further trusts, as to the capital, in favour of the children of A., which by an order were declared to be void for remoteness. By the same order the trustees were ordered to accumulate the surplus income until further order. A. survived the testator, and had two children, the elder of whom attained twenty-three on March 10, 1892. The trustees accumulated the whole of the income until 1895:—Held, that the gift of income for maintenance was separable from the gift of capital, and was valid; and that the trustees had still a discretion to apply all or any part of the income which accrued before March 10, 1892, for the past maintenance of both children, and similarly might apply all or any part of the income from that date until the younger child should attain twenty-three for his maintenance. *Wise, In re, Jackson* v. *Parrott*, 65 L. J., Ch. 281; [1896] 1 Ch. 281; 73 L. T. 743; 44 W. R. 310. And see *Coster* v. *Coster*, infra, col. 1454.

b. Of Particular Classes.

i. *Grandchildren.*

Legacy.] — Maintenance out of interest of legacy to grandchild, when youngest should attain twenty-one, refused. *Lomax v. Lomax*, 11 Ves. 48; 8 R. R. 84.

The court will not allow maintenance to a grandchild legatee out of a fund not vested. *Buckworth* v. *Buckworth*, 1 Cox, 30.

—— **Surrender of Copyholds.**]—Defective surrender of copyhold cannot be supplied for grandchildren. *Perry* v. *Whitehead*, 6 Ves. 544.

No interest given by way of maintenance upon legacy to grandchild. *Id.* 546. S. P., *Elton* v. *Elton*, 3 Atk. 508.

—— **Father not of Ability.**]—Maintenance not allowed upon legacies to grandchildren at twenty-one with interest, though the father was not of ability to maintain them, the legacies with the interest being given over. *Errington* v. *Chapman*. 12 Ves. 20. And see *Buckworth* v. *Buckworth*, 1 Cox, 30.

Accumulations.] — Devise to grandson of twenty-one, with accumulation in the meantime, with similar limitations over to his sisters. The father being dead and the widow married, maintenance was decreed, without an inquiry. *Greenwell* v. *Greenwell*, 5 Ves. 194. (See note 50, *id.* 199 a.)

Not Directed by Will.]—Maintenance decreed

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to grandchildren, though no direction for it in will. *Collis* v. *Blackburn*, 9 Ves. 470.

Gift over—Bankruptcy of Father.]—Bequest to grandchildren at twenty-one or marriage with survivorship and accumulation till the time of payment, and a limitation over absolutely. The father being bankrupt, maintenance was directed by the court, taking the consent of the persons to whom the property was given over. *Fendall* v. *Nash*, 5 Ves. 197, n.

—— **Father's Income Inadequate.**]—Bequest to grandchildren at twenty-one or marriage with survivorship, the interest to accumulate and gift over to the mother. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, the court directed maintenance, taking the consent of the mother. *Cavendish* v. *Mercer*, 5 Ves. 195, n.; 5 R. R. 27.

ii. *Illegitimate Children.*

Surrender.]—The court will not supply a surrender for a natural child; but, if it has a legacy from the father, payable at twenty-one, will allow maintenance. *Crickett* v. *Dolby*, 3 Ves. 12.

Father Lunatic.]—An allowance will be made out of a lunatic's estate for his illegitimate children, but not for their mother. *Haycock, Ex parte*, 5 Russ. 154; 29 R. R. 16.

Brother Illegitimate.]—Liberal allowance of maintenance made for an infant in regard to an illegitimate brother unprovided for. *Bradshaw* v. *Bradshaw*, 1 J. & W. 647.

iii. *Infant Out of Jurisdiction.*

Special Order.]—Special order for allowance of maintenance to an infant resident with her father out of his jurisdiction. *De Weever* v. *Rochport*, 6 Beav. 391. And see *Morrison, In re*, infra, col. 1452.

On Medical Grounds.]—It appearing that an infant ward of the court had been sent abroad, in consequence of the advice of medical men, the court granted a reference for the infant's maintenance out of the jurisdiction, but limited the allowance to be made to one year. *Wyndham* v. *Ennismore*, 1 Keen, 467.

Father Absconding.]—The court has authority to order maintenance for infants out of the jurisdiction, and where an infant had been taken by his father, who had absconded, and would not suffer the infant to return, the court gave liberty to the guardian to apply annually for an allowance for the infant's maintenance on producing certificates showing the proper application of the money. *Stephens* v. *James*, 1 Myl. & K. 627. And see *Lockwood* v. *Fenton*, infra, col. 1453.

5. To Whom Paid.

To Father—Mother's Discretion Controlled.]—Where a fund was given to trustees for infants to pay the income to the mother to be applied at her discretion:—Held, that where the mother had not exercised a sound discretion the court would order the income to be paid to the father. *Roper's Trusts, In re*, 11 Ch. D. 272; 40 L. T. 97; 27 W. R. 408.

—— **Dividends.**]—Accrued and future dividends ordered to be paid to the father, he undertaking to apply the dividends to their maintenance, the court being satisfied that such order would be for the benefit of the minors. *Birch's Trustees, In re*, 15 L. R. Ir. 380.

—— **Consols in Name of Infant Beneficiary.**]—Under 1 Will. 4, c. 65, s. 32, where an infant was beneficially entitled to consols and to maintenance thereout, an order was made for payment of the dividends to the father upon a petition by the father and the infant, by the father as her next friend. *Ramon* v. *Ramon*, 39 L. T. 552; 27 W. R. 260.

The court has jurisdiction under the 1 Will. 4 c. 65, s. 32, upon the petition of the father, where there is no guardian, to direct that dividends belonging to the infant shall be paid to the father for maintenance. *Naish, In re*, 9 L. J., Ch. 252.

Where stock was invested in the name of an infant, and the bank declined to pay the dividends for want of a sufficient receipt, upon petition of infant's father, although the minor was not a ward of court, and no guardian was appointed and no cause was depending, the court ordered the governor of the bank to pay the dividends to the father. *Murphy, In re*, 2 Ir. Eq. R. 24.

To Trustees—Accumulations.]—Consols were standing in the names of a trustee and an infant absolutely entitled under a will. The court ordered the proper officer of the Bank of England, during the minority of the infant, to invest the dividends due and to accrue due. The bank, refusing to act on the order, the court made an order directing the dividends to be paid to the present trustees of the will, for the benefit of the infant. *Kemp, In re*, 59 L. T. 209; 36 W. R. 729.

To Solicitor—Small Legacy.]—The whole of a small legacy, and accumulations, paid out to the solicitor of an infant who had no other property upon his undertaking to apply it in paying for past maintenance, and for a prospective outfit, and after deducting the costs to pay any balance to the infant at majority. *Welch, In re*, 23 L. J., Ch. 344; 2 W. R. 310.

To Guardian.]—An allowance of maintenance to a guardian must be in regard to what the infant then had, and not to what falls in afterwards. *Chaplin* v. *Chaplin*, 3 P. Wms. 368.

—— **Infant out of Jurisdiction.**]—An infant entitled to a fund in court was resident abroad with a guardian appointed by a foreign court. The vice-chancellor ordered the dividends to be paid to her solicitor, he undertaking to remit them to the guardian. *Morrison, In re*, 16 Sim. 42; 11 Jur. 984.

The court has authority to order maintenance for infants out of the jurisdiction. Where an infant had been taken away by his father, who had absconded, and would not suffer the infant to return, the court allowed the guardian to apply annually for an allowance for the infant on producing certificates showing the proper

application of the money. *Stephens* v. *James*, 1 Myl. & K. 627.

Where the mother after a second marriage was living apart from her husband at New York and refused to allow an infant to be brought to this country. On petition by a maternal uncle of the infant the court appointed the mother and uncle the guardians, and refused to make any allowance for maintenance. *Lockwood* v. *Fenton*, 1 Sm. & G. 73; 17 Jur. 127.

—— **Testamentary Guardian—Marriage.**]—The court on the marriage of a female testamentary guardian, to whom an allowance for maintenance has been made, inquires into the altered state of circumstances. *Jones* v. *Powell*, 9 Beav. 345.

—— **Emigration.**]—Part of the principal in court, to which infants were entitled, advanced towards enabling the infants to emigrate with their guardian. *Clarke, In re*, 17 Jur. 362.

—— **Small Sum.**]—A very small sum of stock being in court to the account of several infants, the court made an order that the dividends should be paid to their guardian until the youngest should attain twenty-one, or until further order. *Butterfield, In re*, 19 L. J., Ch. 373; 15 Jur. 96.

—— **Stepmother.**]—A., on the death of her husband, entered into possession of the property he left, and out of its rents, and by carrying on his trade, maintained herself and his children, three being his children by a former marriage. On a bill the court directed a reference to the master, who by his report approved of the widow and her co-executor as the guardians of all the children, and found that the whole income ought to be allowed for their maintenance. The court directed that the receiver should pay all the income of the property to the widow for the maintenance of the children. *Anderton* v. *Yates*, 5 De G. & Sm. 202.

6. PRACTICE.

No Cause Depending.]—Maintenance allowed, though no cause in court. *Kent, Ex parte*, 3 Bro. C. C. 80.

The court, upon ex parte applications, may allow maintenance for an infant where no cause is depending. *Whitfield, Ex parte*, 2 Atk. 315.

Order on Petition.]—The court will allow maintenance upon a petition without bill, where the infant's income does not exceed 100*l.* a year. *Lakin, Ex parte*, 4 Russ. 307.

Maintenance will not be allowed without a bill filed. to an infant entitled to real estate of a yearly value exceeding 100*l.* *Molesworth, In re*, 4 Russ. 308, n.

Reference for maintenance and appointment of guardian ordered on petition without suit; property 200*l.* per annum. *Myerscough, Ex parte*, 1 J. & W. 151.

Order as to maintenance out of freehold estate made upon petition without suit. *Starkie, Ex parte*, 3 Sim. 339; 30 R. R. 170.

—— **Contingent Interests.**]—Maintenance allowed in the case of children and grandchildren; though the interests were contingent. The court, however, refused to make the order on petition, and directed a bill to be filed. *Fairman* v. *Green*, 10 Ves. 45.

Bonus on Policy.]—A bonus on a policy settled on trusts, under which an infant was entitled contingently, directed on petition without suit to be anticipated and applied for maintenance. *Hays, In re*, 3 De G. & Sm. 485.

Petition—By whom Presented.]—Petition as to maintenance by whom to be presented. *Burble* v. *Russell*, 4 Jur. 859.

—— **Appearance.**]—In a petition for a guardian and maintenance, the personal attendance of two infants dispensed with on the ground of illness. *Dawson* v. *Dawson*, 1 Jur. 37.

Reference—Small Property.]—Dividends to which infants were entitled ordered, without a reference, to be paid to their father, the parties being poor and the property of small amount. *Payne* v. *Low*, 1 Russ. & M. 223.

—— **Apprentice Fee.**]—Infant apprenticed and fee paid without reference, father alleging he thought it proper. *Mendes da Costa* v. *De Paz*, Dick. 168.

—— **Special Direction—Unborn Child.**]—A special direction to the master in settling an infant's allowance, to consider the birth of a child unprovided for, refused. *Burnet* v. *Burnet*, 1 Bro. C. C. 179. *And see* Dick. 602.

—— **Costs.**]—Reference for maintenance without suit when first introduced; court will order costs on reference for maintenance without suit. *Thomas, Ex parte*, Amb. 146.

—— **Receiver.**]—Where infants' mother was dead, and the father, a man of irregular habits, had intermarried with his servant, the court referred it to the master to approve of a receiver of the minors' estate, and also to report as to proper maintenance, and whether it would be proper to appoint guardians. *Cormicks, In re*, 2 Ir. Eq. R. 264.

Past Maintenance — Residuary Legatee.]—Where it appeared that an infant residuary legatee, a married woman, had been deserted by her husband, and that there was likely to be a large residue, inquiries were directed to ascertain the probable amount of the petitioner's fortune, and what would be a proper allowance for past and future maintenance. *Coster* v. *Coster*, 1 Keen, 199.

Where a party had maintained a minor for seven years, reference to inquire by whom the minor had been maintained confined to six years. *Forestal* v. *Doyle*, 8 Ir. Eq. R. 520.

Report—Exceptions.]—Exceptions will not lie to a master's report of maintenance; and a title set up against that of the infant cannot be taken notice of, but must be established elsewhere. *Nicholls, Ex parte*, 1 Bro. C. C. 577.

Party in Contempt.]—Applications for maintenance of wards refused, when the party applying is in contempt. *Campbell* v. *Campbell*, 1 Jur. 540.

Education—Change of School.]—A. gave a

legacy to an infant, the income to be applied for its maintenance, under the superintendence of B., who should also have the control of the infant's education. The father and mother resided abroad, and B. sent the infant to school. On the death of B., the father desired to place the infant at another school:—Held, that the opposition of the schoolmistress to a petition was improper; and a petition presented by her for the future maintenance of the infant was dismissed with costs. *Golding* v. *Castle*, 14 Jur. 1080.

G. PROCEEDINGS BY AND AGAINST INFANTS.

1. In General.

In Formâ Pauperis.]—An infant may sue in formâ pauperis by his next friend. *Bryant* v. *Wagner*, 3 Jur. 460.

Inquiry whether Action for Infant's Benefit.]—The court of appeal will not interfere with the discretion of the court below as to an inquiry whether a suit is for an infant plaintiff's benefit. *Pensotti* v. *Pensotti*, 20 L. T. 348; 22 W. R. 461.

When a will is disputed by a guardian ad litem on behalf of infants, the court of probate has power to inquire whether the suit is for their benefit. *Percival* v. *Cross*, 52 L. J., P. 16; 7 P. D. 234; 47 L. T. 353; 31 W. R. 124; 46 J. P. 792.

Compromise of Actions.] — In sanctioning arrangements between parties the court acts upon the statement of counsel that the compromise is expedient, but it does not by such sanction thereby bind infants. *Norman* v. *Strains*, 50 L. J., P. 39; 6 P. D. 219: 45 L. T. 191; 29 W. R. 744.

A compromise on behalf of infants is to be obtained upon petition, supported by an affidavit of a solicitor that counsel's opinion has been given that the compromise is for the benefit of the infants. *Gray* v. *Paul*, 46 L. J., Ch. 818; 25 W. R. 874.

The court has no power to compromise a claim in which infants are interested against the wish of the next friend or guardian ad litem of the infants, acting under the advice of counsel. *Birchall, In re*, *Wilson* v. *Birchall*, 16 Ch. D. 41; 44 L. T. 113; 29 W. R. 27.

A party to a suit, who, knowing that other parties are infants, agrees that a certain course should be taken, cannot afterwards object that his consent does not bind him because the other parties were infants. *Pisani* v. *Att.-Gen.* (*Gibraltar*), L. R. 5 P. C. 517; 30 L. T. 729; 22 W. R. 900.

Discharge of Infant.]—The court refused on motion to discharge an infant, who had sued without prochein amy or guardian, and was in execution for the costs. *Finley* v. *Jowle*, 13 East, 6.

Infant cannot be kept in custody after guardian assigned him. *Perkins* v. *Hamond*, Dick. 287.

The court would not discharge an infant, in an action of slander, from execution for damages and costs, although the insolvent court had refused to relieve him, because, on account of his infancy, he was unable to make the assignment of property required by 7. Geo. 4, c. 57. *Defries* v. *Davies*, 1 Scott, 594; 1 Bing. (N.C.) 692; 3 D. P. C. 629; 1 Hodges, 103; 4 L. J., C. P. 191.

An infant was non-suited, and there was judgment against him for costs. He sued on a writ of error, which was not proceeded with. After the return day of the writ had expired, he was taken in execution on the original judgment:—Held, that he was not entitled to be discharged out of custody. *Dow* v. *Clark*, 1 C. & M. 860; 2 D. P. C. 302; 3 Tyr. 866; 2 L. J., Ex. 271.

Partition—Sale out of Court.]—Where some of the parties beneficially interested are not sui juris, and the trustees have no power of sale under their trust deed, there is no jurisdiction under the Partition Act, 1868, s. 8, to order a sale out of court. *Strugnell* v. *Strugnell*, 53 L. J., Ch. 1167; 27 Ch. D. 258; 51 L. T. 512; 33 W. R. 30.

To Recover Realty.]—When an infant is entitled both at law and in equity to real estate as against another in wrongful possession, he is entitled to recover in equity on a bill stating these facts and asking a declaration of title and account, and may join adult remaindermen as co-plaintiffs. *Howard* v. *Shrewsbury* (*Earl*), 43 L. J., Ch. 495; L. R. 17 Eq. 378; 29 L. T. 862; 22 W. R. 290.

Personal Injuries—Action against Trustees.]—An infant having been injured by an accident, her claims were compromised for a sum of money, which was paid over to trustees of a settlement, the trusts of which gave the income only to her for life. When she came of age she repudiated this arrangement, and sued the trustees for money received to her use:—Held, that the contract entered into by the trustees was to hold the money on the trusts of the settlement, and that they were not liable to her in this form of action. *Schofield* v. *Robinson*, 24 L. T. 591; 19 W. R. 958.

—— **Negligence.**]—Where the jury found that there was negligence in a person taking care of an infant:—Held, that the child was so identified with the person who was negligent that an action in the child's name could not be maintained against the company. *Waite* v. *N. E. Ry.* El., Bl. & El. 728; 28 L. J., Q. B. 258; 5 Jur. (N.S.) 936; 7 W. R. 311—Ex. Ch.

—— **Expenses for Cure.**]—An infant suing for a personal injury cannot sue for expenses paid by his parents for his cure. *Collins* v. *Lefevre*, 1 F. & F. 436.

Contributory Negligence.]—Contributory negligence by an infant has the same effect in disentitling him to maintain an action as in the case of an adult. *Abbott* v. *Macfie*, 2 H. & C. 744; 33 L. J., Ex. 177; 10 Jur. (N.S.) 682; 12 W. R. 315.

Contributory negligence does not disentitle an infant to recover for an injury sustained otherwise than where such injury is occasioned entirely by the negligence of the infant. *Gardner* v. *Grace*, 1 F. & F. 359.

The defendant having placed a crushing machine in a public market for exhibition, a child was injured by putting his fingers between the cog-wheels while another child was turning the handle:—Held, that the defendant was not

liable for negligence in leaving the machine unguarded where it was. *Mangan* v. *Atterton*, 4 H. & C. 388 ; 35 L. J., Ex. 161 ; L. R. 1 Ex. 239 ; 14 W. R. 771.

A child three years and a-half old strayed upon a railway, and had its leg cut off by a train :—Held, that in the absence of any evidence, to show that the child got there through neglect or default on the part of the company, the company was not responsible. *Singleton* v. *Eastern Counties Ry.*, 7 C. B. (N.S.) 287.

Receiving Order against Firm—Infant Partner.]—Where an act of bankruptcy has been committed by a partnership firm of which one partner is an infant, a receiving order cannot be made against the firm generally, but it may be made against the members of the firm "other than" the infant partner. *Lovell* v. *Beauchamp*, 63 L. J., Q. B. 802 ; [1894] A. C. 607 ; 11 R. 60 ; 71 L. T. 587 ; 43 W. R. 129—H. L. (E.)

Debtor's Summons issued by.] — An infant creditor may issue a debtor's summons in his own name. *Brocklebank, Ex parte, Brocklebank, In re*, 46 L. J., Bk. 113 ; 6 Ch. D. 358 ; 37 L. T. 282 ; 25 W. R. 859—C. A.

Fraud of Guardian.]—Infant has remedy against guardian for fraud in conduct of suit. *Richmond* v. *Taylor*, Dick. 38.

Parent Suing for Injuries to Child—Loss of Service.]—In an action for beating the son of the plaintiff, stating him as the servant of the father, per quod servitium amisit, it is not necessary to show that the son did any material business for the father ; it is sufficient that he lives in his house, and is part of his family. *Jones* v. *Brown*, 1 Esp. 217 ; Peake, 233.

The relation of parent and child, though the latter lives with and is under the control of its father, does not necessarily constitute the relation of master and servant. Therefore, where a father brought an action for an injury to a child two years and a-half old, per quod servitium amisit : —Held, that as the child was incapable of performing acts of service, the action was not maintainable. *Hall* v. *Hollander*, 7 D. & R. 133 ; 4 B. & C. 660 ; 4 L. J. (O.S.) K. B. 39.

2. Service.

Infant out of Jurisdiction.]—Service of a subpœna on the father of a minor defendant, if within the jurisdiction, is sufficient, although the minor resides out of jurisdiction. *Kirwan* v. *Kirwan*, 1 Hog. 264.

Service of subpœna on a minor in France, substituted on his father in Guernsey ; where it appeared that the minor could not be personally served. *Loveday* v. *D'Esterre*, 1 Jones, 561.

The court has jurisdiction over the custody of infants being natural-born English subjects, although resident abroad. *Hope* v. *Hope*, 4 De G. M. & G. 328 ; 2 Eq. R. 1047 ; 23 L. J., Ch. 682 ; 2 W. R. 443.

Service on mother in France, where children were, of order to deliver up the children. *S. C.*, 2 W. R. 698.

Secreting Infant.]—An order for substituted service on the father of an infant granted, on an affidavit, stating the refusal of father to say where his child was, the age of the child, and that the usual residence of the child was with his father. *Lloyd* v. *Lloyd*, 11 L. J., Ch. 109 ; 6 Jur. 313.

An infant having been taken out of the jurisdiction to avoid service, the court refused to appoint the senior six-clerk in court to appear and put in his answer. *Lane* v. *Hardwicke*, 5 Beav. 222. And see *Hancock* v. *Eaton*, iq. n.

Substituted service of a subpœna to appear ordered in the case of an infant. *Ib.*

Father secreting infant to prevent his being served with subpœna, ordered to discover where infant was. *Hockly* v. *Lukin*, Dick. 353.

Where a mother secretes her children who are infants, service of a subpœna on her is sufficient. *Smith* v. *Marshall*, 2 Atk. 70.

On Mother.]—Service on mother of infant good. *Baker* v. *Holmes*, Dick. 18. S. P., *Garnum* v. *Marshall*, Dick. 77. *And see* preceding case.

Step-Father.]—Notice of an application to appoint guardian ad litem served at the house of the mother and her second husband, with whom the infants were residing :—Held, sufficient. *Hitch* v. *Wells*, 8 Beav. 576.

Father-in-Law.]—Service of subpœna upon the father-in-law of an infant good service. *Thompson* v. *Jones*, 8 Ves. 141.

On Guardian.]—Service of subpœna to hear judgment on infant not good ; guardian ad litem must be served. *Freeman* v. *Carnock*, Dick. 439. S. P., *Taylor* v. *Atwood*, 2 P. Wms. 643.

Undergraduate—Principal of College.]—Service of a copy of the bill upon the principal of the college of which the infant was an undergraduate member :—Held, sufficient, the plaintiff being unable to discover the residence of the parent. *Christie* v. *Cameron*, 25 L. J., Ch. 488 ; 2 Jur. (N.S.) 635 ; 4 W. R. 589.

After Infant attains Majority.]—An infant having a day to show cause against a decree of foreclosure attained twenty-one and left the kingdom before he was served, to avoid his creditors ; application to serve his clerk in court with the subpœna was granted. *Elcock* v. *Glegg*, Dick. 764.

Service of subpœna to hear judgment on father of defendant, good, although he had attained his age in the interim. *Lloyd* v. *Trimlestown (Lord)*, 2 Moll. 329.

What Sufficient.] — Four minor defendants resided with their father, a co-defendant, when the process-server went to the defendant's house to serve him with subpœnas for his children ; he was denied, though in the house at the time ; the process-server then gave copies to the servant :—Held, that was good service on the minors. *Crofton* v. *Carr*, 1 Hog. 356.

Memorandum of.]—A memorandum of service of notice of the decree upon infants ordered to be entered. *Chalmers* v. *Laurie*, 10 Hare (App.) xxiv., xxvii.

3. Appearance.

In Person.]—If an infant appears in person not by guardian or prochein amy, it is error in fact. *Castledine* v. *Mundy*, 1 N. & M. 635 ; 4 B. & Ad. 90 ; 2 L. J., K. B. 154.

By Attorney.]—Where there has been judg-

ment of nonsuit in an action brought against an infant, it is no ground of error that he appeared by attorney. *Bird* v. *Pegg*, 5 B. & Ald. 418.

If an infant assigns, by attorney, for error coram vobis, that he has improperly appeared in the action by attorney instead of guardian, it is a ground of error: still the court will set the assignment aside, and allow the plaintiff in error to assign by guardian. *Beven* v. *Cheshire*, 3 D. P. C. 70.

After error in fact, brought by a defendant assigning infancy and appearance by attorney on the record, the court ordered all the proceedings subsequent to the appearance to be set aside, and the defendant to appear by guardian. *Carr* v. *Cooper*, 1 B. & S. 230; 4 L. T. 323; 9 W. R. 611.

An appearance entered by a plaintiff for an infant by an attorney is irregular, and the subsequent proceedings may be set aside without costs even after a writ of inquiry executed. *Nunn* v. *Curtis*, 4 D. P. C. 729.

An infant cannot appear by attorney, for he must appear by his guardian. *Dwyer* v. *O'Brien*, 1 Ridgw. 38, n.

—— **Administratrix.**]—If a defendant is sued as administratrix during minority, and appears by attorney, such appearance is irregular, as she should have appeared by guardian. *Hindmarsh* v. *Chandler*, 1 Moore, 250; 7 Taunt. 488.

Who may Enter.]—A solicitor must be taken, in the absence of proof to the contrary, to have authority from his client, though an infant, to enter an appearance for him; and after appearance entered for an infant, a guardian ad litem may be appointed, although he has not been served with the bill. *Lloyd* v. *Rossmore*, Ir. R. 9 Eq. 488.

—— **Liability of Solicitor for Costs.**]—Where a writ is served on an infant, and an appearance entered for him by a solicitor without knowledge of his infancy and bonâ fide:—Held, that although the appearance will be set aside as irregular, the solicitor is not personally liable for the costs. *Wade* v. *Keefe*, 22 L. R. Ir. 154.

Judgment in Default.] — Where a plaintiff signs judgment for default of appearance, not knowing that the defendant is an infant, it is a matter for the discretion of the court whether such judgment should be set aside. *Furnival* v. *Brooke*, 49 L. T. 134.

The 15 & 16 Vict. c. 76 has not abolished the necessity of appointing a guardian to an infant defendant before the plaintiff can sign judgment by default. *Jarman* v. *Lucas*, 15 C. B. (N.S.) 474; 33 L. J., C. P. 108; 12 W. R. 202.

No Appearance Entered.]—Where the defendant is an infant, the plaintiff ought to apply to him to name his guardian, and in default he should apply to the court to oblige the defendant to do so. *Shipman* v. *Stevens*, 2 Wils. 50.

—— **Minor Residing out of Jurisdiction—Official Solicitor Guardian ad litem.**]—The defendant in a probate action was a minor resident out of the jurisdiction. Notice of the writ had been served upon her, and upon her guardian nominated by the foreign court, but her guardian declined to enter an appearance. The court, holding that the practice was governed by Ord. XIII. r. 1, nominated the official solicitor of the court, the defendant's guardian ad litem, and ordered that his costs should be part of the costs of the plaintiff, the executor propounding the will. *White* v. *Duvernay*, 60 L. J., P. 89; [1891] P. 290.

4. Proceedings before Decree or Order.

a. Pleadings and Motions.

Mistake in Pleading.]—Where a bill filed on behalf of an infant does not sufficiently assert the infant's rights, the court will order a new bill to be filed. *Wace* v. *Bickerton*, 3 De G. & Sm. 751; 19 L. J., Ch. 254; 14 Jur. 784.

Court will act for benefit of infant without regard to prayer of petition. *De Manneville* v. *De Manneville*, 10 Ves. 59; 7 R. R. 340.

Although the prayer of a bill may be badly framed, the court will not allow the interest of an infant to be prejudiced. *Walker* v. *Taylor*, 8 Jur. (N.S.) 681.

—— **Supplemental Bill.**]—A common administration decree having been made, an infant interested in the estate some years afterwards was allowed to file a supplemental bill charging a trustee with a breach of trust discovered since the date of the decree. *Hoghton, In re, Hoghton* v. *Fiddey*, 43 L. J., Ch. 758; L. R. 18 Eq. 573; 22 W. R. 854.

Plea of Infancy.]—The withdrawal by a defendant of a plea of infancy, whether true or false, is a sufficient consideration for an agreement by the plaintiff to accept a smaller sum. *Cooper* v. *Parker*, 15 C. B. 822; 3 C. L. R. 710; 24 L. J., C. P. 68; 1 Jur. (N.S.) 281; 3 W. R. 245—Ex. Ch.

—— **Money Paid In.**]—If money is paid into court when there is a plea of infancy, the defendant may still avail himself of his infancy. *Hitchcock* v. *Tyson*, 2 Esp. 481, n.; 5 R. R. 748, n.

—— **How Pleaded.**] — To an action on a bill of exchange against the acceptor, he pleaded that he accepted the bill while an infant, it being without date at acceptance; that the plaintiff afterwards altered the bill by writing a date thereon; and that there never was any licence or ratification by the defendant to such alteration after he attained his majority:—Held, that the plea was not bad for duplicity. *Harrison* v. *Cotgreave*, 4 C. B. 562; 5 D. & L. 169; 16 L. J., C. P. 198.

—— **Joint or Several.**]—In an action against two on joint promises, they pleaded severally, both pleaded non-assumpsit, and one infancy. The plaintiff, in answer, admitted the infancy, and entered a nolle prosequi as to the defendant pleading it, but went to trial against the other:—Held, that he could not recover, his admission on the record being conclusive evidence that there was no joint promise. *Boyle* v. *Webster*, 17 Q. B. 950; 21 L. J., Q. B. 202.

Warranty.]—Infancy is a good defence to an action on the warranty of a horse. *Howlett* v. *Haswell*, 4 Camp. 118. S. P., *Green* v. *Greenbank*, 2 Marsh. 485.

Proof of Infancy.]—The proof of a plea of infancy lies upon the defendant. *Jewne* v. *Ward*,

2 Stark. 328. S. P., *Hartley* v. *Wharton*, 3 P. & D. 529; 11 A. & E. 934; 9 L. J., Q. B. 209; 4 Jur. 576.

—— **Evidence.**]—Family discussion as to birthday, and acts done on the reputed day, are evidence for the jury as to the age of an infant. *Reg.* v. *Hayes*, 2 Cox, C. C. 226.

Action by indorsee against acceptor of a bill of exchange. Proof, that the acceptance was his writing, that he came of age one day before the maturity of the bill, and resided in the same town as the drawer and indorser, is evidence, from which the jury might infer that the bill was accepted during minority. *Roberts* v. *Bethell*, 12 C. B. 778; 22 L. J., C. P. 69; 16 Jur. 1087; 1 W. R. 80.

Replication.] — A replication, on equitable grounds, to a plea of infancy, that the defendant fraudulently contracted the debt by means of a false and fraudulent representation that he was of age, is bad. *De Roo* v. *Foster*, 12 C. B. (N.S.) 272. S. P., *Bartlett* v. *Wells*, 1 B. & S. 836; 31 L. J., Q. B. 57; 8 Jur. (N.S.) 762; 5 L. T. 607; 10 W. R. 229.

Interrogatories.] — An infant cannot be ordered to answer interrogatories. *Mayor* v. *Collins*, 59 L. J., Q. B. 199; 24 Q. B. D. 261; 62 L. T. 326; 38 W. R. 349.

—— **Divorce Proceedings.**] — Whether in a divorce suit any special protection is granted to infants in matters of discovery, quære. *Redfern* v. *Redfern*, 90 L. T. J. 120—C. A. Affirming on other grounds 54 J. P. 792.

Default in Pleading.]—The court ordered that the action should be set down on notice of trial as against the infant defendant. *National Provincial Bank* v. *Evans*, 51 L. J., Ch. 97; 30 W. R. 177.

In an action for sale in lieu of partition no defence was put in, and the plaintiffs moved for judgment on affidavits which verified the statement of claim:—Held, that notice of trial need not be given. There is nothing in the rules of court or in *National Provincial Bank* v. *Evans* (supra) to the contrary. *Fitzwater, In re, Fitzwater* v. *Waterhouse*, 52 L. J., Ch. 83.

The correct course where infants are parties, and their defence is withdrawn and judgment is moved for, is to prove the statement of claim by affidavit. *Gardner* v. *Tapling*, 33 W. R. 473. S. P., *Wallis* v. *Wallis*, 13 L. R. Ir. 258.

—— **Partition.**]—On a motion for judgment in default of pleading by the plaintiffs in a partition action, some of the defendants being infants, it is not necessary to verify the statement of claim by affidavits. *Ripley* v. *Sawyer*, 55 L. J., Ch. 407; 31 Ch. D. 494; 54 L. T. 294; 34 W. R. 270.

Motion for Judgment.] — Upon motion for judgment in an action for sale in lieu of partition, where all persons interested (some being infants) asked that an inquiry as to title might be dispensed with, and for an immediate sale out of court, the court required the allegations in the statement of claim to be verified by affidavit, although they were admitted in the defence. *Willis* v. *Willis*, 61 L. T. 610; 38 W. R. 7. And see *Ellis* v. *Robbins*, 50 L. J., Ch. 512.

Staying Proceedings—Administration Action.] —Where some of the defendants in an administration action offered to satisfy the whole of the plaintiff's claim and the costs of the action, the court refused to stay the proceedings unless the rights of an infant defendant interested in the suit were also provided for. *Clegg* v. *Clegg*, 17 L. R. Ir. 118.

b. Parol to Demur and Day to Show Cause.

In General.]—A minor is bound by a decree. *Lightburne* v. *Swift*, 2 Ball & B. 213.

Infants have been obliged to answer in equity, where the parol should have demurred at law. *Hale* v. *Hide*, Tothill, 108.

—— **Tenant in Tail.**]—Tenant in tail coming into esse before decree is as much bound by all complete proceedings as he would be after decree. *Westmeath* v. *Westmeath*, 3 Madd. 436.

Consent Order.]—Infants are bound by a decree taken by consent, although no reference to a master whether it was to their benefit. *Wall* v. *Bushby*, 1 Bro. C. C. 484.

An order was made, which was expressed to be by consent of one of the respondents, who was treated as an adult though in fact she was under age, and the order was enrolled. On attaining her majority, the respondent filed her bill to set aside the order. It appearing that another infant in the same interest as the plaintiff had been a party, on whose behalf the court had ascertained that the order was one which ought to be made, the court refused to set aside the order. *Fudelle* v. *Bernard*, 19 W. R. 555.

Where a consent order was a right order to be made, if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not, as he was allowed, on coming of age, to make a new defence. *Malone* v. *Malone*, 8 Cl. & F. 179; West, 637; 3 Ir. Eq. R. 536. *S. C.*, nom. *Malone* v. *O'Connor*, 2 Dr. & Wal. 491, 536.

Quære, whether, on the authorities, an infant defendant, in a case such as this, is entitled, after coming of age, to put in a new answer and make a new defence. *Ib.*

Fraud or Mistake — Personal Estate.] — An infant, unless there is new matter or fraud, or collusion, is bound by a decree made for his benefit; and with respect to personal estate, unless for such causes the parol never demurs. So, where there is a decree for the benefit of an infant, and he dies, his executor shall never dispute the decree. *Sheffield* v. *Bucks* (*Duke*), 1 Atk. 631.

—— **Compromise.**]—Where a compromise has been entered into by the court on behalf of an infant, with a full knowledge of the facts, the infant is bound, even though it turn out that the court was mistaken; but if, by suppression or misstatement of facts intentionally made, the court has been led to an erroneous conclusion, it will set aside the compromise as against the innocent party. *Brooke* v. *Mostyn* (*Lord*), 10 Jur. (N.S.) 554. Affirmed 11 L. T. 392; 13 W. R. 115.

Infant Born after Decree.]—When an infant, interested in an action, is born after decree,

an order may be obtained binding the infant by all proceedings up to the time of his birth; and then a summons may be taken out, calling on the infant to show cause why he should not be bound by the proceedings subsequent. *Scruby* v. *Payne*, 34 L. T. 845.

Right, when to be Exercised.]—An infant is not bound by the decree of the court of equity, but must have a reasonable time after he comes of age to show cause against it. *Effingham* (*Lady*) v. *Napier*, 4 Bro. P. C. 340.

An infant could not pray the parol to demur in any other stage of the proceeding than at the time of pleading. *Derisley* v. *Custance*, 4 Term Rep. 75.

An infant aggrieved by a decree not bound to stay till he is of age, but may apply as soon as he thinks fit to reverse it. *Richmond* v. *Tayleur*, 1 P. Wms. 737.

Where a declaration was made binding the infant's inheritance but reserving a question of construction, the court refused to give the infant a day to show cause against the decree until the hearing on the equity reserved, when it would appear whether the infant would be required to execute a conveyance or not. *Walsh* v. *Trevannion*, 16 Sim. 180; 12 Jur. 547.

—— **Foreclosure.**] — In a foreclosure suit against an infant, though the infant has six months after he comes of age to show cause, &c., he can only show an error in the decree. *Mallack* v. *Galton*, 3 P. Wms. 352.

Devisee—Specialty Creditor.]—An infant devisee, sued by a specialty creditor of the devisor, could not pray the parol to demur; such privilege of an heir who was in by descent not being extended to a devisee by 3 Will. & M. c. 14. *Plaskett* v. *Beeby*, 4 East, 485; 1 Smith, 264.

Testator devised an estate to his heir-at-law charged with two legacies, and afterwards died indebted on specialty, leaving his heir an infant; in this case the parol shall not demur. *Mould* v. *Williamson*, 2 Cox, 386.

Where lands are devised to trustees for payment of debts, and the heir is an infant, he has no day to show cause; but if the lands are not devised to a particular person, it is otherwise. *Blatch* v. *Wilder*, 1 Atk. 421.

Heir-at-Law.]—Bill for sale of real estate for payment of debts. The heir-at-law being an infant, the parol demurred. The court will appoint a receiver as in other cases. *Sweet* v. *Partridge*, 1 Cox, 433; Dick. 696.

An estate descending to an infant heir subject to lien or equitable charge:—Held, that the parol does not demur in a suit instituted by other creditors. *Brookfield* v. *Bradley*, Jacob, 632.

To a bill for sale of real estates by simple contract creditors of a trader against his heir, the parol may demur, semble. *Lechmere* v. *Brasier*, 2 J. & W. 287; 22 R. R. 130.

Where an infant in his answer to a creditor's bill, insisted that the parol ought to demur during the minority; it was ordered accordingly, although his counsel would have waived it as prejudicial to him. *Searth* v. *Cotton*, Forrest. 198.

Sale — Marshalling Assets.] — Assets marshalled, but no sale decreed until the infant devisee attains twenty-one. *Powell* v. *Robins*, 7 Ves. 209. But see *id.* 211, n.

—— **Charges by Will.**]—By the decree in a suit to raise charges created by will, certain lands, vested in a trustee in trust for minors, were directed to be sold. The cestuis qui trustent were parties to the suit, and a day was given to show cause. *Kirby* v. *O'Hea*, 2 Jones, 635.

Decree for sale against devisee and infant heir and that plaintiff should be let into possession, and hold against the infant, who should convey, when of age, unless cause shown six months after. *Sikes* v. *Lister*, 5 Vin. Abr. 541, pl. 28.

Accounts.]—The court will decree the defendant though an infant to pay money charged by will, and to account for profits of moiety of lands devised, but the defendant must have a day to show cause when she comes of age. *Gundry* v. *Baynard*, 2 Vern. 479.

Bond.]—One gives her son lands in lieu of lands entailed, and by will gives the entailed lands to her daughter, and takes a bond from her son to permit her daughter to enjoy the entailed land. The son dies, leaving an infant son, who, being in possession of the land in recompense, brings an ejectment of the entailed lands. By reason of the infancy of the grandson, the bond could not be sued. The daughter is decreed to be quieted in possession of the entailed lands until six months after the infant comes of age, and then the infant may show cause. *Thomas* v. *Gyles*, 2 Vern. 232.

Legal Estate in Trustees.]—Where legal estate is in trustees there is no occasion to give the infant a day to show cause. *Thornton* v. *Blackbourne*, 2 Eq. Ca. Abr. 303. S. P., *Bingham* v. *Clanmorris* (*Lord*) 2 Moll. 393.

Enlarging Time to show Cause.]—The court enlarged the time for a defendant to show cause after he came of age, till the plaintiffs in the first cause had put in an answer to a bill of discovery he filed against them after he came of age. *Trefusis* v. *Cotton*, Moseley, 203.

It is a good cause why a decree should not be made absolute against an infant after he comes of age that he has put in a new answer. *Id.* 313.

Amended Answer.]—Decree omitting to give an infant six months to show cause against it is erroneous. *Savage* v. *Carroll*, 1 Ball & B. 551; 12 R. R. 32.

An infant defendant entitled to amend his answer after decree, and going into a new defence. *Id.* 444.

If an infant is plaintiff in the original cause, and defendant in the cross-cause, and has six months after he comes of age to show cause against the decree, he may amend his answer, or put in a new one, but cannot put in a new bill or amend his former. *Anon.*, Moseley, 66.

Upon a decree against an infant, unless cause within six months after he comes of age, the infant may answer anew. *Napier* v. *Effingham* (*Lady*), 2 P. Wms. 401. S. P., *Fountain* v. *Caine*, 1 P. Wms. 504.

Amending Decree.]—The court refused to amend a decree by striking out the day to show cause, which had been given to a minor defendant, the first tenant in tail of the lands sold. *Mahon* v. *Dawson*, 2 Dr. & War. 286, n.

Semble, the court will not amend a decree by inserting therein for a minor defendant a day to show cause. *Tilsm* v. *Lawder*, 2 Dr. & War. 285; 1 Con. & L. 392.

Infant Plaintiff.]—An infant is bound by a decree in a cause where he is plaintiff, and after coming of age he is not allowed, by a new bill, to dispute anything that was done during his minority in regard to maintenance. *Gregory* v. *Molesworth*, 3 Atk. 626.

Infancy not Pleaded.]—In a case in which the defence of an infant had not been properly raised and proved, a decree was made for the plaintiff, without prejudice to any bill to be filed by the infant within six months to establish his rights. *Lane* v. *Hardwicke*, 9 Beav. 148.

Appeal.]—If an appeal is dismissed on account of the neglect of the guardians of an infant to bring it to a decision, the infant is entitled to renew it when he attains his majority. *Orphan Board* (*President*) v. *Van Reenen*, 1 Knapp, 85.

Infant's Inheritance.]—An infant's inheritance never bound by acts of the court. *Taylor* v. *Phillips*, 2 Ves. sen. 23.

—— **Decree for Sale.**]—Though the usual practice is for the parol to demur till the infant come of age, yet where it is for his interest that the estate should be sold, Lord Hardwicke decreed a sale; but declared he did not mean to break in upon the rule of the parol demurring. *Uvedale* v. *Uvedale*, 3 Atk. 117.

Special Occupant.]—Lands are given to A. and his heirs for three lives; A. dies; his heir does not take by descent so as to have his age, or to make the parol demur, but takes as special occupant. *Chaplin* v. *Chaplin*, 3 P. Wms. 368.

Conveyance—Partition.]—The rebeing, on bill for partition, infant cestuis que trustent, conveyance respited till they come of age. *Att.-Gen.* v. *Hamilton*, 1 Madd. 214; 16 R. R. 208.

Partition between an adult and the infant; the latter having time till of age to show cause. Court orders the conveyance from the adult to be respited till that time. *Tuckfield* v. *Buller*, Amb. 197.

Partition decreed of lands conveyed to trustees as to a moiety for an infant, but the trustees not to convey till the infant is of age, that he might join in confirming the partition. *Brook* (*Lord*) v. *Hertford* (*Lord*), 2 P. Wms. 518.

Enrolment of Decree.]—The costs of an infant defendant were ordered to be paid out of the estate on the understanding that no further litigation should take place. He attained his majority shortly before the five years, within which the decree might be enrolled, and two years afterwards applied for leave to enrol the decree, which was refused. *Monypenny* v. *Dering*, 4 De G. & J. 175; 28 L. J., Ch. 503; 5 Jur. (N.S.) 661; 7 W. R. 439.

Enrolment of decree by one of the defendants five months after the decree, during the infancy and absence of the chief plaintiff from the country:—Held, not to have been done with undue haste, the infant having been properly represented according to the practice of the court. *Hyslop* v. *Jones*, 3 Moore, P. C. 15.

Foreclosure—Equitable Mortgage.]—In an action by an equitable mortgagee for foreclosure:—Held, on motion for judgment, that the infant heir must be ordered to convey when he attained twenty-one, and that he must have a day to show cause. *Price* v. *Carver* (3 My. & Cr. 157) followed. *Mellor* v. *Porter*, 53 L. J., Ch. 178; 25 Ch. D. 158; 50 L. T. 49; 32 W. R. 271.

Judgment for foreclosure was made absolute against an infant without giving time to show cause, the mortgagee offering to pay the infant's costs as between solicitor and client, and the guardian being of opinion that it was for the benefit of the infant that the order should be made, and the mortgage debt greatly exceeded the value of the property. *Younge* v. *Cocker*, 32 W. R. 359.

Decree on Bill pro confesso.]—Decree on bill pro confesso is absolute, and no day given to show cause against it. But where defendant is served, and does not appear, he has a day to show cause. *London* v. *Ready*, 1 Sim. & S. 44; 1 L. J. (O.S.) Ch. 15.

Death of Party.]—Proceedings having been taken after a suit had become defective by the death of the defendant, a first tenant for life:—Held, that an infant, the second tenant for life (who had attended the proceedings under the decree), could not be bound by an order under 15 & 16 Vict. c. 86, s. 52. *Powell* v. *Phillips*, 24 L. T. 128; 19 W. R. 562.

5. Order or Decree.

Relief not Prayed by Bill.]—Infant may have decree according to his case, though not prayed by bill. *Stapleton* v. *Stapleton*, 1 Atk. 6.

Access.]—Semble, an order for access to an infant under 2 & 3 Vict. c. 54, may be made ex parte if necessary. *Taylor, In re*, 11 Sim. 178; 9 L. J., Ch. 399; 4 Jur. 983.

Leave to Marry.]—The form of an order given to a male infant to marry after reference to the master. *Plymouth* (*Earl*) v. *Lewis*, Dick. 801.

Conveyance.]—The master was ordered to settle a conveyance. An infant was interested:—Held, that the words "if the parties disagree" might be inserted in the order. *Richardson* v. *Ward*, 11 Beav. 378.

Infants not Parties—Settlement.]—By a post-nuptial settlement, lands were settled, subject to successive life estates for husband and wife, upon the children of the marriage. The husband and wife executed a second settlement of the lands settled. Afterwards both husband and wife purported to mortgage the lands in fee. In a suit for foreclosure, an order was made declaring the mortgage well charged on the

lands. The children were at the date of the order infants, and were not parties nor represented by guardians:—Held, that the order was not binding on the children. *Bell's Estate, In re*, 11 L. R. Ir. 512.

Order against Infant Trustee to Account.]—In an action against trustees of a settlement, held that the proper form of decree was to order the account against the adult trustees in the usual form, directing an inquiry whether all or any, and what parts, of the trust property had come to the hands of R. an infant trustee, and what had been his dealings and transactions in respect of the same, and as to the dates of, and circumstances attending, such receipts, dealings, and transactions. *Garnes, In re, Garnes* v. *Applin*, 55 L. J., Ch. 303; 31 Ch. D. 147; 54 L. T. 141; 34 W. R. 127—C. A.

6. Guardian ad Litem.

a. In General.

Benefit of Infant.]—When a will is disputed by a guardian ad litem, the court of probate has power to inquire whether the suit is for the infant's benefit. *Percival* v. *Cross*, 52 L. J., P. 16; 7 P. D. 234; 47 L. T. 353; 31 W. R. 124; 46 J. P. 792.

Appointment of.]—N. filed a bill to which there were infant defendants, and subsequently moved to take his bill off the file. No guardian ad litem had been appointed:—Held, that a guardian ad litem must first be appointed. *N——* v. *N——*, 31 L. T. 79; 22 W. R. 819.

—— **Bankruptcy Court.**]—When it is desired to bring an infant before the court, the proper course is to apply for the appointment of a guardian ad litem. Where on an appeal from a county court, the divisional court in bankruptcy directs such appeal to stand over in order that infants may be made parties, an application for the appointment for a guardian ad litem should be made to the county court. *Trustee, Ex parte, Lowndes, In re*, 3 Morrell, 216.

Consent to Evidence.]—A guardian ad litem may consent, without the leave of the court, to evidence being taken by affidavit instead of viva voce. *Fryer* v. *Wiseman*, 45 L. J., Ch. 199; 33 L. T. 779; 24 W. R. 205. S. P., *Knatchbull* v. *Fowle*, 1 Ch. D. 604; 24 W. R. 629.

Interrogatories.]—A guardian ad litem is not a party to the action within the meaning of Ord. XXXI. r. 1, and therefore cannot be compelled to answer interrogatories. *Ingram* v. *Little*, 11 Q. B. D. 251; 31 W. R. 858.

Liability for Costs.]—Where a party becomes the guardian on record of an infant, he is liable to the payment of the attorney's bill, though he did not interfere in the conduct of the action. *Marnell* v. *Pickmore*, 2 Esp. 473.

The guardian ad litem of an infant defendant raising an unsuccessful defence, will not be ordered to pay the costs unless it is a case of gross misconduct on his part. *Morgan* v. *Morgan*, 5 N. R. 427; 11 Jur. (N.S.) 223; 12 L. T. 199.

Where, upon an application of a plaintiff, the solicitor of the suitors' fund, who also acted for other defendants appearing in formâ pauperis, was appointed guardian ad litem of an infant defendant, and the plaintiff was ordered to pay the infant's costs, the court refused to apportion the costs between the several defendants, and allowed the solicitor of the suitors' fund the infant's full costs. *Frazer* v. *Thompson*, 1 Giff. 337; 29 L. J., Ch. 402.

The court has no jurisdiction to order payment out of the suitors' fund of the costs incurred by the solicitor of the suitors' fund as guardian ad litem. *Fraser* v. *Thompson*, 4 De G. & J. 659.

—— **Foreclosure.**]—Foreclosure action against devisees, some of whom were infants. On the application of the plaintiff, the solicitor of the suitors' fund was appointed the guardian of the infant defendants. A decree was made for foreclosure and sale:—Held, that the plaintiff was liable to pay the costs incurred by the solicitor of the suitor's fund. *Harris* v. *Hamlyn*, 3 De G. & Sm. 470; 18 L. J., Ch. 403; 14 Jur. 55; S. P., *Newbury* v. *Martin*, 15 Jur. 166.

—— **Partition.**]—To a bill for a partition an infant defendant, tenant in tail of an undivided share, did not appear; and, on the application of the plaintiff, the solicitor to the suitors' fee fund was appointed guardian ad litem. The court directed the plaintiff to pay the infant's costs, and charged them on his share. *Robinson* v. *Aston*, 9 Jur. 224.

Appearance by Mother as Guardian.]—The mother of an infant defendant appeared as his guardian, though not really so, but the court refused to set aside the appearance. *Humphrey* v. *Brewer*, Vern. & S. 306.

Person of Full Age with Guardian.]—On the application of the plaintiffs, a six-clerk was appointed guardian ad litem for a defendant, stated to be an infant, but in reality of full age. A decree was made, and the accounts taken on that footing:—Held, that the proceedings were not binding on him, and the plaintiffs were ordered to pay the costs of the six-clerk. *Green* v. *Badley*, 7 Beav. 271.

Commission—Answer to Supplemental Bill.]—Infant defendants being out of the kingdom a guardian ad litem was appointed by commission to put in their answer. Supplemental bill was filed to which same infants were defendants. Ordered that same guardian might put in their answer to the supplemental bill. *Lushington* v. *Sewell*, 6 Madd. 28.

b. Appointment, Practice on.

By Motion.]—Habeas corpus to bring up an infant arrested for necessaries, to have guardian assigned him, must be by motion, not petition. *Horne* v. *Lanoy*, Dick. 170.

Order made appointing guardian for infant defendant on the motion of plaintiff. *Williams* v. *Wynn*, 10 Ves. 159.

Infant Abroad.]—An infant defendant abroad cannot have a guardian assigned to put in his answer on motion, but a commission must go. *Tappen* v. *Norman*, 11 Ves. 563.

Infant defendant abroad, his father assigned his guardian for putting in his answer on motion

without a commission. *Jongsma* v. *Pfiel*, 9 Ves. 357.

Guardian ad litem to an infant defendant resident out of the jurisdiction appointed on motion, and affidavits of fitness and no adverse interest. *Smith* v. *Palmer*, 3 Beav. 10.

Guardian to be Named.]—A motion for leave to answer by guardian must name the guardian. *Brassington* v. *Brassington*, 2 Anstr. 369.

On Filing Bill.]—The court appointed a guardian of the plaintiff (an infant), on filing the bill, before the defendant had appeared. *Pendleton* v. *Mackrory*, Dick. 736.

Title of Order of Course.]—An order of course for the appointment of a guardian ad litem to an infant served with a petition intituled "in matters" and not in a cause. *Barrington, In re*, 27 Beav. 272.

Special Case.]—Application for the appointment of a guardian to concur in a special case, to be made in court. *Thornhill* v. *Copleston*, 10 Hare (App.) lii.

The appointment of a guardian ad litem in a special case should be asked for by motion. *Goodfellow, In re*, 1 Eq. Rep. 191; 1 W. R. 446.

After Petition Presented.]—Under the 19 & 20 Vict., c. 120, the appointment of a guardian to infant petitioners should be made after the petition has been presented. *Hargreave's Settled Estates, In re*, 28 L. J., Ch. 197; 5 Jur. (N.S.) 60; 7 W. R. 156.

c. In what Cases Appointed.

Infant out of Jurisdiction.]—Appointment of guardian ad litem to infant defendant abroad. *Fowler* v. *Ward*, 6 Jur. 403. S. P., *Copley* v. *Smithson*, 5 De G. & Sm. 583.

—— **Supplemental Bill.**]—A guardian appointed to put in answer for an infant, sole defendant to a supplemental bill, and out of the jurisdiction. *Kyan* v. *Galli*, 12 L. J., Ch. 72.

Investment of Trust Funds.]—Where an infant appears upon a petition for the investment of trust funds in which he is interested, the special appointment of a guardian ad litem is necessary. *Cleveland (Duke), Harte Estate, In re*, 1 Dr. & Sm. 46; 29 L.J., Ch. 530; 8 W. R. 336.

On Petitions.]—A guardian ad litem must be appointed to infants who are served with petitions, intituled "in matters," and not in causes. *Barrington, In re*, 27 Beav. 272.

Upon a petition for payment out of court of a fund in which infants are interested:—Held, that a guardian ad litem must be appointed. *Ward's Will, In re*, 2 Giff. 122; 6 Jur. (N.S.) 441; 2 L. T. 82.

Real estate had descended to an infant heir of a trustee. On a petition for the appointment of new trustees and a vesting order, the court made the order subject to the appointment of a guardian ad litem to be dated prior to the order. *Cooper, In re*, 9 W. R. 531.

After Attachment.]—After attachment against infant for want of answer, the proper course is a messenger to bring him into court to have a guardian assigned him. *Eyles* v. *Le Gros*, 9 Ves. 12. S. P., *Carr* v. *Aylmer*, Vern. & S. 301; *Wilson* v. *Bott*, 1 Price, 62.

Married Woman an Infant.]—The answer of a married woman who is an infant cannot be taken, either separately or jointly with her husband, until she has had a guardian assigned. *Colman*, v. *Northcote*, 2 Hare, 147; 12 L. J., Ch. 255; 7 Jur. 528.

To Consent.]—N. filed a bill to which there were infant defendants, and subsequently moved to take his bill off the file. No guardian ad litem of the infants had then been appointed:—Held, that a guardian ad litem for the infants must first be appointed in order to consent. *N*—— v. *N*——, 31 L. T. 79; 22 W. R. 819.

d. Commission and Appearance of Infant.

General Rule.]—Upon an application to appoint a guardian ad litem to an infant his appearance in court will not be dispensed with unless under special circumstances. *Baynton* v. *Hooper*, 10 Beav. 168.

Motion to appoint a guardian ad litem to infant defendants without their appearance or a commission refused. *Mower* v. *Orr*, 6 Hare, 417; 18 L. J., Ch. 50; 12 Jur. 997. S. P., *Cowardine* v. *Wishlade*, 21 L. J., Ch. 464; 16 Jur. 461.

Special Circumstances.]—Whether a guardian ad litem can be assigned to an infant without bringing him into court or by means of a commission, quære. *Nixon* v. *Few*, 7 Beav. 349.

Guardian ad litem appointed to infants under special circumstances without a commission or their appearing in court. *Stillwell* v. *Blair*, 13 Sim. 399. S. P., *Drant* v. *Vause*, 2 Y. & C. C. C. 524; 12 L. J., Ch. 439; 7 Jur. 637; and *Storr* v. *Pannell*, 1 W. R. 209.

—— **Expense.**]—Upon an application to the court to appoint a specified person to be guardian ad litem to an infant defendant, it appearing that the cost by appearance or commission would be 9*l.*, but that the costs of an appointment on motion would be only 3*l.* 16*s.* 6*d.*, the court made the order. *Benison* v. *Wortley*, 5 De G. & Sm. 648; 17 Jur. 2.

Order for the assignment of a guardian ad litem to an infant defendant without a commission to save expense. *Egremont* v. *Egremont*, 2 De G. M. & G. 730; 9 Hare (App.) xxvii.; 22 L. J., Ch. 108; 17 Jur. 55; 1 W. R. 69. S. P., *Fletcher* v. *Rogers*, 10 Hare (App.) cxiii.; 1 W. R. 74.

Whether special circumstances are now necessary to dispense with a commission, quære. *Ib.*

—— **Infant of Tender Age.**]—On a motion for the appointment of a guardian of infant defendants, the appearance of one less than a month old was dispensed with on an affidavit of the birth, and a medical certificate that the infant could not be safely produced. *Stuteley* v. *Harison*, 3 De G. & Sm. 390; 18 L. J., Ch. 336; 13 Jur. 860.

—— **Illness of Infant.**]—The appearance of infants in court on the appointment of a guardian ad litem enables the court to ascertain that they are actually under the care of the

guardian it appoints; but, upon a proper affidavit of the illness of an infant, the court appointed a guardian. *Crabbe* v. *Mowbery*, 5 De G. & S. 347. *S. C.*, nom. *Crabb* v. *Moxhay*, 21 L. J., Ch. 504.

When Infant Secreted.]—A messenger ordered to bring an infant defendant into court to have a guardian assigned. The messenger's return stated that the infant was secreted by her mother. The vice-chancellor ordered the senior six-clerk to be appointed the guardian without the infant being produced. *Steed* v. *Caley*, 7 Sim. 148; 4 L. J., Ch. 1.

Infant out of Jurisdiction.]—Infant defendant residing abroad, his father, not interested in the suit, was assigned his guardian for putting in his answer without a commission. *Jongsma* v. *Pfiel*, 9 Ves. 357. Sed quære, see *Tappen* v. *Norman*, 11 Ves. 563.

Guardian ad litem to infant defendants, resident out of the jurisdiction, appointed without a commission. *Barrett* v. *Buck*, 8 Jur. 508.

The testamentary guardian of an infant trustee, residing out of the jurisdiction, appointed guardian ad litem, without either the appearance of the infant or a commission. *Shuttleworth* v. *Shuttleworth*, 2 Hare, 147.

Where an infant defendant was out of the jurisdiction the court dispensed with the production of the infant, but refused to appoint a person guardian ad litem who was not within the jurisdiction. *Anon.*, 18 Jur. 770.

e. Notice of Application.

After Appearance.]—After an infant defendant had appeared, the plaintiff moved that S., a solicitor, might be appointed the infant's guardian to answer and defend:—Held, that, as the infant had appeared, the court might grant the motion on an affidavit stating that notice of the motion had been served on the solicitor who had entered the appearance. *Cookson* v. *Lee*, 15 Sim. 302.

—— **To Principal of College.**]—Notice of an application to appoint a guardian ad litem to an infant defendant to the principal of the college of which the infant was a resident undergraduate:—Held, sufficient, the plaintiff being unable to discover the residence of the infant's parent. *Christie* v. *Cameron*, 25 L. J., Ch. 488; 2 Jur. (N.S.) 635; 4 W. R. 589.

—— **Affidavit of Service.**]—Guardian ad litem of an infant defendant appointed, on the motion of the plaintiff, without affidavit of service of the writ of summons, where the infant had appeared to the claim. *Wood* v. *Logsden*, 9 Hare (App.) xxvi.; 22 L. J., Ch. 257; 1 W. R. 46.

Infant Abroad.]—Upon an application for the appointment of a guardian ad litem to an infant defendant resident abroad, and not substantially interested in the suit, the court dispensed with the notice of the application directed by Cons. Ord. 7, r. 3. *Lambert* v. *Turner*, 31 L. J., Ch. 494; 10 W. R. 335. And see *O'Brien* v. *Maitland*, 4 De G. F. & J. 331; 6 L. T. 38; 10 W. R. 275.

Infant not Served with Bill.]—Where the appearance has been entered by a solicitor the court will act upon it without service; and, therefore, after appearance entered for an infant a guardian ad litem may be appointed for him although he has not been served with the *Lloyd* v. *Rossmore*, Ir. R. 9 Eq. 488.

f. Affidavit.

Of Infancy.]—On an application for the appointment, without a commission, of a guardian ad litem to an infant abroad, an affidavit should be produced of the infancy of the party. *Lingren* v. *Lingren*, 7 Beav. 66.

To Show Interest of Guardian.]—On an application for the appointment of guardian of infant the affidavit must show in the proposed guardian some interest, connection, or authority over the person of the infant. *Foster* v. *Cautley*, 10 Hare (App.) xxiv.; 22 L. J., Ch. 639; 17 Jur. 370; 1 W. R. 275.

Title of—Special Case.]—An affidavit in support of an order to appoint a guardian to concur, in a special case, under the 13 & 14 Vict. c. 35, s. 5, ought to be intituled, "In the matter of the act," and "In the matter of the infant," and not "In the special case." *Star* v. *Newbery*, 20 Beav. 14. S. P., *Maddison* v. *Shein*, 6 L. T. 20.

g. Who Appointed.

Officer of Court.]—An infant defendant. Motion on producing an attachment against him for want of answer, that officer of court may be appointed guardian to put in an answer Ordered. *Morgan* v. *Morgan*, 2 Moll. 362.

—— **Solicitor to Suitors' Fund.**]—The plaintiff's solicitor ought not to be appointed guardian ad litem to a defendant. The solicitor to the suitors' fund ought, in general, to be appointed such guardian. *Sheppard* v. *Harris*, 15 L. J., Ch. 104; 10 Jur. 24. S. P., *Topping* v. *Howard*, 10 Jur. 629.

After the appearance by the infant voluntarily, the court made an order that a solicitor of the court, not towards the cause, should be appointed guardian. *Cookson* v. *Lee*, 15 Sim. 302. S. P., *Thomas* v. *Gwyn*, 13 L. J., Ch. 79.

To a bill for a partition, filed by the mortgagee of the life estate, an infant defendant, tenant in tail of an undivided share, did not appear; and, on the application of the plaintiff, the solicitor to the suitors' fee fund was appointed the infant's guardian ad litem. *Robinson* v. *Aston*, 9 Jur. 224.

The court nominates the solicitor for the infant, and usually appoints the solicitor of the suitors' fund. *Thomas* v. *Thomas*, 7 Beav. 47. S. P., *Bentley* v. *Robinson*, 9 Hare (App.), lxxvi.

On Coming of Age.]—Where there was an order of court appointing a solicitor for a number of minor plaintiffs, the court, on application of some of those who had come of age, varied the former order, and permitted them to appoint their own solicitors, respectively. *Bennett* v. *Wheeler*, 1 Ir. Eq. R. 16.

Not a Mere Stranger.]—Guardian ad litem not being a party to the cause, should not be a mere stranger. *Foster* v. *Cautley*, 10 Hare

(App.) xxiv.; 22 L. J., Ch. 639; 17 Jur. 370; 1 W. R. 275.

How Selected.]—Selection of a party to be the guardian ad litem of an infant defendant. *Anon.*, 9 Hare (App.) xxvii.

Person with Adverse Interest.]—The court will not permit as next friend or guardian ad litem persons whose interests are adverse to the infant's. But the adverse interest to disqualify must be clear and substantial. *Langford* v. *Little*, 5 Ir. Eq. R. 343.

—— **Mother.**]—Where the mother of infant defendants makes an adverse claim, although she has been appointed guardian ad litem, she must still make a special application, on an affidavit by her, that she has no conflicting interest. *Leese* v. *Knight*, 8 Jur. (N.S.) 1006; 10 W. R. 711.

Married Woman.]—The court will not appoint a married woman guardian ad litem of an infant; but if her husband join, will appoint them both. *Jones* v. *Geale*, 8 Ir. Eq. R. 239.

Testamentary Guardian.]—Testamentary guardian assigned guardian for infant abroad, to answer and defend suit. *Howard* (*Lord*) v. *Abergavenny* (*Lord*), Dick. 31.

Infant out of Jurisdiction.]—The court refused to appoint an English guardian to an infant residing with his mother in America without associating the mother in the guardianship. *Lockwood* v. *Fenton*, 17 Jur. 127.

Guardian ad litem to an infant defendant resident out of the jurisdiction, appointed on motion, upon proof of respectability, and that she had no interest adverse to that of the infant. *Smith* v. *Palmer*, 3 Beav. 10.

Where an infant defendant was out of the jurisdiction, the court dispensed with the production of the infant before it, but refused to appoint a person guardian ad litem who was not within the jurisdiction. *Anon.*, 18 Jur. 770.

7. Next Friend.

a. In General.

Office of.]—A prochein ami is not a party to the suit, but simply a person appointed by the court to look after the interests of the infant, and manage the suit for him. *Sinclair* v. *Sinclair*, 13 M. & W. 640; 14 L. J., Ex. 109. S. P., *Melhuish* v. *Collier*, 19 L. J., Q. B. 493; 14 Jur. 621.

In Formâ pauperis.]—An infant may sue in formâ pauperis by his next friend. *Bryant* v. *Wagner*, 3 Jur. 460.

An order for an infant to sue by a next friend in formâ pauperis discharged as irregular. *Lindsay* v. *Tyrrell*, 3 Jur. (N.S.) 1014.

Death of Infant before Judgment.]—Where an infant, in an action of tort purely personal, sues by his next friend and dies after verdict, and before judgment, the next friend may sign judgment for the amount of the damages and taxed costs. *Kramer* v. *Waymark*, 4 H. & C. 427; 35 L. J., Ex. 148; L. R. 1 Ex. 241; 12 Jur. (N.S.) 395; 14 L. T. 368; 14 W. R. 659.

Acting without Authority.]—When a father as next friend commenced an action for crim. con., in his son's name, without his authority, and recovered a verdict:—Held, that no authority from the son was necessary to enable the father to sue as prochein ami, and that the son was bound by the judgment in the action. *Morgan* v. *Thorn*, 7 M. & W. 310; 9 D. P. C. 228; 10 L. J., Ex. 125; 5 Jur. 294.

Compromise by.]—The next friend, being appointed only for the conduct of the action, cannot bind the infant by a compromise, unless such compromise is for the benefit of the infant. *Rhodes* v. *Swithenbank*, 58 L. J., Q. B. 287; 22 Q. B. D. 577; 60 L. T. 856; 37 W. R. 457.

The court has no power to compromise a claim in which infants are interested against the wish of the next friend or guardian ad litem of the infants, acting under the advice of counsel. *Birchall*, *In re*, *Wilson* v. *Birchall*, 16 Ch. D. 41; 29 W. R. 27.

Receiver.]—Prochein ami of infant plaintiffs not permitted to act as receiver. *Stone* v. *Wishart*, 2 Madd. 64.

Liability of.]—Quære, whether the next friend of an infant, who omits to call for the payment of the trust moneys into court, may not be made answerable for any loss of interest which the infant may sustain thereby. *Gresley* v. *Heathcote*, 3 L. J. (O.S.) Ch. 107.

Deposition of.]—The deposition of the prochein ami of the plaintiff cannot be read for the plaintiff, he being liable to costs. *Head* v. *Head*, 3 Atk. 511.

The depositions of a wife of a prochein ami cannot be read, as the husband is liable to costs. *Id.* 547.

Evidence of, as against Infant.]—Where a minor sues by his guardian, a declaration made by the guardian is not evidence against him. *Cowling* v. *Ely*, 2 Stark. 366; 20 R. R. 699.

Co-plaintiff, as next friend, struck out, his evidence being necessary; but, as a general rule, giving security for the costs incurred. *Witts* v. *Campbell*, 12 Ves. 493.

Affidavit of Documents.]—The court refused to order the next friend to make an affidavit as to documents. *Dyke* v. *Stephens*, 55 L. J., Ch. 41; 30 Ch. D. 189; 53 L. T. 561; 33 W. R. 932.

Where plaintiffs were suing by their next friend, the court ordered the production of documents under the Chancery (Ireland) Act, 1867 (30 & 31 Vict. c. 44), on the oath of the next friend. *Crowe* v. *Bank of Ireland*, Ir. R. 5 Eq. 578; 19 W. R. 910.

Form of order in such a case. *Ib.*

Production of Documents.]—The next friend of an infant plaintiff is not a party to the action and no order can be made against him for production of documents under Ord. XXXI. r. 12. *Corsellis*, *In re*, *Lawton* v. *Elves*, 52 L. J., Ch. 399; 48 L. T. 425; 31 W. R. 414.

Service on.]—Notice of motion for an order appointing a new next friend, served on the next friend and defendant:—Held, regular. *Furtado* v. *Furtado*, 6 Jur. 227.

Every application on behalf of an infant must be made by a next friend. *Furtado* v. *Furtado* (supra) explained. *Cox* v. *Wright*, 2 N. R. 436.

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Irregularity in Bill.]—Where a bill was filed on behalf of infants, and did not contain the address of the next friend :—Held, an irregularity, and the next friend was ordered to pay the costs, and give an undertaking to amend. *Major* v. *Arnott*, 2 Jur. (N.S.) 80 ; 4 W. R. 229.

When Cannot be Found.]—Where the prochein ami cannot be found at the address at which he is described, the proper course is to take out a summons for a stay of proceedings until his address is given by the plaintiff's attorney. *Hayes* v. *Carr*, 1 D. (N.S.) 522 ; 4 Scott (N.R.) 560 ; 11 L. J., C. P. 111.

Who may be Solicitor for.]—The solicitor of a next friend must not have interests adverse to the minor's, nor be professionally bound to support adverse interests. Subject to that restriction, a next friend may employ what solicitor he pleases. *Langford* v. *Little*, 5 Ir. Eq. R. 34.

Changing Solicitor.]—The attorney acting for an infant plaintiff suing by his next friend is the attorney of the next friend, and a rule to change him cannot be entered without the authority of the next friend. *Almack* v. *Moore*, 2 L. R. Ir. 90.

When the next friend of an infant dies, his nearest paternal relations are entitled to nominate the new next friend ; and he may obtain orders of course changing the solicitors and appointing himself next friend. *Talbot* v. *Talbot*, 43 L. J., Ch. 352 ; L. R. 17 Eq. 347 ; 22 W. R. 619.

In a suit by adults and infants, the next friend was charged by an order of the court. The adult plaintiffs obtained an order of course for changing the solicitor, on a petition representing the original next friend as next friend, and stating incorrectly that the order changing the next friend had not been drawn up :—Held, that the order so obtained was irregular. *Piddock* v. *Boultbee*, 2 Sim. (N.S.) 223 ; 21 L. J., Ch. 786.

A motion by the next friend of infants describing himself as such in the notice of motion, is irregular. The motion should be by the infants by their next friend. *Ib.*

Motives for Instituting Suit.]—A bill filed on behalf of an infant ordered to be taken off the file with costs to be paid by the next friend, he being a person of low circumstances, and of immoral character, and there being reason to suppose that he had instituted the suit from spite. *Walker* v. *Else*, 7 Sim. 234 ; 4 L. J., Ch. 54. *And see* infra, col. 1482.

Inquiry whether Suit is Beneficial.]—An administration suit having been instituted on behalf of infants by a next friend, the son of the solicitor for the plaintiffs, who was a stranger to, and had not before filing the bill communicated with the testator's family, the court directed inquiries whether the suit was for the benefit of the infants, and whether the next friend was a proper person to conduct it ; staying all proceedings in the meantime. *Towsey* v. *Groves*, 1 N. R. 226 ; 32 L. J., Ch. 225 ; 9 Jur. (N.S.) 194 ; 7 L. T. 778 ; 11 W. R. 252.

Where a bill has been filed on behalf of infants, under circumstances raising a strong suspicion against the motives of the next friend, the court will direct an inquiry whether the suit is for the benefit of the infants, and if so, whether such next friend is a proper person to conduct it. *Nalder* v. *Hawkins*, 2 Myl. & K. 243 ; Coop. t. Brough. 175.

—— **Two Suits.**]—Where two suits for the same purpose are instituted on behalf of an infant by different persons acting as his next friend, that one is to be preferred which appears most for his benefit on taking into account all the circumstances likely to influence the course of the proceedings. The priority of one of the suits to the other, or the fact that in the one the next friend is a relative, and in the other not, is to be disregarded, if it appear that the latter, or that in which the next friend is not a relative, is most likely to be prosecuted zealously for the benefit of the infant, and the court would restrain the further prosecution of a suit not for his benefit. *Morrisson* v. *Bell*, 5 Ir. Eq. R. 354.

Where two bills are filed by different next friends, the court will grant a motion to restrain proceedings in the cause in which a decree has been obtained. *Nanney* v. *Wymer*, 2 Jur. 962.

Upon the question as to which of two administration suits, relating to the same estate, should proceed, the court will prefer the mother as next friend, although in humble life, supposing she is respectable, although a decree has been made in the other suit. *Harris* v. *Lightfoot*, *Harris* v. *Harris*, 10 W. R. 31.

b. Death.

After Decree.]—Prochein ami plaintiff dying after decree, reference to master to appoint another directed on motion of defendant. *Bracey* v. *Sandiford*, 3 Madd. 468.

Right of Defendant.]—On death of prochein ami, and plaintiff refusing to name new prochein ami, defendant, after ten days' notice, to be at liberty to name one. *Lancaster* v. *Thornton*, Dick. 346 ; Amb. 398.

Where the next friend of an infant plaintiff dies, the proper order for the defendant to obtain is that the master may approve of a new next friend ; and four days' notice of the order must be given to the plaintiff's solicitor. *Glover* v. *Webber*, 12 Sim. 351.

Where a prochein ami dies, the court will order the bill to be dismissed within a given time unless a new prochein ami be named. *Anon.*, 1 L. J. (O.S.) Ch. 60.

Right of Solicitor.]—In an infant's suit, the next friend dying, the solicitor whom he had employed commonly obtains an order appointing a new next friend, and the order, in the absence of any peculiarity, is of course. *Westby* v. *Westby*, 2 C. P. Cooper, 211.

Where the mother of the infant employed a solicitor to prosecute a suit on his behalf, and the prochein ami dying, and the mother having discharged the solicitor, he named a new prochein ami without her sanction, the court ordered that on payment by the mother of the costs of the new-named prochein ami, he should be removed, and another appointed, the costs to be paid by solicitor. *Lander* v. *Ingersoll*, 4 Hare, 596.

By Whom Nominated.]—When the next friend of an infant plaintiff dies, his nearest paternal relations are entitled to nominate the new next friend ; and their nominee may obtain orders of course in the suit changing the solicitors on

the record, and appointing himself next friend. *Talbot* v. *Talbot*, 43 L. J., Ch., 352; L. R. 17 Eq. 347 : 22 W. R. 619.

In such a case the order appointing the new next friend need not be supported by any affidavit as to his fitness. *Ib.*

Ex parte Motion.]—When the next friend of an infant plaintiff dies pending the action, a new next friend may be appointed on an ex parte motion in court. *Daly* v. *Daly*, 9 L. R., Ir. 383.

c. Appointment.

Father.]—The father, as being the natural guardian of the infant, ought, in the first instance, to be appointed prochein ami. *Watson* v. *Fraser*, 8 M. & W. 660; 9 D. P. C. 741; 10 L. J., Ex. 420; 5 Jur. 682.

An infant was admitted to sue by her father and next friend, on a petition signed for her by the father. *Eades* v. *Booth*, 8 Q. B. 718; 3 D. & L. 770; 15 L. J., Q. B. 263; 10 Jur. 311.

When an administration action had been commenced on behalf of infants the father was appointed next friend, in substitution for a stranger who had constituted himself next friend and commenced the action. *Woolf* v. *Pemberton*, 6 Ch. D. 19; 37 L. T. 328; 25 W. R. 873—C. A.

—— **Though Insolvent.**]—The court will allow a father, though an insolvent debtor, to prosecute an action as prochein ami, for his infant son, if it is clearly shown that no fitter person can be obtained. *Duckett* v. *Satchwell*, 1 D. & L. 980; 12 M. & W. 779; 13 L. J., Ex. 224; 8 Jur. 408.

—— **Absconding.**]—Where a suit was instituted by the father as next friend, who afterwards absconded, the court refused to appoint a next friend, but ordered that a person to be named by the wife should prosecute the suit. *Greenaway* v. *Rotherham*, 9 Sim. 88; 7 L. J., Ch. 98; 2 Jur. 45.

Married Woman.]—Sect. 1, sub-s. 2, of the Married Women's Property Act, 1882, does not abolish the rule that a married woman is incapable of filling the office of next friend, or guardian ad litem. *Somerset (Duke), In re, Thynne* v. *St. Maur*, 56 L. J., Ch. 733; 34 Ch. D. 465; 56 L. T. 145; 35 W. R. 273.

Some of the plaintiffs in a suit were infants, their sister, also a plaintiff, being their next friend. On her marriage the court directed a new next friend to be appointed, and the former next friend and her husband to be made defendants. *Jones* v. *Jones*, 17 W. R. 1003.

Administration—Executor.]—In administration under a decree made in a suit where an infant was plaintiff, it became necessary to take hostile proceedings in order to get in the assets:—Held, that in the absence of misconduct on the part of the executor, he was the proper person to have the conduct of the intended suit. *Harrison* v. *Richards*, 35 L. J., Ch. 677.

Solicitor's Clerk.]—The clerk of the solicitor to the defendant in the first suit was made the next friend of the infant in the second suit:—Held, that he was not necessarily an improper next friend. *Ashley* v. *Allden*, 16 Jur. 460.

Condition of.]—Circumstances of proposed prochein ami not to be inquired into, though suggested that he was indigent. *Davenport* v. *Davenport*, 1 Sim. & S. 101.

Any person may, as prochein ami, exhibit a bill in the name of an infant, without his leave. *Andrews* v. *Cradock*, Pre. Ch. 376; Gilb. Eq. Rep. 36.

A prochein ami need not be a relation, but he must be a person of substance, because liable to costs. *Anon.*, 1 Atk. 570.

When a Stranger.]—Difficulties in dealing with suits filed by strangers on behalf of infants. On the one hand, you may encourage useless and expensive litigation; on the other, you may discourage interference very often necessary for their protection. *Cross* v. *Cross*, 8 Beav. 455.

What is an Adverse Interest.]—The court will not permit as next friend or guardian ad litem of an infant persons whose interests are adverse to the infant's. But the adverse interest to disqualify must be clear and substantial. *Langford* v. *Little*, 5 Ir. Eq. R. 343.

—— **Defendant.**]—A defendant may not be a next friend. *Anon.*, 11 Jur. 258.

d. Removal.

On what Grounds.]—The court will not, upon petition of an infant party, direct an inquiry whether the cause has been properly conducted; but if the next friend or guardian does not do his duty he will be removed. *Russell* v. *Sharpe*, 1 J. & W. 482.

Where an administration suit was instituted on behalf of some infants, a nominee of their father being next friend, and the suit being conducted by the father, the court refused to dismiss the next friend, upon allegations of improper motives. *Gravatt* v. *Tann*, 15 W. R. 83.

The court will change a next friend upon his not proceeding with a cause; solicitor is not to attach without orders from his client; but where the client is next friend of an infant, and moves to discharge the attachment on that ground, the court will refer it to the master, to see whether it is for the interest of the infant that the next friend should be continued. *Ward* v. *Ward*, 3 Mer. 706.

For Misconduct.]—If the friend or guardian ad litem is acting improperly, the proper course is to remove him and appoint a new next friend. *Birchall, In re, Wilson* v. *Birchall*, 18 Ch. D. 41; 29 W. R. 27.

—— **Refusal to Appeal.**]—The next friend of infant plaintiffs has no power to deprive them of their right to appeal; and his refusal to appeal, though admittedly bonâ fide, is misconduct sufficient to justify his removal. *Dupuy* v. *Welsford*, 42 L. T. 730; 28 W. R. 762.

By the Court.]—On an application by the next friend the court refused the application, and ordered that the official solicitor should be named as the next friend in all future proceedings, and that the next friend should deliver up all documents to him. On appeal, this order was discharged, on the ground that such a course ought not to be taken without giving the next friend an opportunity of explaining his conduct.

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Corsellis, In re, Lawton v. *Elwes*, 50 L. T. 703; 32 W. R. 965—C. A.

Insolvency.]—Where an uncertificated bankrupt was appointed prochein ami the court removed him, and ordered another to be appointed. *Watson* v. *Fraser*, 8 M. & W. 660; 9 D. P. C. 741; 10 L. J., Ex. 420; 5 Jur. 682.

Where an infant being plaintiff his nearest relative, who was insolvent, had been appointed prochein ami, the court removed him, it not appearing that no solvent person could be found to act. *Lees* v. *Smith*, 5 H. & N. 632; 29 L. J., Ex. 294; 2 L. T. 252; 8 W. R. 464.

For Adverse Interest.]—The court will remove a next friend if it appear that he has an interest in the suit adverse to the infant. *Gee* v. *Gee*, 9 L. T. 557; 12 W. R. 187.

The court will remove a next friend, and appoint a new one, where the former is so connected with a defendant having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him. *Peyton* v. *Bond*, 1 Sim. 390.

The court will not remove a next friend merely because he is nearly related to or connected with the defendant; but it must see that there is a probability that the infant's interest will be prejudiced, if the next friend is allowed to remain. *Bedwin* v. *Asprey*, 11 Sim. 530; 5 Jur. 362.

The name of a defendant, who was also the next friend of the plaintiff, and whose wife was a defendant, was struck out, and liberty was given to the wife to defend separately. *Lewis* v. *Nobbs*, 47 L. J., Ch. 662; 8 Ch. D. 591; 26 W. R. 631.

A suit was instituted to carry out articles for a settlement, the father being unable to perform his covenant. The bill being by the infant children by their next friend, a near relative of the defendant, a motion was made to remove him, and substitute the brother-in-law of the wife, on the ground of the present next friend's near connection with the defendant, that he was a stranger to the family, and that the defendant being one of the trustees of the articles, had, in fact, filed the bill, and had omitted to enforce the articles. Motion refused with costs. *Pifford* v. *Beeby*, 14 W. R. 948.

Doubts having arisen as to the proper custody of an infant, a suit was commenced in her name for the administration of her father's estate. A next friend was appointed, who was a friend of the defendants, the executors and trustees of the will, and accepted the office at their request:—Held, that his connection with the executors made him an improper person to act as next friend, and that he ought to be removed. *Burgess, In re, Burgess* v. *Bottomley*, 25 Ch. D. 243; 50 L. T. 168; 32 W. R. 511—C. A.

—— **Liability to Account.**]—A person being an accounting party in the suit, removed from acting as the next friend of infant plaintiffs. *Hopkinson* v. *Roe*, 9 L. J. (O.S.) Ch. 7.

The court will not remove a next friend merely on the ground that he is nearly related to the accounting party. *Sandford* v. *Sandford*, 9 Jur. (N.S.) 298; 8 L. T. 194; 11 W. R. 336.

Mere relationship to an accounting party is not a sufficient ground for removing a next friend. *S*—— v. *S*——, 1 N. R. 384.

Two Actions.]—A suit was instituted on behalf of an infant, and an administration decree pronounced in it. Before the decree was drawn up, another suit was also begun for the same purpose as the former. The next friend of the infant in the first suit was the clerk to the solicitors who acted for all parties; but no objection was made to him. On a motion in the second suit to change the next friend in the first, or for inquiries whether he was a fit and proper person to conduct it:—Held, that the motion must be refused, with costs. *Lloyd* v. *Davies*, *Lloyd* v. *Banks*, 10 Jur. (N.S.) 1041; 10 L. T. 183; 3 N. R. 700.

Stranger Appointed by Father.]—A father authorised B. to act as next friend for his children, and by will appointed their mother the guardian:—Held, that the mother could remove the next friend and be substituted in his place. *Hutchinson* v. *Norwood*, 55 L. J., Ch. 375; 31 Ch. D. 237; 54 L. T. 15; 34 W. R. 214.

Where Person does not Consent to Act.]—The name of a person who had been made the next friend of an infant plaintiff, without his authority, was ordered to be struck out, but liberty was given for the co-plaintiff to amend by naming a new next friend. *Ward* v. *Ward*, 6 Beav. 251; 12 L. J., Ch. 332.

As to the liability of the next friend in such a case as regards the defendant. *Ib.*

Reference to Master.]—Prochein ami cannot remove himself from that situation without reference to master. *Snelling* v. *Snelling*, 4 Madd. 261.

—— **Affidavit.**]—On motion to substitute a new next friend of an infant plaintiff, the court must be satisfied, by affidavit, of the circumstances and respectability of the party proposed to be substituted, though all the other parties to the cause consent to the substitution. *Harrison* v. *Harrison*, 5 Beav. 130. And see *Anon.*, 1 Ves. J. 409.

e. Costs, Charges, and Expenses.

Costs in General.]—A prochein ami need not be a relation, but must be a person of substance, because liable to costs. *Anon.*, 1 Atk. 570.

—— **Death of Infant.**]—Had the infant proceeded in the cause, he would have been liable to the whole costs. Vide Mitf. Pl. 21, 124. In *Morgan* v. *Compton* (2 Fowl. Exch. Pr. 376), an infant dying before costs, ordered on a dismissal, were taxed, a motion that the next friend might pay them was denied. *Ib.*

Bill by an infant dismissed for want of prosecution, but, before the costs were taxed, the infant died; by the death of the prochein ami, the costs would have been lost, and so they are by the death of the infant. *S. C.*, Bunb. 332.

Appointment of Another.]—The next friend of an infant cannot move that another may be substituted for him; for the court will not then allow him, by withdrawing, to escape costs to which he may be liable. *Melling* v. *Melling*, 4 Madd. 261.

On Petition.]—The petition of an infant is the petition of his next friend, and the next friend

ordered to pay costs. *Jones* v. *Lewis*, 1 De G. & Sm. 245. S. P., *Wheelers, In re*, 2 Moll. 251.

Petition by prochein ami that the infant, being now come of age, might repay him the costs expended in the suit: ordered to show cause. *Brown* v. *Jones*, 2 Fowl. Exch. Pr. 375.

Where Suit beneficial to Infant.]—The next friend allowed costs, though the bill had been dismissed, the master having reported the suit for the infant's benefit. *Tuner* or *Tanner* v. *Ivie*, 2 Ves. sen. 466; Dick. 168.

Two suits were instituted by different persons as next friends. The master, on reference, reported that the second ought to be alone prosecuted. After decree in the second, the next friend in the first suit applied for his costs:—Held, that the determination of the master did not imply that the first suit was improper, and that the party was therefore entitled to his costs. *Crowther* v. *Flood*, 5 L. J., Ch. 352.

The next friend ordered to pay the costs, the chief clerk having found that the action for administration was not for the benefit of the infants. *Thomas* v. *Elsum*, 46 L. J., Ch. 793.

Where in an administration suit the decree, after the usual accounts and inquiries, added an inquiry "what benefit had accrued to the plaintiff from the institution of the suit," such inquiry was struck out. *Clayton* v. *Clarke*, 3 De G. F. & J. 682; 30 L. J., Ch. 657; 7 Jur. (N.S.) 562; 4 L. T. 489; 9 W. R. 718.

A next friend was refused his costs of the last-mentioned inquiry, and of the suit, until the decree; but he was allowed his costs of the suit after the decree; and no costs were allowed on the appeal. *Ib.*

Motion for Receiver.]—Motion on infant's behalf to restrain defendant's executor receiving more of personal estate, and rents and profits of real estate, and for receiver; prochein ami ordered to pay costs of motion refused. *Buckley* v. *Buckeridge*, Amb. 395.

Ne Exeat Regno.]—Writ of ne exeat regno, when the answer came in, was discharged, with costs against the prochein ami; but upon the admissions in the answer, the defendant was ordered to give security to abide the decree. *Roddam* v. *Hetherington*, 5 Ves. 91.

Leaseholds — Infant attaining Majority.]—Three minors, by their next friend, filed a bill for a renewal of a lease. Pending the cause, the eldest plaintiff attained twenty-one, and entered a rule to proceed in his own name, and the second attained twenty-one. Afterwards there was a final decree that the defendant should execute the renewal, but that the plaintiffs should pay his costs. For those costs the next friend was arrested for non-payment; and a receiver was appointed, over the lands comprised in the lease:—Held, that although the plaintiffs, who had attained the age of twenty-one, and adopted the proceedings, were severally liable for the whole costs, the next friend was also liable; that the separate proceeding against him was quite regular. *Purcell* v. *Woodley*, 5 Ir. Eq. R. 376.

Administration Action.]—A widow entered into possession of the real and personal property of her husband, and by carrying on his trade, maintained herself and his infant children. Shortly after the husband's death a bill was filed by the maternal grandfather, as next friend, for accounts, and the appointment of guardians and of a receiver. The master by his report approved of the widow and her co-executor as the guardians, and found that the whole income ought to be allowed for their maintenance. The court on petition confirmed this report, and the costs of all the proceedings were ordered to be paid by the next friend. *Anderton* v. *Yates*, 5 De G. & Sm. 202.

Master in Chancery.]—Lord Manners held, that a master in chancery, if prochein ami, is liable personally for costs when decreed to defendant. *Frizell* v. *Hodgens*, 2 Moll. 456.

Improper Conduct.]—Nothing short of a dishonest intention will be sufficient to fix a prochein ami personally with costs; no degree of mistake nor misapprehension will be sufficient. *Whittaker* v. *Marlar*, 1 Cox, 285.

Infant, on coming of age, may dismiss bill filed for him, but cannot make prochein ami pay costs, unless he prove suit improperly instituted. *Anon.*, 4 Madd. 461.

Where a suit appeared to have been improperly instituted in the names of two infants, one on attaining full age allowed to have her name struck out, with costs to be paid by the next friend; and afterwards, the other infant applying, the suit dismissed with costs in like manner. *Guy* v. *Guy*, 2 Beav. 460; 9 L. J., Ch. 289; 4 Jur. 313.

Bill dismissed with costs, upon facts which, though not known when the bill was filed, might have been with reasonable diligence. The next friend not allowed the costs out of the infant's estate. *Pearce* v. *Pearce*, 9 Ves. 548.

In a clear case the court, being of opinion that a suit had been commenced by the next friend to promote his own views, and not for the benefit of the infants, summarily dismissed it, with costs to be paid by the next friend. *Sale* v. *Sale*, 1 Beav. 586.

The master reported that a suit, instituted on behalf of infants, was improperly instituted, and ought not to be prosecuted; it was dismissed, with costs to be paid by the next friend. *Fox* v. *Swerkrop*, 1 Beav. 583.

A bill ordered to be taken off the file with costs, to be paid by the next friend, he being a person of low circumstances, and of immoral character, and suspected of having instituted the suit from spite. *Walker* v. *Else*, 7 Sim. 234; 4 L. J., Ch. 54.

—— **Two Suits.**]—Two suits were instituted but it was found that it was most for the infant's benefit to prosecute the second. There being some impropriety of conduct on the part of the solicitor, who instituted the first suit and nominated his brother as next friend, the first bill was dismissed without costs. *Startin* v. *Bartholomew*, 6 Beav. 143; 12 L. J., Ch. 179.

—— **No Inquiries Made.**]—A next friend having filed a bill for administration without being a friend of the family, and without making sufficient inquiries:—Held, that she must pay her own costs, although the suit resulted in the appointment of a new trustee. *Edgley* v. *Adams*, 31 L. T. 15.

Final Order.]—When at the hearing costs

are ordered to be paid by a next friend, without any reservation of the question how they are ultimately to be borne, the order is final against him personally, and cannot be re-opened on further consideration. *Caley* v. *Caley*, 25 W. R. 528.

Solicitor's Clerk.]—Where an administration action was commenced by the managing clerk of infant's solicitor and the result of the accounts was to show that the suit was not for their benefit:—Held, that the next friend was entitled to his costs. *Gravatt* v. *Tann*, 38 L. J., Ch. 459; L. R. 7 Eq. 436.

Employment of Solicitor.]—An infant suing by his next friend is entitled to the costs of an attorney employed to conduct such action, although the only notice to the defendant of an attorney being employed was the address of the next friend being at the office of such attorney, as stated on the back of the declaration:—"E. B., next friend, at C.'s, 8, Symond's-inn, Chancery-lane." *Bryant* v. *Wilson*, 3 C. B. (N.S.) 722; 4 Jur. (N.S.) 362; 6 W. R. 292.

Charge on Infant's Interest for.]—Where an action had been brought by an infant tenant in tail, by his next friend, for the benefit of the entailed estate, which was approved by the court, the court sanctioned a charge upon the infant's interest in the property for raising a sum to pay the costs of the action. *Jones, In re*, 48 L. T. 188; 31 W. R. 399.

What Allowed.]—Semble, if the prochein ami is to a certainty to have all that exceeds the taxed costs, that leads him to be very careless; the inquiry could be only what was properly expended. *Osborne* v. *Denne*, 7 Ves. 424.

Next friend is entitled to fair expenses beyond taxed costs, under the head of just allowances. *Fearns* v. *Young*, 10 Ves. 184.

An application being made for costs as between attorney and client, the court said that the question is, whether charges, not coming strictly under the head of costs, cannot be given under just allowances; for, as the infant himself cannot incur charges and expenses, if the next friend is to be at the whole expense beyond the costs, persons will deliberate before they accept that office. *Ib.*

The next friend of infants conducting a suit on their behalf to a successful issue is entitled to his costs, charges, and expenses properly incurred before suit with reference to the institution thereof. *Palmer* v. *Jones*, 22 W. R. 909.

The costs of the next friend, to the time the infant attained twenty-one, allowed as between solicitor and client, but no costs allowed of proceedings subsequently taken, without the authority of the plaintiff. *Brown* v. *Weatherhead*, 4 Hare, 122; 9 Jur. 787.

Reversion.]—When the costs of infants suing by their next friend are directed to be paid out of a fund in court to which the infants are entitled in reversion, party and party costs only will be immediately paid; the next friend having liberty to apply for the difference between those costs and costs as between solicitor and client when the fund comes into possession. *Damant* v. *Hennell*, 33 Ch. D. 224; 55 L. T. 182; 34 W. R. 774.

f. Security for Costs.

General Rule.]—The old rule in chancery as to a next friend giving security for costs, and the old rule at common law, are abrogated by the Judicature Rules; and under Rule 8 of Order XVI., the court has a judicial discretion to direct security for costs to be given at any time. *Martano* v. *Mann*, 49 L. J., Ch. 510; 14 Ch. D. 419.

Next friend of infant cannot be compelled to give security for costs. *St. John* v. *Besborough (Earl)*, 1 Hog. 41.

When Required—Infant Pauper.]—An infant lessor in ejectment is a pauper, the court will require him to find some person to be security for the defendant's costs. *Doe* d. *Roberts* v. *Roberts*, 6 D. P. C. 556. S. P., *Anon.*, 1 Wils. 130.

—— **Undertaken by Guardian.**]—The court refused to compel an infant to give security for costs, upon its being shewn that the guardian had undertaken for them. *Anon.*, Cowp. 128. S. P., *Yarworth* v. *Mitchell*, 2 D. & R. 423; 1 L. J. (O.S.) K. B. 112; 25 R. R. 555.

When an infant sues, the court will oblige the prochein ami, or guardian, or attorney, to give security for the costs. *Doe* d. *Selby* v. *Alston*, 1 Term Rep. 493.

Poverty.]—The court will not compel the next friend of an infant, on the ground of poverty, to give security for costs. *Fellows* v. *Barrett*, 1 Keen, 119.

A feme covert and infants, as co-plaintiffs, by the same next friend, filed a bill:—Held, that though poverty is not a sufficient objection to the next friend, yet that the feme covert and the infants having the same next friend, the proceedings must either be stayed as to all the parties, or not at all. *Drinan* v. *Mannix*, 2 Con. & L. 87; 3 Dr. & War. 154; 5 Ir. Eq. R. 190.

The form of the order, in such a case, is, that the proceedings be stayed until the next friend of the feme covert be changed, or security for costs be given. *Ib.*

The court refused a motion that a next friend might give security for costs, or a new one be appointed, on the ground that the one in this case was a privileged person, except on affidavit that the next friend is in mean and doubtful circumstances. *Anon.*, Moseley, 86.

Motion after answer, that a prochein ami might give security for costs, or another be named, on the ground that he was in indigent circumstances, refused. *Squirrel* v. *Squirrel*, 2 P. Wms. 297, n.; Dick. 765.

Insolvency.]—Prochein ami becoming insolvent, and receiving groats after answer filed; motion, that he might be removed and another appointed, refused, but leave given to apply to stay proceedings until he be changed, or security given for costs. *Pennington* v. *Alvin*, 1 Sim. & S. 264; 1 L. J. (O.S.) Ch. 202.

The next friend was insolvent, and had been indemnified from the costs of the suit, and a motion that the proceedings might be stayed until the next friend was changed, or had given security for costs, was refused. *Murrell* v. *Clapham*, 8 Sim. 74.

Where an infant sues by guardian who is sworn to be in insolvent circumstances, the court will

require him to give security for costs. *Mann* v. *Berthen*, 4 M. & P. 215.

Misdescription.]—Where the next friend described himself as a "clerk," and it appeared that he was a letter carrier in the General Post-office. A motion to compel the next friend to give security for costs on the ground of misdescription, refused with costs. *Watts* v. *Kelly*, 6 W. R. 206.

Change of Address.]—Proceedings stayed till security given for costs by next friend, he having changed residence ex necessitate. *Greening* v. *Bell*, 2 Jur. 794.

Next Friend Absconding.]—On affidavit that one named next friend had absconded, and was not worth anything, it was ordered that he should give security for costs, all proceedings stayed in the meantime. *Wale* v. *Salter*, Moseley, 47.

Substitution of Another.]—Motion by a plaintiff, that the name of a co-plaintiff, as a next friend, might be struck out, and a new next friend substituted, on the ground that the evidence of the next friend was necessary, granted, on the terms that the next friend should give security for the costs incurred in his time. *Witts* v. *Campbell*, 12 Ves. 493.

Prochein ami withdrawing himself, ordered, on substitution of new one, to give security for costs already incurred. *Davenport* v. *Davenport*, 1 Sim. & S. 101.

Ne exeat regno.]—Writ of ne exeat regno was discharged with costs against the prochein ami, but upon the admissions in the answer the defendant was ordered to give security to abide the decree. *Roddam* v. *Hetherington*, 5 Ves. 91.

8. Costs.

Answer.]—Where a bill was filed to recover the amount of a judgment debt out of the real and personal estate of the conusor:—Held, that the defendant, who was a minor, and the heiress-at-law of the conusor, was not entitled, as against the plaintiff, to the costs of putting in an answer. *Downes* v. *Hogan*, 2 Ir. Eq. R. 112.

Misjoinder of Parties.]—Extra costs occasioned by an infant being made a defendant, who ought to have been made a plaintiff, not allowed. *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; 11 L. J., Ch. 230; 6 Jur. 386.

Want of Diligence.]—Bill by infant dismissed with costs upon facts, which, though not known when the bill was filed, might have been with reasonable diligence; the next friend not allowed the costs out of the infant's estate. *Pearce* v. *Pearce*, 9 Ves. 548.

Contempt—Messenger.]—Infant cannot be detained in custody after guardian assigned him. *Perkins* v. *Hamond*, Dick. 287.

Infant defendant pays no costs of contempt. *Ib.*

Plaintiff always pays messenger against infant. *Ib.*

After Majority.]—An infant by prochein ami brings a bill, and never stirs in it after he comes of age, and the bill is dismissed. The infant and prochein ami are both liable to pay costs. *Turner* v. *Turner*, 2 P. Wms. 297; Select Ca. Ch. 49; 2 Str. 708.

Out of what Fund.]—Where infants are absolutely entitled to a trust-fund, and the court has directed the whole income to be applied for their maintenance, the court will order the costs to be raised out of the corpus. *Burnand*, *Ex parte*, 8 Jur. 558.

Infants entitled to share in a residue, having filed a bill for an account, the accounts proving correct, the costs ordered to be paid out of the plaintiff's share alone. *Mackenzie* v. *Taylor*, 7 Beav. 467.

Costs of unsuccessful defence of an infant charged not upon general fund but upon his own share. *Orford* (*Earl*) v. *Churchill*, 3 V. & B. 59.

—— **Legacy.**]—If an infant sues for a legacy, costs must be paid out of the assets, and not out of the legacy. *Anon.*, Moseley, 5.

—— **Tenant for Life.**]—Decree against an infant that the costs should be paid out of the trust-money, reversed, because the money was to be laid out in land, whereof the infant was only tenant for life. *Peller* v. *Husband*, 6 Vin. Abr. 365, pl. 10.

Special Counsel.]—The court will authorise the retainer of special counsel, if the master shall think it necessary to defend an ejectment on the title to an infant's estate. *Browne* v. *Richards*, 1 Hog. 346.

Issue.]—A bill was filed on behalf of an infant, with the sanction of the master, to set aside deeds executed by a lunatic. An issue having been directed, the jury found in favour of the deeds. The bill was dismissed with costs of suit and of the issue. *Frank* v. *Mainwaring*, 4 Beav. 37.

Solicitor—Undertaking to Pay.]—A continued employment of attorney by infant client, after coming of age, may amount to an undertaking to pay a prior bill of costs. *Guy* v. *Burgess*, 1 Smith, 117.

Where a petition on behalf of an infant is presented by a solicitor who is a stranger to the infant, even although the master should find that the petition is a proper one and for the benefit of the infant, the court will not award out of the infant's estate to the petitioner any costs, except costs out of pocket. *Goode, In re*, 1 Ir. Ch. R. 256.

And where such a petition was presented by a solicitor, and the master found that the petition was a proper one, and for the benefit of the infant, as the petitioner had not previously ascertained that none of the relatives of the infants would present such a petition, the court refused to grant out of the minor's estate even costs out of pocket to petitioner. *Ib.*

By the decree in a suit on behalf of infants, the money recovered was brought into court, for the benefit of the infants, defendant to pay the costs. He having absconded, a motion by the solicitor for the plaintiff, in which he was joined by prochein ami, was granted, that the solicitor might be paid his costs out of the money in court. *Staines* v. *Maddox*, Moseley, 319.

—— **Lien—Repudiation by Infant.**]—Where an infant plaintiff, on coming of age, repudiated the suit:—Held, that a defendant who had brought deeds into court was entitled to have them returned, and that the solicitor of the next friend of the infant had no lien on them for his costs. *Dunn* v. *Dunn*, 7 De G. M. & G. 25; 3 W. R. 199.

And see cases, supra, col. 1480.

H. GUARDIAN.

1. APPOINTMENT.

a. In General.

General Rule.]—A guardian may be appointed, though no cause is depending. *Birchell, Ex parte*, 3 Atk. 813.

—— **Testamentary Guardian.**] — The court interferes where there is a testamentary guardian who has all the remedies a father has. But there must be a suit instituted relative to the infant's estate to give the court jurisdiction. *Butler* v. *Freeman*, Amb. 303.

Upon Petition.]—Order for the appointment of a person to act as guardian (the father being living), and for a reference as to maintenance, but not for a receiver, upon a petition, without any suit instituted. *Mountfort, Ex parte*, 15 Ves. 445.

By Spiritual Court.]—The spiritual court may appoint a guardian to an infant until fourteen, if he has only personal estate, but not if he has realty. *Carlisle (Bishop)* v. *Wells*, 2 Lev. 162. S. P., *Loury* v. *Reymes*, 2 Lev. 217.

Discretion of Court.]—A father has no absolute right to have a guardian appointed of his infant child, but the court has a discretion whether it will make such an appointment. *Lyons, In re*, 22 L. T. 770; 18 W. R. 238.

Religion of Children—Indication of Father's Intention.] — W., a Roman Catholic, shortly before his marriage wrote to Miss D.'s mother, stating that as to guardianship, on no consideration would he "permit anyone to step between [his intended wife] and her children," but "would by will leave her sole and undivided authority." A child, C., was born, and with W.'s sanction, baptised as a Roman Catholic. W. having died intestate in 1879:—Held, that upon the facts his children should be committed to the guardianship of their mother. *Walsh, In re*, 13 L. R. Ir. 269—L. C. See also *Scanlan, In re*, infra, col. 1510.

Infant entitled to Property.] — Where an infant is entitled to property independent of the father, it seems a jurisdiction arises to the lord chancellor to appoint a guardian of the person. *Stewart, In re*, Wall. Lyn. 115.

Ill-treatment by Father.] — Order for a guardian and maintenance for infants upon ill-treatment by their father. *Whitfield* v. *Hales*, 12 Ves. 492.

Wards of Court.]—The court has jurisdiction to appoint a guardian for infant wards of court, excluding the father. *Wellesley* v. *Wellesley*, 2 Bligh (N.S.) 124; 1 Dow (N.S.) 152.

Evidence that the father was living in a state of adultery, and had encouraged his children in swearing, &c., was considered a fit case to exercise such power. *Ib.*

To Consent to Marriage.]—Guardian appointed to consent to marriage of infant without property. *Woolscombe, In re*, 1 Madd. 213. See 4 Geo. 4, c. 76, ss. 16, 17 (ante, col. 1387), and 2 P. Wms. 120, note (z).

By Infant.]—Infant at seventeen appointing guardian by deed does not preclude jurisdiction of chancellor to grant one. *Curtis* v. *Rippon*, 4 Madd. 462.

Guardian out of the Jurisdiction.]—Where the mother of infants, whose father died intestate, was permanently resident in England, the court, with her consent, made an order, under the 49 & 50 Vict. c. 27, s. 6, substituting a paternal uncle as guardian. Form of procedure in such cases. *Lemons, In re*, 19 L. R., Ir. 575—L. C.

Two infants having been sent to England for education by their father, resident in India, the court appointed a guardian during the father's absence abroad, notwithstanding that their mother was residing in this country. *Thomas, In re*, 22 L. J., Ch. 1075.

Palatinate Court—Jurisdiction.]—On a petition in the palatinate court of Lancaster the mother and another person were appointed guardians, and an allowance for maintenance was fixed, and was afterwards varied by the court. The mother, as next friend, obtained in the high court a judgment for administration of the testator's estate, and then took out a summons in the action for the appointment of guardians and an allowance for maintenance. On summons before the vice-chancellor of the palatinate court the mother gave an undertaking not to proceed with the summons in the high court. She afterwards appealed to the high court:—Held, that, although the high court had jurisdiction to appoint guardians, notwithstanding the previous orders made by the palatine court, such jurisdiction ought not to be exercised unless some special ground was shown, and that the proceedings in the palatine court ought not to be stayed. *Alison, In re, Johnson, In re*, 47 L. J., Ch. 755; 8 Ch. D. 1; 38 L. T. 304; 26 W. R. 450—C. A.

Held, also, that as the vice-chancellor of the county palatine had no jurisdiction to grant an injunction to restrain proceedings in the high court, he ought not to have taken an undertaking to discontinue them, and the undertaking was accordingly discharged. *Ib.*

Guardian appointed by Foreign Court.]—The order of a foreign court appointing a guardian of an infant, the child of a British subject, will be recognised in the court with the respect due by the comity of nations to the order of a foreign court, but it does not confer on the appointee the character of guardian in this country. *Dawson, In re*, 2 Sm. & G. 199; 1 Jur. (N.S.) 36; 2 W. R. 314. See 2 W. R. 366.

Where infant residing in France had a guardian appointed by the French courts:—Held, that the English court would not interfere with the decision of the French court by appointing an English guardian. *Bourgoise, In re*, 41 Ch. D. 310; 60 L. T. 553; 37 W. R. 563—C. A.

Infants, the subjects of a foreign state, were sent to this country by their guardian, appointed by the foreign court, for education. Part of the property of the infants was in this country, and a bill was filed and an order obtained ex parte, for the appointment of guardians here:—Held, that the court ought not to interfere with the guardian's rights over the children, but that the appointment of the guardians here should be continued without prejudice to those rights. *Nugent* v. *Vetsera*, 35 L. J., Ch. 777; L. R. 2 Eq. 704; 12 Jur. (N.S.) 781; 15 L. T. 33; 14 W. R. 960.

Property out of Jurisdiction.]—The court has jurisdiction to appoint guardians to an infant although his domicil and all his property are situated in Scotland, and the infant being made a ward of court by the mere filing of the bill, the court is bound to appoint guardians. *Johnstone* v. *Beattie*, 10 Cl. & F. 42; 7 Jur. 1023. Affirming 1 Ph. 17; 10 L. J., Ch. 300.

British Subject born Abroad.]—If an infant be born abroad whose paternal grandfather was a natural-born British subject, the court has jurisdiction to appoint a guardian of such infant, although the infant is resident abroad, and has no property in this country. *Willoughby, In re*, 54 L. J., Ch. 1122; 30 Ch. D. 324; 53 L. T. 926; 33 W. R. 850—C. A.

Deed of Appointment—Guardian Attesting Witness.]—A deed appointing a guardian of the person and estate of an infant is well executed within 12 Car. 2, c. 24, although the guardian is an attesting witness to the deed. *Morgan* v. *Hatchell*, 19 Beav. 96; 3 Eq. R. 121; 24 L. J., Ch. 135; 1 Jur. (N.S.) 125; 3 W. R. 126.

b. How Appointed.

i. *By the Court.*

In General.]—Where a petition is presented by infants for the appointment of a guardian it should be by a next friend. *Russell's Estate, In re*, 20 L. J., Ch. 384; 15 Jur. 981.

On Reference.]—Reference to the master to inquire whether the plaintiff's late father had appointed a guardian, and if not, that the master should approve of a proper person to be guardian. *Bettesworth* v. *Bettesworth*, Dick. 729.

When a father, by his will, names guardians for his natural child, the court will not appoint them guardians without reference to the master. *Ward* v. *St. Paul*, 2 Bro. C. C. 583. But see *Peckham* v. *Peckham*, 2 Cox, 46.

Amount of Property.]—Order made on petition without suit for a reference to approve of a guardian for an infant, having 150*l.* a year. *Angell, Ex parte*, 13 Sim. 258.

Guardian appointed without a reference, property being but 15*l.* per annum. *Jones, In re*, 1 Russ. 478.

Order appointing a guardian without a reference only where the property is excessively small; refused where it amounted to 1,500*l.* *Wheeler, Ex parte*, 16 Ves. 267.

Guardian appointed to an infant entitled to freehold property worth 80*l.* a year without a reference. *Jackson, Ex parte*, 6 Sim. 212.

The fortune of an infant being 1,000*l.* only, order made under affidavit, without reference, appointing guardian. *Allsop, In re*, C. P. Cooper, 44; 7 L. J. Ch. 194.

Guardian not to be appointed without a reference, when the infant's property amounts to 150*l.* per annum. *Janion, Ex parte*, 1 J. & W. 395.

Will not Executed.]—Where a person is appointed guardian, under a will not duly executed for that purpose, the court will appoint him without a reference. *Hull* v. *Storer*, 1 Y. & C. 556. *S. C.*, nom. *Hall* v. *Stork*, 5 L. J., Ex. Eq. 97.

Where Contest.]—Although the court will sometimes appoint a guardian to an infant without a reference, it will in no case dispense with a reference where the guardianship is contested. *Beattie* v. *Johnstone*, 1 Ph. 17; 10 L. J., Ch. 300; 5 Jur. 671. And see *S. C.*, nom. *Johnstone* v. *Beattie*, 10 Cl. & F. 42; 7 Jur. 1023.

Appointment by Infant.]—The court will refer it to the master to approve of the guardian, although the infant of the age of fourteen, entitled to real estate, has appointed one by deed. *Coham* v. *Coham*, 13 Sim. 639; 8 Jur. 26.

Attendance of Guardian.] — Guardian appointed and his presence in court dispensed with, on affidavit of his inability to attend from illness. *Hill* v. *Smith*, 1 Madd. 290.

Cost of.]—The cost of appointing a guardian where the infants appear in court is 2*l.* 5*s.* 8*d.*, and by commission, if executed in one place, 3*l.* 2*s.* 2*d.*, and in two places, 4*l.* 9*s.* 10*d.* It is therefore desirable to adhere to the ancient practice of the court. *Carwardine* v. *Wishlade*, 21 L. J., Ch. 464; 16 Jur. 461.

Payment of Dividends to.]—Semble, that 1 Will. 4, c. 56, s. 32, does not authorise the appointment of a guardian, and a direction for payment of dividends upon the same petition, but two petitions are proper. *Pongerard, In re*, 1 De G. & Sm. 426; 11 Jur. 744.

Bill—Amount of Property.]—In infancy, if the estate is large, a bill must be filed to appoint a guardian, as the accounts can be better taken than on petition. *Corbett* v. *Tottenham*, 2 Moll. 319.

Where property of a minor is small, a guardian may be appointed, and maintenance allowed on petition; when trustees are called on to allow a maintenance, a bill must be filed. *S. C.*, 1 Ball & B. 60.

Petition.]—If surviving testamentary guardian declines charge, whether it can be referred to master to appoint, &c., upon petition only without bill, quære. *Champney, Ex parte*, Dick. 350.

Where a testamentary guardian has not acted, the mode of proceeding in order to have a guardian appointed is by petition; it is not necessary to file a bill. Secus, if after acting he has misconducted himself. *O'Keefe* v. *Casey*, 1 Sch. & Lef. 106.

Guardian may be appointed and maintenance allowed upon petition without suit. *Salter, Ex parte*, 3 Bro. C. C. 500; Dick. 769.

The costs of the petition are to be allowed to the guardian in his accounts. *Ib.*

Guardian appointed merely on petition, but not without a reference. *Watkins, Ex parte*, 2 Ves. sen. 470.

At Hearing.]—Directions for appointing a guardian, though usually by petition, may be given at the hearing of the cause. *Bradshaw* v. ——, 2 L. J. (o.s.) Ch. 79.

ii. *By Will.*

In Ireland.]—Appointment to be guardian of the estate of infant children does not constitute him a testamentary guardian under 15 Car. 2, Ir., c. 19, s. 6. *Norbury (Lord), In re*, Ir. R. 9 Eq. 134.

Recommendation by Testator.]—A father having by will appointed a guardian to his children, with a recommendation that they should be placed under the care of two relatives:—Held, that the court was bound to give effect to the recommendation, but not further than might be consistent with preserving to the guardian the general superintendence and control over the children and their fortunes. *Knott* v. *Cottee*, 2 Ph. 192.

Unattested Will—Codicil.]—Appointment of guardians by an unattested will, made good by a codicil and three witnesses on the same paper, referring to the will as annexed, and confirming it. *De Bathe* v. *Fingal (Lord)*, 16 Ves. 167.

Declaration by Testator.]—A declaration of a father upon his death-bed, that he expected A. would take care to see his children educated in the Protestant religion, is a sufficient appointment of guardian of the infant. *Teynham* v. *Lennard*, 4 Bro. P. C. 302.

Testator directed the trustees of his will to engage a proper person for the purpose of taking the management and care of his children during their minorities; and he requested his late wife's sister, if she should be alive at his decease, to take such management and care on herself:—Held, an appointment of the wife's sister to be guardian. *Miller* v. *Harris*, 14 Sim. 540; 9 Jur. 388.

A testator, by will, expressed his urgest wish and desire that their aunt E. should have the charge and care of his infant children; and also that she might receive a sufficient allowance to enable her to make and keep a house for their residence, and that they might be attended to in illness by E. The testator stated his wish that, in case of E.'s ceasing from any cause to have such charge and care of the children, that they should not be taken charge of, or reside with, any other relative whatever. He appointed L. his executor and legal guardian of his children. Notwithstanding the direction, the chief clerk certified that it was not for the benefit of the children that E. should have their charge and management; and the court refused to vary the certificate. *Hartley* v. *Smith*, 6 L. T. 681, 734; 10 W. R. 750.

Children Unborn.]—Testator married, but not having children, gave the guardianship of all his children, born or to be born, to his wife and brother, or the survivor. The guardianship extends to all the children, by that or a future marriage. *Ilchester (Earl), Ex parte*, 7 Ves. 348; 6 R. R. 138.

By Jew.]—Jew may devise the guardianship of his children under 12 Car. 2, c. 24. *Bedford Charity, In re*, 2 Swanst. 538.

Revocation.]—Where, by will, the testator appointed his widow and two others guardians of his children, and by a codicil, "left their care, charge, and education" to his widow:—Held, that the appointment was not revoked by the codicil. *Hare* v. *Hare*, 5 Beav. 629; 12 L. J., Ch. 344; 7 Jur. 336.

Testamentary appointment of a guardian is not revoked by subsequent testamentary appointment, not executed according to statute, and not directly importing a revocation. *Ilchester (Earl), Ex parte*, supra.

A testator gave the guardianship of his children to his wife and his four trustees, and suitable sums were to be applied out of the estate for their maintenance. He, by a codicil, revoked the appointment of three of his "trustees and executors," and appointed two other persons to act as such "trustees and executors":—Held, that this revocation did not extend to the guardianship. *Park, In re*, 14 Sim. 89; 13 L. J., Ch. 369; 8 Jur. 372.

Nomination by Surviving Guardian.]—A testator, by will, appointed certain persons to be guardians of his daughter, and in case of the death of either of such persons he authorised the survivor to nominate another person as guardian:—Held, that the 12 Car. 2, c. 24, s. 8, sanctions his giving authority to a surviving guardian to nominate a person in the place of one who has died. *Parnell, In goods of*, 41 L. J., P. 35; L. R. 2 P. 379; 26 L. T. 744; 20 W. R. 494.

c. Who may appoint.

i. *In General.*

Right of Father.]—A father has no absolute right to have a guardian appointed of his infant child, but the court has a discretion whether it will make such an appointment. *Lyons, In re*, 22 L. T. 770; 18 W. R. 238.

Grandfather.]—Grandfather cannot appoint guardians of his grandson, but may give his estate to him on that condition, and the father submitting is bound by it. *Blake* v. *Leigh*, Amb. 306.

Infant Tenant in Socage.]—If no testamentary guardian or mother, infant, having socage land, may choose guardian at twelve, if female; fourteen, if male; done on circuit if no reasonable objection. *Anon.*, 2 Ves. sen. 375.

Lunatic of Age.]—Father or uncle devises the custody of a lunatic son or nephew who is above twenty-one; this void. *Ludlow, Ex parte*, 2 P. Wms. 638.

Mother.]—A mother cannot appoint a testamentary guardian. *Villareal* v. *Mellish*, 2 Swanst. 536. S. P., *Hunt, In re*, 3 Con. & L. 373.

Stranger.]—There is no decided case that guardians can be appointed for a child by a stranger during the life of the parent, but the law will take care that the child shall be

educated according to his expectations. *Powel* v. *Cleaver*, 2 Bro. C. C. 500.

ii. *In case of Illegitimate Children.*

In General.]—A testator cannot by will lawfully appoint anyone to be guardian of his illegitimate children. *Sleeman* v. *Wilson*, L. R. 13 Eq. 36.

Reputed Father.]—A natural child can have no guardian except by the appointment of the court; but the reputed father, having named his executor the guardian, the lord chancellor made the appointment without a reference. *Barry* v. *Barry*, 1 Moll. 210.

Persons nominated by a testator to be guardians of his natural children, appointed without a reference. *Chatteris* v. *Young*, 1 J. & W. 106; 20 R. R. 342. S. P., *Ward* v. *St. Paul*, 2 Bro. C. C. 583; *Peckham* v. *Peckham*, 2 Cox, 46.

By the Court.]—Where a person was reported by a master to be a fit guardian to a natural child, such guardian was not allowed, but the child was placed with the father. *Ord* v. *Blackett*, 9 Mod. 116.

—— **Mother Living.**]—The mother of natural children being alive, another person appointed guardian, with directions for intercourse between the infants and their mother. *Courtois* v. *Vincent*, Jacob, 628.

Mother.]—The mother of an illegitimate child has no power to appoint a guardian for it under 12 Car. 2, c. 24, s. 8. *Glover*, *Ex parte*, 4 D. P. C. 291; 1 H. & W. 508.

d. Who may be Appointed.

i. *In General.*

Father.]—A female infant was entitled to property producing 90*l.* a year, and on petition the court, being satisfied as to the condition in life and circumstances of the father, and he and two sufficient persons undertaking to account, made an order appointing the father guardian of her estate without a reference. *Bond*, *Ex parte*, 16 L. J., Ch. 147; 11 Jur. 114.

Father-in-law.]—A. and B., infants, intermarry; A.'s father is living; but B.'s mother, her testamentary guardian, is dead. The court will appoint A.'s father to be B.'s guardian, without a reference. *Quarrill* v. *Binmore*, 8 Jur. 1113.

Father's Executor.]—The court of exchequer refused to appoint certain persons to be gudarians without reference, although one of the persons was the executor of the father. *Whitelock* v. *Finch*, 3 Y. & C. 724.

Uncle—Executor.]—An uncle who was entitled to executorship to testator, and to inheritance after son, not admitted as guardian to testator's son. *Selby* v. *Selby*, 2 Eq. Ca. Abr. 488.

Uncle and aunt appointed guardians of the person of an infant on petition without suit or reference, no allowance being asked. *Neale*, *In re*, 15 Beav. 250.

Mother.]—The court will not appoint a mother to be the guardian without having some information as to the family of the father. *Cook*, *In re*, 20 L. J., Ch. 392; 15 Jur. 836.

A mother and her co-executor appointed guardians of her own children and those by a previous wife. *Anderton* v. *Yates*, 5 De G. & Sm. 202.

Where the father of an infant devises the guardianship to the mother, the court has no power to control this will, unless upon proof made of misbehaviour. *Dillon* v. *Mount-Cashell* (*Lady*), 4 Bro. P. C. 306.

Order made without a reference, appointing the mother guardian of her infant son, and for the payment to her for his maintenance of the interest on 1,000*l.*, to which he was entitled. *Allsop*, *In re*, C. P. Cooper, 44; 7 L. J., Ch. 194.

Married Woman.]—A married woman appointed guardian of an illegitimate child, and payment ordered to her upon her separate receipt. *Wallis* v. *Campbell*, 13 Ves. 517.

The appointment of a married woman, sole guardian of infants, is open to objection. *Kaye*, *In re*, L. R. 1 Ch. 387; 12 Jur. (N. S.) 350; 14 L. T., 388; 14 W. R. 597.

The court will not ordinarily interfere with the discretion of the judge; but where a married woman had been appointed sole guardian, and the appointment was in other respects open to objection, the court appointed two other persons guardians in her place. *Ib.*

Solicitor—Testamentary Guardians Refusing Trust.]—Two out of three testamentary guardians declined to accept the trust. They are not entitled, after the death of their co-guardian, to be appointed guardians by the court. But testamentary guardians will be preferred to the person nominated in the will of the mother (the third guardian). The solicitor for any of the persons who exercise a control over the minor's estate will not be appointed the guardian of their persons. *Johnstons*, *In re*, 3 Jo. & Lat. 222.

Dissenter—Second Marriage of Mother.]—Exceptions allowed to the answer on a bill, in stating that the husband of the guardian was not a fit person to have the management of the minors, "being a man of small fortune, increasing family, and also a sectary." *Corbett* v. *Tottenham*, 1 Ball & B. 59.

A mother having children by a second marriage, is not thereby rendered incompetent to be guardian to the children of her first marriage. A person is not incapacitated to act as guardian by being a dissenter. *Id.* 61.

Creditor.]—A., indebted to B. by deed, grants the guardianship of his child to B., and covenants not to revoke it, and dies; equity will not set aside the deed unless the debt be paid or the trust abused. *Lecone* v. *Sheires*, 1 Vern. 442.

Settlor.]—A settlement being made on an infant (whose father was dead), on condition of her being under the care of the settlor, it was referred to the master to consider whether he should be appointed guardian, taking the settlement into consideration. *Fagnani* v. *Selwyn*, Jacob, 268, n.

Master of the Court.]—The practice of appointing one of the masters of the court guardian of the fortune of infants, although proper in the

absence of all suitable persons, is mischievous as a general course. In substance it is appointing the receiver guardian. *Sullivans, In re*, 1 Moll. 225.

Clerk.]—The court may assign one of the six clerks to be guardian to an infant. *Offley* v. *Jenney*, Nels. Ch. Rep. 44. *Anon.*, 2 Ch. Ca. 163.

Person Out of Jurisdiction.]—Persons residing out of the jurisdiction not to be appointed guardians by the court. *Logan* v. *Fairlie*, 1 Jacob, 193; 3 L. J. (o.s.) Ch. 152; 23 R. R. 28.

Guardians were appointed in Ireland to infants brought up, educated, and domiciled there. Their fortunes were in court in England. The court adopted the proceedings in Ireland, appointed the same persons guardians, notwithstanding they resided out of the jurisdiction. *Daniel* v. *Newton*, 8 Beav. 485.

A father domiciled in and having only property in Scotland, having by will appointed tutors of his daughter, who was afterwards brought into England, and while so residing a bill was filed, making the infant a ward of court:—Held, first, That Scotch testamentary tutors were not testamentary guardians in England; secondly, that the lord chancellor had power to appoint guardians, although her property was in Scotland; thirdly, that being a ward, the court was bound to appoint guardians, and that the Scotch tutors, although they had the management of the property, had none over the person nor were they entitled to be appointed in England; and lastly, that persons out of the jurisdiction, if otherwise qualified, might be appointed guardians, jointly with any other residing permanently within it. *Johnstone* v. *Beattie*, 10 Cl. & F. 42; 7 Jur. 1023. Affirming 1 Ph. 17; 10 L. J., Ch. 300.

Order of Foreign Court.]—The order of a foreign court appointing a guardian of an infant the child of a British subject will be recognised in this court with the respect due by the comity of nations, but it does not constitute the appointee a guardian in this country. *Dawson, In re*, 2 Sm. & G. 199; 1 Jur. (N.S.) 36; 2 W. R. 311. *And see* supra, cols. 1488, 1489.

Roman Catholic Ecclesiastics.] — Roman Catholic Ecclesiastics are not incapacitated to be testamentary guardians, and may, where the present custody of such wards is illegal, claim a writ of habeas corpus. *Byrnes, In re*, Ir. R. 7 C. L. 199; 21 W. R. 622.

In Case of Illegitimate Children.]—*See cases*, ante, col. 1493.

2. REMOVAL, DISCHARGE, AND DEATH.

Guardianship of Infants Act, 1886.]—The court has jurisdiction to interfere with and to remove a guardian of a child who has no property, on proof of misconduct of the guardian towards the child, or on proof that it is for the welfare of the child that the guardian should be removed. *McGrath, In re* (*Infants*), 62 L. J., Ch. 208; [1893] 1 Ch. 143; 2 R. 137; 67 L. T. 636; 41 W. R. 97—C. A.

But the duty of the court towards a penniless child under the care of a legal guardian who is able and willing to maintain the child is to leave the child alone. The welfare of the child—religious, moral, and social, as well as physical and pecuniary—is the paramount consideration for the court. *Ib.*

At Common Law.]—Guardians at common law may be removed or compelled to give security, if there appears any danger of their abusing the person or estate of their ward; and of this there are many instances. *Hanbury* v. *Walker*, 3 Ch. Rep. 58. *Foster* v. *Denny*, 2 Ch. Ca. 237. *And see* Styles, 456; Hardr. 96; 1 Sid. 424; 3 Salk. 177.

Testamentary Guardian.]—Court cannot remove a testamentary guardian, but will appoint proper person to superintend education, &c., of infant. *Ingham* v. *Bickerdike*, 6 Madd. 275.

On Application of Infant.]—On application of infant, and by consent of his relations and guardians, other persons appointed to have the care of him till further order. *Spencer* v. *Chesterfield*, Amb. 146.

Controlling Conduct.]—Orders may be made to regulate conduct of guardian, without his being thereby discharged. *Roach* v. *Garvan*, 1 Ves. sen. 160.

Practice — Petition.] — Proper application to change guardian is by petition. *Ilchester* (*Earl*), *Ex parte*, 7 Ves. 348; 6 R. R. 138.

It is not the rule of the court to remove a testamentary guardian for misconduct, on petition. There must be a bill filed; but if the guardian consents, when there is no charge against him, it may be done on petition. *Swift, In re*, 2 Moll. 330.

For Misbehaviour.]—When the father of an infant devises the guardianship to the mother, the court has no power to control this will, unless upon complaint, and proof made of misbehaviour in the mother. *Dillon* v. *Mount-Cashell* (*Lady*), 4 Bro. P. C. 306.

Guardians appointed by will, according to the statute of 12 Car. 2, c. 24, have no more power than guardians in socage, and are but trustees; on whose misbehaviour, or giving occasion of suspicion, the court will interpose. *Beaufort* v. *Berty*, 1 P. Wms. 703.

This court will interpose if guardians give occasion to suspect their behaviour. *Ib.*

Change of Religion.]—A mother, a testamentary guardian, who brings up her child in a religion different from that in which her husband died, will be removed. *Hunt, In re*, 2 Con. & L. 373.

Residence Abroad.]—Testator's guardian residing abroad not removed on that ground. *Lewis, In re*, 2 Moll. 485.

Discharge of.]—The court has jurisdiction to discharge a testamentary guardian of infant ward of court, on his own application. *Gray* (*an Infant*), *In re*, 27 L. R., Ir. 609.

Death.]—One of three persons who had been jointly appointed guardians of an infant, having

died, the vice-chancellor, without a reference, appointed the two survivors guardians of the infant. *Hall* v. *Jones*, 2 Sim. 41.

—— **Survivorship.**]—A guardianship devised to three, without saying "and to the survivors or survivor of them," yet the survivor shall have it. *Eyre* v. *Shaftesbury* (*Countess*), 2 P. Wms. 102.

If two persons are appointed by the court guardians until further order, the guardianship is at an end on the death of one, and there must be a new application. *Bradshaw* v. *Bradshaw*, 1 Russ. 528; 25 R. R. 127.

3. Marriage of Guardian or Ward.

Female Guardian.]—Where a female guardian appointed by the court marries, although she be the mother of the infant, it is of course to make a new reference, but the same person may again propose herself. *Gornall*, *Ex parte*, 1 Beav. 347; 8 L. J., Ch. 283; 3 Jur. 500.

Where a female appointed guardian marries, it is of course to appoint a new one. *Anon.*, 8 Sim. 346.

Guardian will not be appointed after a marriage, nor discharged because of a marriage; but without discharging guardian, orders regulating their conduct may be made. *Roach* v. *Garvan*, 1 Ves. sen. 160.

Jewess Marrying Christian.]—V., the widow of a Jew, having abjured Judaism, and married a Christian, the court ordered that the children of the first marriage should be delivered to their mother, the right of the mother to be guardian continuing, notwithstanding her second marriage. *Villareal* v. *Mellish*, 2 Swanst. 533.

Effect of Marriage of Ward.]—Guardianship is not discharged by marriage of ward, or till twenty-one. *Roach* v. *Garvan*, supra. S. P., *Mendes* v. *Mendes*, 3 Atk. 625; 1 Ves. sen. 91.

Prevention of.]—This court will assist the testamentary guardian to prevent an improper marriage of the infant heir. *Raymond's* (*Lord*) *case*, Forrest. 58.

Consent to, how Controlled.]—Under what circumstances the court will control the consent of a guardian to the marriage of an infant ward, and will refuse to confirm a master's report, approving of proposals for a settlement. *Gordon* (*Lord*) v. *Irwin* (*Vicountess*), 4 Bro. P. C. 355.

To Son of Guardian.]—One of the guardians of an infant of nine years marries her to his own son who has no estate; the court ordered the guardian to produce the girl, and then committed her to the other guardian, ordering an information to be brought against the guardian who married the ward, but held this did not amount to a contempt. *Goodall* v. *Harris*, 2 P. Wms. 561.

Approval — Of Guardian Abroad.]—Application to approve of an infant's marriage under 26 Geo. 2, c. 33, s. 12, testamentary guardian being abroad. *Blake* v. *Blake*, Dick. 459.

—— **By Petition.**]—Petition that a guardian may be assigned to consent to a marriage (unless to carry on a suit to protect an interest), must be pursuant to that statute 26 Geo. 2, c. 33. *Beecher*, *Ex parte*, 1 Bro. C. C. 556.

4. Duties and Powers.

a. In General.

Office not Assignable.] — Guardianship of infant is not assignable. *Reynolds* v. *Teynham* (*Lady*), 9 Mod. 49.

Testamentary guardianship is not assignable. *Mellish* v. *De Costa*, 2 Atk. 14.

Protecting Wards.]—Observations as to the duty of guardians to watch over their wards. *Kay* v. *Johnston*, 21 Beav. 536.

Elopement of Ward.]—Guardians of a female under age are justified in stopping an elopement, and in detaining her clothes if she has eloped; and a carrier by whom she has sent them may deliver them up to the guardians. *Barker* v. *Taylor*, 1 Car. & P. 101; 28 R. R. 767.

Powers of Testamentary Guardians.]—Guardians appointed by will under 12 Car. 2, c. 24, s. 8, have the same powers as guardians in socage. *Gilbert* v. *Schwenck*, 14 M. & W. 488; 14 L. J., Ex. 317; 9 Jur. 693.

Joint testamentary guardians are like trustees, and one can maintain an action for trespass against his companion, alleging that the infant was his servant, and that the defendant forcibly took him out of his possession, per quod servitium amisit. *Ib.*

Under Merchant Shipping Act, 1854.]—The guardian of a registered infant owner of a ship has no power under the Merchant Shipping Act, 1854, s. 99, to sell or mortgage the ship on behalf of the infant. *Michael* v. *Fripp*, L. R. 7 Eq. 95; 19 L. T. 257; 17 W. R. 23.

Infant taken out of Jurisdiction.]—An infant allowed to be taken out of the jurisdiction for his benefit, upon the guardian entering into a recognizance. *Medley*, *In re*, Ir. R. 6 Eq. 339.

Form of recognizance in such case. *Ib.*

Attainter.]—Guardians are recommended by will to act with the advice of J. S., and J. S. is attainted, this superintendency devolves upon the Great Seal. *Beaufort* v. *Berty*, 1 P. Wms. 703.

Recognizance by Guardian.]— Recognizance by a guardian in the matter of a minor, is not a debt due to the crown. *Usher*, *Ex parte*, 1 Ball & B. 199.

Arbitration.]—A submission to arbitration by a guardian, on behalf of his ward, binds the guardian only. *Harley*, *In re*, 1 Hay. & J. 160.

Practice — Answer.] — Guardian of infant defendant being co-defendant need only sign joint answer once. *Anon.*, 2 J. & W. 553.

Nothing in answer of guardian can be read against the ward. *Leigh* v. *Ward*, 2 Vent. 72.

—— **Evidence.**]—Where a guardian has been guilty of ill practice in the prosecution of a suit,

though it was not the act of the infant herself, yet that malpractice may be given in evidence. *Baker* v. *Hart*, 3 Atk. 544 ; 1 Ves. sen. 28.

—— **Administration.**]—When suit is instituted for administration of infant's estate, court has jurisdiction over the infant ; and, on petition of guardians, may order him to be delivered up to them. *Wright* v. *Naylor*, 5 Madd. 77.

Appointment by Deed—Setting aside Deed.]—A. indebted to B. by deed, grants the guardianship of his child to B., and covenants not to revoke it, and dies ; equity will not set aside the deed, unless the debt be paid, or the trust abused. *Lecone* v. *Sheires*, 1 Vern. 442. And see *Morgan* v. *Hatchell*, supra, col. 1489.

Abducting Ward.]—A testator, by his will expressly excluded his wife from the guardianship of his children, and he appointed his executors to be their guardians. After the testator's death, his widow forcibly removed one of the daughters from a school, and took the child abroad. She then filed a bill as next friend, against the executors, for an account of the testator's estate. The court directed the account to be taken, but referred it to the master to inquire into the alleged misconduct of the mother, and ordered all proceedings under the decree to be stayed until the report was made. *Arnott* v. *Bleasdale*, 4 Sim. 387.

b. Dealing with Property.

In General—Testamentary Guardian.]—When there is a testamentary guardian, the law (14 & 15 Car. 2, c. 192) authorises him to manage the estate of the infant, and the court will not interfere with, or remove him, unless it be absolutely necessary so to do. *Goode, In re*, 1 Ir. Ch. R. 256.

—— **Receiver.**]—The appointment of a testamentary guardian does not, under the statute 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the estate of the infant. *Gardner* v. *Blane*, 1 Hare, 381.

—— **Is a Trustee.**]—A testamentary guardian is a trustee of such property as comes to his hands in that character. *Sleeman* v. *Wilson*, L. R. 13 Eq. 36.

Changing Estate of Infant.]—Guardians may change the nature of an infant's estate where it is manifestly for the infant's interest. *Inwood* v. *Twyne*, Amb. 419.

Taking Possession of Infant's Estate.]—A person entering upon the estate of an infant will be fixed with a fiduciary position as to the infant—first, whenever he is the natural guardian of the infant ; secondly, when he is so connected with the infant as to impose upon him a duty to protect, or at least not to prejudice the infant's rights ; or, thirdly, where he takes possession with knowledge or express notice of the infant's rights. *Quinton* v. *Frith*, Ir. R. 2 Eq. 396.

A person accepting a conveyance of an infant's lands, with express notice of the infant's rights, will be deemed to be the bailiff of the infant during his infancy. *Ib.*

Unauthorised Acts.]—Act of guardian without authority, if beneficial to the infant, protected. *Milner* v. *Harewood (Lord)*, 18 Ves. 273.

Purchase of Land.]—Lands purchased by guardian for infant during minority considered as personalty. *Gibson* v. *Scudamore*, Dick. 45.

Cutting Timber.]—Where guardian of an infant, tenant in tail, cuts down timber, the money for it shall be personal estate of the infant ; but, if the infant has the fee, it shall be considered as real estate. *Tullit* v. *Tullit*, Amb. 370 ; Dick. 322.

Guardian for an infant, who had a contingent estate, cannot cut timber of his own authority, though it may be a probable benefit. Such an act is not waste. *Knight* v. *Duplessis*, 2 Ves. sen. 360.

Changing Cultivation.]—It is waste by guardian turning ancient pasture into arable, however beneficial. *Clark* v. *Thorp*, 2 Ves. sen. 232.

Lease for Lives—Renewal.]—Guardian of an infant entitled to a lease for three lives, upon the decease of one of the three lives took a new lease for three new lives. The infant died. The lease shall go to the heirs of the infant ex parte paterna, for the new lease is to be considered as a new acquisition, and to vest in the infant as a purchaser. *Pierson* v. *Shore*, 1 Atk. 480.

A feme purchases a church lease to her and her heirs for three lives, and dies leaving an infant daughter. Two of the lives die. The infant's guardian renews the lease. This is a new acquisition, and shall go to the heirs on the part of the father. *Mason* v. *Day*, Pre. Ch. 319 ; Gilb. Eq. Rep. 77.

Receipt by Guardian—Payment out of Court of Ward's Funds.]—A testamentary guardian is not entitled as such to obtain payment out of court of funds, the property of his infant ward, which have been paid into court under the Legacy Duty Act :—Semble, that in ordinary cases, a testamentary guardian is entitled to give a receipt for funds coming to his ward. *Creswell, In re*, 45 L. T. 468 ; 30 W. R. 244.

Payment of Legacy to Guardian.]—Payment to the father as guardian of a legacy given to a child, ill ; though the testator by parol directed it. *Dagley* v. *Tolferry*, 1 P. Wms. 285. *S. C.*, sub nom. *Dawley* v. *Belfry*, 1 Eq. Ca. Ab. 300. See 1 Ves. J. 249 n.

Where an infant is entitled to a vested legacy, payment thereof during his minority by the executor to the testamentary guardian is valid, although the period directed by the testator for payment is the attainment of twenty-one years or marriage. *M'Creight* v. *M'Creight*, 13 Ir. Eq. R. 314.

—— **Foreign Law.**]—A fund devolving upon an infant according to the law of Prussia was paid to the father as guardian, upon evidence that by the law of Prussia he was entitled to receive the fund. *Brown, In re*, 12 L. T. 488.

Payment to Agent of Guardian.]—A., as agent for W., the guardian of J. (an infant), lent a sum of money, the property of the infant, to trustees, upon these terms :—"One day, after date, we . . . . promise to pay to W., as curator for J.,

the sum of 2,000*l.*, value received in money borrowed of him." A. held the note, and as factor received the interest from time to time; and ultimately received back the 2,000*l.*, and delivered up the note to the trustees. A. died insolvent:—Held, against the trustees, that their payment to A. was not a good discharge of their liability to W. and the infant. *Clyde River Trustees* v. *Duncan*, 17 Jur. 701.

Distinction between this case and *Whitlock* v. *Waltham* (1 Salk. 157). *Ib.*

—— **Redemption of Land Tax.**]—The testamentary guardian of an infant sold part of his estates for the redemption of the land tax. The vendee paid the purchase money to the agent of the vendor, who was also agent for the vendee, and the conveyance was executed, but the agent did not pay the money into the bank as required by the Act 38 Geo. 3, c. 60. The purchaser entered and continued in possession for many years. Nearly twenty years after attaining his age, the heir-at-law brought an ejectment against the purchaser. On a bill filed by the purchaser for confirmation of title the court dismissed the bill without costs. *Hicks* v. *Morant*, 3 Y. & J. 286. Affirmed, 2 Dow & Cl. 414; 5 Bligh (N.S.) 643.

Portion—Right of Action.]—Testator directed his trustees to sell and convert, and out of proceeds when invested to pay a portion to the plaintiff at twenty-one or marriage. H., her guardian, received more than the principal of the portion, and, after action brought against him for the principal, allowed the residuary legatee, X., to take possession. The plaintiff filed a bill, making X. a party:—Held, that the payment to her guardian H. did not bind the plaintiff. *O'Neill* v. *Hamill*, Beat. 618.

Payment off of Mortgage.]—A guardian, during the infant's minority, may, without the direction of the court, pay off a mortgage. and the interest of any other real incumbrance. *Palmes* v. *Danby*, Pre. Ch. 137.

What incumbrances on infant's estate guardian may pay off without direction of court. *S. C.*, 1 Eq. Ca. Abr. 261.

Mother, as guardian of an infant, out of his personal estate pays off a mortgage upon his land, and the infant dies, and the lands descend to a remote heir. The mother shall not have back the money. *Audley* v. *Audley*, 2 Vern. 193.

—— **Money Borrowed.**]—A guardian borrows money of A. to pay off an incumbrance on the infant's estate, and promises to give A. a security for his money, but dies defore it was done. The court would not decree him a satisfaction of his debt out of the infant's estate. *Hooper* v. *Eyles*, 2 Vern. 480.

Debt of Ancestor.]—Guardian not compellable to apply the profits of the lands descended on the infant heir, to pay off the bond debt of the ancestor. *Waters* v. *Ebrall*, 2 Vern. 606.

Arrears of Rent.]—If a guardian takes a bond for the arrears of rent, he makes it his own debt. *Wale* v. *Buckle*, 2 Ch. Rep. 97.

Lease.]—Lease made by guardian of infant and executed by infant, ordered to be fully recognised by infant after his coming of age, or infant to refund consideration. *Evroy* v. *Nicholas*, 2 Eq. Ca. Abr. 488.

A testamentary guardian may grant a lease of the infant's lands, during the term of his minority. *Shaw* v. *Shaw*, Vern. & S. 607.

The guardian authorised by the court, under 1 Will. 4, c. 65, s. 17, to grant leases of the infant's estate for terms of years exceeding the minority, when beneficial to the infant, and approved by the court. *Anstey* v. *Hobson*, 1 Sm. & G. 505.

Order of the court in Ireland that the guardian of an infant tenant for life should execute a lease in conformity with a covenant for renewal:—Held, semble, not to be authorised by this statute. *Sadleir* v. *Biggs*, 4 H. L. Cas. 435.

Curator and Factor.]—A curator bonis and factor loco tutoris of Scotch infants is not bound to pay into the court assets belonging to the infants receivable under an English will of which the curator is administrator, and which is in course of administration by the court. *Mackie* v. *Darling*, L. R. 12 Eq. 319; 19 W. R. 796.

Property out of Jurisdiction.]—As to the authority of guardians to recover property of the infant out of the jurisdiction. *Scott* v. *Bentley*, 1 K. & J. 281; 24 L. J., Ch. 244; 1 Jur. (N.S.) 394; 3 Eq. R. 428; 3 W. R. 280.

Ship—Sale or Mortgage.]—The guardian of a registered infant owner of a ship has no power under the Merchant Shipping Act 1854, s. 99, to sell or mortgage the ship on behalf of the infant. *Michael* v. *Fripp*, L. R. 7 Eq. 95; 19 L. T. 257; 17 W. R. 23.

Tenant for Life—Draining.] — Under the Draining Act, 3 & 4 Vict. c. 55, where the tenant for life is an infant, the petition must be presented in the name of his guardian. Amount of the expenses of draining ordered to be paid out of a fund to which the infant tenant for life was absolutely entitled, in lieu of charging the lands. *Stanhope* v. *Stanhope*, 3 Beav. 547.

Sale of Infant's Inheritance.] — Publication passed in a supplemental suit by consent, although an infant party, and the object the more speedy sale of the minor's inheritance, and the cause set down out of the regular course on petition and consent without a reference whether for his benefit. Lord Chancellor holding the discretion of the guardian consenting a sufficient protection. *Sheppard* v. *Green*, 1 Moll. 275.

c. Accounts.

By Third Party.] — Infant, even during minority, may, by prochein ami, call guardian to account. *Falkland* v. *Bertie*, 2 Vern. 342; 12 Mod. 182; 2 Freem. 220; 3 Ch. Ca. 122; Select Ca. Ch. 129. S. P., *Eyre* v. *Shaftesbury* (*Countess*), 2 P. Wms. 119.

Statute of Limitations.] — A testamentary guardian is a trustee, and therefore the Statute of Limitations is inapplicable to accounts as between him and his ward. *Mathew* v. *Brise*, 14 Beav. 343.

By Receiver.]—A receiver to the guardian of an infant, who has his account allowed him by the guardian, shall not be obliged to account

over again to the infant when he comes of age. *Clavering's case*, Pre. Ch. 535.

Guardians and receivers obliged to account on application, being bound to account, when called on, and are considered as officers of the court. *Burke, In re*, 1 Ball & B. 74.

When ordered.]—The guardian of the person is not bound to account specifically for an allowance for maintenance. But in a case of gross abuse, the court will make an order to account. *Oldfield, In re*, 2 Moll. 294.

—— **Account Settled.**]—An account settled between a guardian and an infant soon after he comes of age shall not be conclusive. Under what circumstances an account settled shall be binding upon the ward. *Wych* v. *Packington*, 3 Bro. P. C. 46.

From what Time.]—Where guardian, after his ward attains full age, continues to manage property at the request of the ward, and before the accounts of the minority are settled, it is a continuance of the guardianship, and he must account as though the transactions were during the minority. *Mellish* v. *Mellish*, 1 Sim. & S. 138; 1 L. J. (O.S.) Ch. 32, 120.

—— **Continued Possession.**]—If a father who has entered upon the estates of his infant children retain possession after the children attain twenty-one, such possession will be considered to be as their guardian and bailiff, so that an account will be directed, if necessary, from the time of entry. *Thomas* v. *Thomas*, 2 Kay & J. 79; 25 L. J., Ch. 159; 1 Jur. (N.S.) 1106; 4 W. R. 135. And see *Nanney* v. *Williams*, 22 Beav. 452.

Where any person, whether a parent or a stranger, enters upon an infant's estate, and continues in possession, equity considers him as guardian, and will decree an account to be carried on after the infancy, unless the infant, being of age, has waived such account. *Morgan* v. *Morgan*, 1 Atk. 489. And see *Newburgh* v. *Bickerstaffe*, 1 Vern. 295.

Cost of Education.]—Where a guardian by will remits to his ward whatever is due to him for his maintenance, it will include all demands for his education. *Anstis* v. *Gandy*, 4 Bro. P. C. 313.

Of Profits].—Defendants, executors to their father, who was guardian in socage to the plaintiff, were ordered to answer for profits taken by him. *Burgh* v. *Wentworth*, Cary, 54.

Duress.]—If A. buy from B., a minor, under circumstances of distress, the reversion of a house worth 40*l.* a year for 100*l.*, and sell it again in a few days for 200*l.*, equity will compel him to account to B. for the difference. *Spencer* v. *Chase*, 9 Mod. 29.

Interest.]—Interest decreed upon balance kept by guardian in his banker's hand. *Dawson* v. *Massey*, 1 Ball & B. 219.

Rent—Improvements.]—B. demised hereditaments for 1,000 years to secure 200*l.* and interest. Upon his death, leaving two infant co-heiresses, J., one of the executors and trustees of his will, which was invalid as to the real estate, entered into possession, received the rents and profits, kept down the interest on the mortgage, and expended 780*l.* in the erection of buildings. H., one of the co-heiresses, being still an infant, intermarried with P., and S., the other co-heiress, died, leaving H. her heiress-at-law:—Held, that there must be accounts from the death of B. of the rents received by J., as guardian during the infancy of the co-heiresses, and the infancy and coverture of the survivor, with an allowance for all permanent improvements made by him for the benefit of the infants. *Pelley* v. *Bascombe*, 9 Jur. (N.S.) 1120; 9 L. T. 317; 2 N. R. 263; 11 W. R. 766.

A ward upon attaining his majority was induced by his guardian to create a mortgage for the purpose of paying off a debt of 5,000*l.* incurred by the guardian in improving the estate during a minority, in addition to an expenditure of the income of the property for the same purpose:—Held, that the ward was not entitled to have this mortgage set aside as against his guardian, without giving credit to his guardian for, and deducting the outlay upon, those improvements which have produced a permanent return in the shape of increased rental. *Dacre* v. *Strachan*, 4 W. R. 401.

Advances obtained by Ward after Majority.]—P., being guardian to appellant's wife during minority, placed her with C. for her education, and ordered respondent to pay C. what sums should be calculated for. Several sums were paid and allowed. Appellant's wife, when of age, as by order of P., desired more money, and two sums were paid her:—Held, that there appearing no positive orders from P. for payment of these two sums, appellant ought to pay the principal, interest, and costs. *Dolphin* v. *Haynes*, Shower, P. C. 17.

How taken between Guardians.]—H. and C. were trustees and executors of a will and guardians of the testator's daughters. The daughters were maintained by C., and H. allowed him to receive the income for that purpose. In an action to administer the testator's estate:—Held, that H. as trustee, was not discharged by mere evidence of payment of the income to C., his co-guardian, but that under the inquiry H. was not bound to vouch the items of expenditure; and if it was shown that C. had properly maintained and educated the children, the sum proper for that purpose would be allowed against the balance found due on the account, without vouching the details of the application. *Evans, In re, Welch* v. *Channell*, 53 L. J., Ch. 709; 26 Ch. D. 58; 51 L. T. 175; 32 W. R. 736.

I. CUSTODY AND EDUCATION.

1. Religious Education.

a. Ante-Nuptial Contracts Respecting.

In General.]—A contract entered into before marriage, that the children shall be brought up in a particular religion, is not binding on the husband, and cannot be enforced in a court of equity, semble. *Browne, In re*, 2 Ir. Ch. R. 151.

Mixed Marriage—Abandonment of Father's Right.]—An ante-nuptial agreement that the children shall be brought up in a different religion from that of the father is not binding at law or in equity; but such an agreement will have weight with the court in considering

whether the father has abandoned his right to educate his children in his own religion. *Andrews* v. *Salt*, L. R. 8 Ch. 622; 28 L. T. 686; 21 W. R. 431, 616.

When a father has not forfeited his right to educate his children in his own religion, the court cannot refuse to order a child to be educated in that religion merely because it thinks that the child will be more happy and contented if left with those who have had the care of it. *Ib.*

But if a father has forfeited or abandoned this right, the court will consider only the happiness and benefit of the child, and will order it to remain in the care of those by whom it has been brought up, and to be educated in their religion; although the child may not have so far imbibed the particular doctrines of that religion as to render it dangerous to change its religious training. *Ib.*

A Roman Catholic father, who married a Protestant, allowed his two daughters to be brought up as Protestants until they attained the ages of fifteen and eleven respectively. After the death of the mother the father gave way to intemperate habits and neglected his children, and by an order of the court, made after notice to the father, but in his absence, they were placed for four years in the custody of a Protestant. During the pendency of this order the father, having become a reformed character and a devout Roman Catholic, applied to have his children brought up in his own religion:—Held, that it was too late to change the religion of the elder girl against her will; that it was undesirable to separate the children; and that the conduct of the father was such as to justify the court in disregarding his wishes. *Newton, In re*, 65 L. J., Ch. 641; [1896] 1 Ch. 740; 73 L. T. 692; 44 W. R. 470—C. A.

An Englishman, a Protestant, married in Germany a German, a Roman Catholic. Previously to the marriage a written agreement was signed by both, which provided that the children of the marriage should be educated in the Roman Catholic faith. The two children were, with the father's knowledge, baptised as Roman Catholics. The father allowed the mother to bring up the two children as Roman Catholics:—Held, that the father by his conduct had abandoned his right to have the child brought up in his own faith, and had indicated a wish that he should be brought up as a Roman Catholic. *Clarke, In re*, 51 L. J., Ch. 762; 21 Ch. D. 817; 47 L. T. 84; 31 W. R. 37.

Held, also, that it would be most for the benefit of the infant that he should be educated in the Roman Catholic faith. *Ib. Hawksworth* v. *Hawksworth* (infra, col. 1509), *Andrews* v. *Salt* (supra), and *Hill* v. *Hill* (infra, col. 1509), considered. *Ib.*

—— **Promise by Father Retracted.**]—The father of the infant plaintiffs was a Protestant, and the mother a Roman Catholic. The mother married the father, relying on his express promise that all the children should be brought up as Roman Catholics. This promise was retracted soon after the marriage, and the father insisted that the children should be brought up as Protestants, and himself instructed them in the Protestant faith. The mother, secretly and unknown to the father, brought up the children as Roman Catholics:—Held, that as it was a question affecting the wards, the court had jurisdiction to grant an injunction to restrain the mother from interfering with the religious education of the children. *Stourton* v. *Stourton* (infra, col. 1508) considered. *Agar-Ellis, In re, Agar-Ellis* v. *Lascelles*, 48 L. J., Ch. 1; 10 Ch. D. 49; 39 L. T. 380; 27 W. R. 117—C. A.

W., a Roman Catholic, before his marriage with a Protestant, wrote to the priest promising to have the children brought up as Roman Catholics. He also wrote to the mother of his intended wife stating that as to guardianship, on no consideration would he "permit anyone to step between [his intended wife] and her children," but "would by will leave her sole and undivided authority." A child was born, which was, with W.'s sanction, baptised as a Roman Catholic:—Held, that the facts afforded a sufficient indication of W.'s intention that his children should be committed to the guardianship of their mother, and an order to that effect was made. *Walsh, In re*, 13 L. R. Ir. 269.

The daughter of a Protestant father and a Roman Catholic mother was, with the concurrence of the father, baptised in the Roman Catholic faith, the parents having signed an ante-nuptial declaration that the children should be brought up as Roman Catholics. The father on his death-bed commended his wife and child to the care of M., a Protestant. The mother died intestate. The child remained in the custody of M. for four years after the death of the father; she was then forcibly abducted and sent to some Roman Catholic relatives, where she remained for some months:—Held, that it was the duty of the court to consider the welfare of the child without regard to the ante-nuptial declaration, and the court gave the custody of the child to M., and directed that she should be brought up as a Protestant. *Nevin, In re*, 60 L. J., Ch. 542; [1891] 2 Ch. 299; 65 L. T. 35—C. A.

b. Control of, by Court.

In General.]—The general rule is, that an infant is to be brought up in the religion of the father. *Newbery, In re*, 35 L. J., Ch. 330; L. R. 1 Ch. 263; 12 Jur. (N.S.) 154; 13 L. T. 781; 14 W. R. 360.

A father has a right to direct and regulate the religious faith in which his child shall be brought up, and the court will not interfere with the right unless there is an abuse of parental authority. *Browne, In re*, 2 Ir. Ch. R. 156.

To insist on bringing up the child in his own religion, notwithstanding a verbal agreement to the contrary, entered into before marriage with his wife, is not an abuse of parental authority which will induce the court to interfere. *Ib.*

Custody given to Third Persons.]—A Protestant father died leaving a widow and infant children. The infants being in the custody of their mother, who had, since her husband's death, become a Roman Catholic, were removed without their mother's consent; and on a writ of habeas corpus being issued for the production of the infants, the court being informed that a petition was presented, made an order enlarging the return, and directing a reference to the master to approve of a proper guardian; but refused to order the delivery of the infants to their mother, and consigned them to certain persons until further orders. *North, In re*, 11 Jur. 7.

Where the father has not left nor expressed

any direction or instruction as to the religion in which his infant children are to be educated, the court will assume that his wishes were that they should be educated in his own religion. *Ib.*

Child Born in India.]—A child born in India, whose father was a European British subject and a christian, must be presumed to have the father's religion, and his corresponding civil and social status, and it is the duty of a guardian to bring up his ward in his father's religion. *Skinner* v. *Orde*, 8 Moore, P. C. (N.S.) 261; L. R. 4 P. C. 60.

Testamentary Guardian.] — Testamentary guardians have the same right as the father to direct the religious education of a child according to the father's wishes. *Browne, In re*, 2 Ir. Ch. R. 151.

Jurisdiction of the court in controlling the powers of testamentary guardians. *Talbot* v. *Shrewsbury (Earl)*, 4 Myl. & Cr. 672; 9 L. J., Ch. 125; 4 Jur. 380.

The circumstance that it will be more for the pecuniary interest of a child to be educated in one religious faith than in another will not induce the court to interfere with his religious education. *Ib.*

And semble, the court will not interfere with the discretion of the testamentary guardian as to the faith in which he educates his ward. *Ib.*

—— **At Common Law.**]—In a court of common law, the right of a father to the custody of a child is absolute, and cannot be taken away by the fact that he may have agreed with the mother of the child, that the child shall be taught a particular religion; and this right extends to testamentary guardians appointed under 12 Car. 2, c. 24, s. 8. *Andrews, In re*, L. R. 8 Q. B. 153; 28 L. T. 353; 21 W. R. 480. *S. C.*, nom. *Edwards, In re*, 42 L. J., Q. B. 99.

—— **Right of Mother.**]—A mother, a testamentary guardian, has no right to bring up her child in a religion different from that in which her husband died; if she do so she will be removed from the office of guardian. *Hunt, In re*, 2 Con. & L. 373.

Custody of Mother.]—The court will not take a child of tender years from the custody of its mother on the ground that the mother's religion differs from that of the deceased father, and that such change of custody is requisite to the training of the child in the father's religion. *Austin, In re, Austin* v. *Austin*, 34 Beav. 257; 34 L. J., Ch. 192; 11 Jur. (N.S.) 101; 11 L. T. 616; 13 W. R. 332.

The father of an infant three years old died a Roman Catholic. His widow married again. The court committed the child, until it should attain the age of seven, to the mother; but the court declared that the child ought to be brought up and educated as a Roman Catholic; and directed that when she attained the age of seven, application should be made to the court respecting her guardianship and education and religious instruction. *Austin* v. *Austin*, 4 De G. J. & S. 716; 11 Jur. (N.S.) 536; 13 W. R. 761.

—— **On Separation.**]—Although the wife may have obtained a decree of judicial separation, the court will not give her the custody of the children if she intends to bring them up in a religion different from that of the father, and different from that in which they have been educated during the cohabitation of their parents. *D'Alton* v. *D'Alton*, 47 L. J., P. 59; 4 P. D. 87.

Religious Convictions of Infant.]—The court has jurisdiction to protect the conscientious convictions of a minor, although adverse to the religion or even to the declared wishes of a living father who has not forfeited his parental authority, but such jurisdiction is only to be exercised with extreme caution. *Grimes, In re*, Ir. R. 11 Eq. 465.

If the case for interference is rested solely on the ground of the child's religious convictions, it must be established that they have some root, and are entertained by a mind of intelligence adequate to understand their importance, and with stability capable of adhering to them; and, in order to inform itself on these points, the court may, by a personal interview, test the opinions and wishes of the child. *Ib.*

A ward of court, aged nine, who had been ordered to be brought up as a Roman Catholic, was, in disobedience to the orders of the court, removed out of the jurisdiction, and educated in the doctrines of the established church. At the age of fifteen she was brought back within the jurisdiction; and the lord chancellor having, in personal interviews, been convinced that she was herself attached to the religious opinions in which she had been brought up, ordered her future religious education to be conducted in conformity with them. *Browne, In re*, 8 Ir. Ch. R. 172.

The actual conscientious convictions of a minor, who has arrived at the age of conscious responsibility, are to be secured against pressure or coercive influence. *Ib.*

A Roman Catholic left a widow, a Roman Catholic, and a child. The widow, after her husband's death, became a member of the Church of England, and brought up the child as a member of the Church of England, until he was upwards of nine years old; and it appeared, in an interview with him, that the distinctive doctrines of that church had taken a strong hold on his mind:—Held, that it was too late for the court to give directions that he should be educated in the faith of his father. *Stourton* v. *Stourton*, 8 De G. M. & G. 760; 26 L. J., Ch. 354; 3 Jur. (N.S.) 527; 5 W. R. 418.

Unless a child has been allowed to grow up in faith different to that of his father, and great danger to his moral and religious welfare would arise by effacing the strong religious convictions entertained by the child, the court will not interfere with the express directions contained in the father's will. *Davis* v. *Davis*, 10 W. R. 245.

When a father has acted in such a manner as to abdicate during his lifetime the duty of controlling the religious education of his child, and has intrusted it to his wife and a relation of a different religion, who have grounded that child in the tenets of their own religion, the religion of the father shall not determine that of the child. *Garnett, In re*, 20 W. R. 222.

A father by will directed his son to be brought up in the Roman Catholic faith. The infant having been brought up chiefly with his Protestant relations, and educated in their faith till the age of fifteen, the court, considering the bad effect upon the faith and moral character of the infant, which a change of religion at that time might work, decided to see the infant, and ascertain the state

of his mind, before making any order. *Witty* v. *Marshall*, 1 Y. & C. C. C. 68 ; 5 Jur. 1079.

Abandonment of Father's Right.]—Where a Roman Catholic father allowed the mother, a Protestant, to have the exclusive charge of the education of the children, and they were with his full knowledge brought up in the Protestant faith :—Held, to have abdicated his right to direct the religious education of his children ; and the court disregarded a direction in his will that they should be brought up in the Roman Catholic faith. *Hill* v. *Hill*, 31 L. J., Ch. 505 ; 8 Jur. (N.S.) 609 ; 6 L. T. 99 ; 10 W. R. 400. And see *Scanlan, In re*, infra, col. 1510.

When a father has not forfeited or abandoned his right to educate his children in his own religion, the court cannot refuse to order a child to be educated in that religion merely because it thinks that the child will be more happy, or better provided for, if left with those who have had the care of it. *Andrews* v. *Salt*, L. R. 8 Ch. 622 ; 28 L. T. 686 ; 21 W. R. 616.

But if a father has forfeited or abandoned his right to educate his children in his own religion, the court will consider only the happiness and benefit of the child, and will order it to remain in the care of those by whom it has been brought up, and to be educated in their religion ; although the child may not have so far imbibed the particular doctrines of that religion as to render it dangerous to change its religious training *Ib.* S. P., *Clarke, In re*, 51 L. J., Ch. 762 ; 21 Ch. D. 817 ; 47 L. T. 84 ; 31 W. R. 37.

A Roman Catholic, married to a Protestant, had all his children baptised by Roman Catholic clergymen, but he permitted the children to attend divine service as Protestants. They did not receive any religious instruction as Roman Catholics, nor attend Roman Catholic worship. The mother's wish was that the children should be brought up as Protestants :—Held, that the children were to be brought up as Protestants. *O'Malley, In re*, 8 Ir. Ch. R. 291.

—— **By Application to the Court.**]—A father, who makes his children wards of court, and then applies to the court to assist him in directing their religious education, does not necessarily thereby abdicate his parental authority. In such a case, if the father has not abandoned his right to educate his children, the court will not interfere with him in the honest exercise of his parental authority, nor will it see the children, although they may have acquired strong religious convictions different from those of the father, but will give effect to his wishes. *Agar-Ellis, In re, Agar-Ellis* v. *Lascelles*, 48 L. J., Ch. 1 ; 10 Ch. D. 49 ; 39 L. T. 380 ; 27 W. R. 117—C. A.

No Directions by Father.]—A Roman Catholic died, leaving a widow, a Protestant, and an infant daughter. He left no directions as to her religious education. The daughter was brought up by her mother as a Protestant till she was eight years and a half old. The court made an order that the child should be brought up in the Roman Catholic faith, but did not think it advisable to have an interview with the child. *Hawksworth* v. *Hawksworth*, 40 L. J., Ch. 534 ; L. R. 6 Ch. 539 ; 25 L. T. 115 ; 19 W. R. 735.

Father Irreligious.]—A father's authority over his children controlled, on the ground of his professing and acting on irreligious principles. *Shelley* v. *Westbrooke*, Jacob, 266 ; 23 R. R. 47.

Court has jurisdiction to prevent parents preaching irreligious doctrines in presence of their children. *De Manneville* v. *De Manneville*, 10 Ves. 58 ; 7 R. R. 340.

As to the jurisdiction of court over parents with respect to their children. *Id.* 10 Ves. 52.

The peculiar religious opinions of the father form no ground for removing a child from the custody of its father. *Curtis, In re*, 28 L. J., Ch. 458 ; 5 Jur. (N.S.) 1147 ; 7 W. R. 474.

Where a father deserted his wife and lived with the leader of a sect professing peculiar opinions, and the wife after her desertion gave birth to a child, who was maintained by his mother and grandmother :—Held, a proper case for restraining the father from acquiring possession of the infant. *Thomas* v. *Roberts*, 3 De G. & Sm. 758 ; 19 L. J., Ch. 506 ; 14 Jur. 639.

Mother Irreligious—Separation Deed.]—By a covenant in a separation deed, a father agreed that his daughter should remain in her mother's custody during eleven months in each year. The mother held and promulgated atheistical opinions, and refused to allow the child to receive any religious instruction. She also published and circulated an obscene book :—Held, that it was the duty of the court to bring up the child in the religion of her father ; and also that the refusal of religious instruction to the child and the publication of the obscene book were in themselves sufficient grounds for removing her from the custody of the mother. *Besant, In re*, 48 L. J., Ch. 497 ; 11 Ch. D. 508 ; 40 L. T. 469 ; 27 W. R. 741.

Interference by Father with Infant's Religion.]—The court of chancery has jurisdiction to restrain a father from interfering with the religious education of his infant child ; but that jurisdiction will not be exercised unless the court sees that the interference of the father will be injurious to the happiness and welfare of the child. *Meade, In re*, Ir. R. 5 Eq. 98 ; 19 W. R. 313.

Under Guardianship of Infants Act, 1886.]—The court has jurisdiction to appoint a guardian to act with the mother after the father's death, in order to insure the infants being brought up in the religion of the father, and the fact that the infants have no property, and that the father was an alien, does not affect the jurisdiction. *Magees, In re*, 31 L. R. Ir. 513.

The Guardianship of Infants Act, 1886, does not affect the right of the father to determine the religion in which his children shall be brought up after his death. *Scanlan, In re*, 57 L. J., Ch. 718 ; 40 Ch. D. 200 ; 59 L. T. 599 ; 36 W. R. 842.

The children of a Protestant father and Roman Catholic mother, aged ten, nine, and three years, were with the assent of the father educated as Roman Catholics for three years, and his two elder children were admitted to communion, according to the rights of that faith. At the end of that period the father, being then dependent for support upon the Protestant clergy of his parish, caused his children to be educated as Protestants, and expressed a wish that they should thenceforth be brought up in that religion :—Held, that the

father had not abandoned the right to have his children brought up in his own religion. *Ib.*

—— **Welfare of Infants.**]—The court has jurisdiction under the Guardianship of Infants Act, 1866, to remove a guardian appointed under that act, and appoint another, and give directions as to the religion in which the infant shall be brought up, although the infant is not a ward of court and has no property, and although the religious faith in which the infant shall be brought up is the only ground for interference. *McGrath (an infant), In re*, 61 L. J., Ch. 549; [1892] 2 Ch. 496; 67 L. T. 636; 41 W. R. 97—C. A.

Change of Religion by Parent.]—Where a widow without means had voluntarily placed her son (who had been baptised as a Roman Catholic) in a Protestant school, and after a time desired to remove him that he might be brought up as a Roman Catholic:—Held, that the authorities had no right to detain the boy from the custody of his mother. *Reg.* v. *Williams*, 58 L. J., Q. B. 176.

—— **Child under Ten—Desertion by Father—Rights of Mother.**]—A Protestant mother placed her son at a boys' home. The father had deserted his family. The mother, who had lately become a member of the Church of Rome, desired to have the infant restored to her, and a gentleman was prepared to provide for its maintenance, education, and advancement:—Held, that the manager of the home must give the child up to the mother. *Reg.* v. *Barnardo*, 58 L. J., Q. B. 522.

Evidence of Father's Wishes.]—A presbyterian makes his will, appointing his brothers, and also a clergyman of the Church of England, guardian to his three infant daughters, and dies, having sent his eldest daughter to his next brother; the three brothers, presbyterians, brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed and declared he would have his children bred up presbyterians. The court declared no proof out of the will ought to be admitted in the case of a devise of a guardianship any more than in the case of a devise of land. *Storke* v. *Storke*, 3 P. Wms. 51.

Mother out of Jurisdiction.]—Infants interested in real estate in England, whose father was dead, were living in charge of their mother, who was resident out of their jurisdiction, and was one of their testamentary guardians. At the instance of their other two guardians an order was made declaring in what faith they ought to be educated. *Montagu, In re, Montagu* v. *Festing*, 54 L. J., Ch. 397; 28 Ch. D. 82; 33 W. R. 322.

2. CUSTODY.

a. In General.

Jurisdiction of Court.]—As to the jurisdiction of court over parents with respect to their children. *De Manneville* v. *De Manneville*, 10 Ves. 52; 7 R. R. 340.

Court has jurisdiction to prevent parties preaching irreligious doctrines in presence of their children. *Id.* 10 Ves. 58.

When the custody of an infant is in question the matter rests absolutely on the discretion of the judge, and the interests of the child are primarily to be considered by him. *Taylor, In re*, 25 W. R. 69.

Right of Father.]—A father has a right to the custody of his daughter up to sixteen. *Reg.* v. *Howes*, 3 El. & El. 332; 30 L. J., M. C. 47; 7 Jur. (N.S.) 22. *S. C.*, nom. *Barford, Ex parte*, 3 L. T. 467; 9 W. R. 99; 8 Cox, C. C. 405.

Guardianship for nurture continues until a child attains the age of fourteen: until that age the child cannot exercise his own choice as to quitting or remaining with his father. *Hyde* v. *Hyde*, 29 L. J., P. & M. 150.

The father is by law entitled to the custody of his legitimate children, and semble, that a court of common law has no jurisdiction, under any circumstances, to deprive him of that right. *Hakewill, In re*, 12 C. B. 223.

The court of common pleas has not any authority to control the right of a father to the possession of his child. *Skinner, Ex parte*, 9 Moore, 278: 27 R. R. 710.

Nor has the king's bench any such delegated authority. *De Manneville* v. *De Manneville*, supra.

—— **How Controlled.**]—The court of chancery, representing the king as parens patriæ, has jurisdiction to control the right of a father to the possession of his child. *Warner, Ex parte*, 4 Bro. C. C. 101.

The court of chancery has jurisdiction over the custody of the children of an English subject, though such children were born and are resident abroad. *Hope* v. *Hope*, 4 De G. M. & G. 328; 23 L. J., Ch. 682; 2 W. R. 698.

Age of Nurture—Exclusion of Mother.]—The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the court sees no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother an Englishwoman. *Rex* v. *De Manneville*, 5 East, 221; 1 Smith, 358; 7 R. R. 693.

A father is entitled to the custody of his children, to the exclusion of their mother, although they are within the age of nurture. *Rex* v. *Greenhill*, 6 N. & M. 244; 4 A. & E. 624.

When the children are in the custody of the mother, the court will compel her to deliver them to the father, unless it appears that the child would be improperly restrained, or its morals contaminated by the father. *Ib.*

The father having formed an adulterous connection away from home is not sufficient to warrant the court in refusing to enforce his right to the custody of his children. *Ib.*

When a child is of years of discretion, though under age, the court will not interfere to place him under the restraint of his father. *Ib.*

—— **Lunatic Mother.**]—The court will, under exceptional circumstances, such as the dangerous lunacy and improbable recovery of the mother, order the removal of a child within the age of nurture from her care, notwithstanding the rule established by *Reg.* v. *Birmingham* (5 Q. B. 210). *Reg.* v. *Barnet Union*, 57 L. J., M. C. 39; 58 L. T. 947; 52 J. P. 611.

Refusal of Wife to Live with Husband.]—A wife left her husband's home without any reasonable cause, taking with her their child. The court ordered the wife forthwith to deliver the child to the father, with liberty to either party to apply in chambers as to access. *Constable* v. *Constable*, 34 W. R. 649.

Separation Deed—Habeas Corpus.]—Children ordered to be delivered up by their mother to their father, on habeas corpus, notwithstanding provisions contained in deeds of separation for their residing with their mother. *Westmeath's (Lord) Children, Ex parte*, Jacob, 251, n.

Removal from Mother's Custody.]—The court will remove a child from the custody of the mother to that of the father, although there is no suggestion that the child is subjected to any improper restraint, nothing showing that the custody of the father is improper. *M'Clellan, Ex parte*, 1 D. P. C. 81.

Father out of Jurisdiction.]—If a father residing abroad has directed his child to be in custody of a person, not a relative, the child will not, pending an application to him for directions, be removed from the care of her near relatives. *Suttor, In re*, 2 F. & F. 267.

Duration of.]—Protection in respect of infancy continued after majority, until proper information has been obtained. *Walker* v. *Symonds*, 3 Swanst. 69; 19 R. R. 155.

Right of Guardians.]—Where suit is instituted for administration of infant's estate, court has jurisdiction, and may order him to be delivered up to the guardians. *Wright* v. *Naylor*, 5 Madd. 77.

—— **Testamentary.**] — Testamentary guardians, appointed under 12 Car. 2, c. 24, s. 8, are entitled to the custody of their infant wards. *Rex* v. *Isley*, 6 N. & M. 730; 5 A. & E. 441; 2 H. & W. 196; 5 L. J., K. B. 253.

A father having, by will, appointed a guardian of his children, the mother has no right to their custody, though the court may leave them under her care. *Talbot* v. *Shrewsbury (Earl)*, 4 Myl. & Cr. 672; 4 Jur. 380.

—— **Place of Education.**]—Guardian's control over infant as to the place of his being educated. *Tremain's case*, 1 Stra. 168.

The guardian is a proper judge at what school to place his ward. *Hall* v. *Hall*, 3 Atk. 721.

Widow—Education of Daughters.]—A mother, who is a widow, allowed to see and visit her children while with their guardians. Semble, she ought also to have some influence as to the mode of educating and bringing up her daughters. *Fermor* v. *Pomfret*, 1 Jur. 150.

Recommendation by Testator.]—A father having by will appointed a guardian to his children, with a recommendation that, in the event of their mother's death, they should be placed under the care of two female relations:—Held, that the court was bound to give effect to the recommendation, but not further than might be consistent with preserving to the testamentary guardian the general superintendence and control over the children. *Knott* v. *Cottee*, 2 Ph. 192.

A testator by will, having expressed his wish that his deceased wife's sister should take charge of his children:—Held, that unless a case were made against the propriety of the children remaining in charge of the party named in the will, the court would give effect to the directions of the testator. *Hartley* v. *Smith*, 10 W. R. 763.

Interference by Court.]—The power of the parent over his child is subordinate to that of the state; therefore, where it appears improper that the father should have the custody of his child, too young to make a choice, the court has a discretionary power in assigning the custody. *Blisset's case*, Lofft, 748.

Infant above Sixteen—Free Access to Mother restricted.]—A father has a legal right to direct the education and bringing up of his children until they attain the age of twenty-one, even although they are wards of court, and the court will not interfere with him, except (1) where by his moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his authority, or (3) where he seeks to remove his children, wards of court, out of the jurisdiction. *Agar-Ellis, In re, Agar-Ellis* v. *Lascelles*, 53 L. J., Ch. 10; 24 Ch. D. 317; 50 L. T. 161; 32 W. R. 1—C. A.

A father put restrictions on the intercourse between his daughter, in her seventeenth year, a ward of court, and her mother. The court refused to interfere. *Ib.*

Grounds for Interference.]—The court has no right to interfere with the course adopted for the education of an infant of tender years by a father who has not misconducted himself. Where a husband and wife have been separated through the misconduct of the wife only, her petition for access to her infant child was dismissed. *W——, In re*, 5 N. R. 363.

—— **Religious.**]—A father's authority over his children controlled on the ground of his professing and acting on irreligious and immoral principles. *Shelley* v. *Westbrooke*, Jacob, 266; 23 R. R. 47. S. P., *Lyons* v. *Blenkin*, Jacob, 267; *Wellesley* v. *Beaufort (Duke)*, 2 Russ. 1.

A court of equity has no jurisdiction to remove a child from the custody of the father or mother, merely because it would be for the benefit of the child. *Curtis, In re*, 28 L. J., Ch. 458; 5 Jur. (N.S.) 1147; 7 W. R. 474.

The religious opinions, or the poverty of the father, form no ground for removing a child. *Ib.*

Mere acts of harshness by a father, not such as would be injurious to the health of the children, or the fact of a somewhat passionate temper, will not form grounds for removing the children. *Ib.*

—— **Immorality.**]—In the absence of an appointment by a father, the mother surviving him is the guardian for nurture, and entitled to the custody of a legitimate child until it attains the age of fourteen. *Moore, In re*, 11 Ir. C. L. R. 1.

But the right to the custody of the child may be forfeited by prior immorality, by the want of bona fides in the application to the court to

obtain the custody of the child, by its being shown that the parent or guardian has an illegal object in view in obtaining the custody of the child, or that such parent is unfit for discharging the duties of guardian, and that it would not be for the welfare of the child that it should be given into the custody of the parent or guardian. *Ib.*

But in order to constitute a forfeiture of the right to the custody of the child, the immorality must be of so gross a character that the morals of the child would be seriously endangered. *Ib.*

Wilful and deliberate lying, together with fraud practised on a charitable society, will cause a forfeiture of the right to the custody of the child. *Ib.*

—— **Adultery.**]—The court has no jurisdiction to deprive a father, though living in adultery, of the custody of his child, unless he brings the child in contact with the woman; nor to order him to permit the mother to have access to the child, unless misconduct is shown with reference to the management of the child. *Ball* v. *Ball*, 2 Sim. 35.

Before depriving a father of the guardianship of his children, the court must be satisfied that the father has so conducted himself as to render it essential to their safety or welfare, that the father's rights should be interfered with, except in the cases within 2 & 3 Vict. c. 54. *Fynn, In re*, 2 De G. & S. 457; 13 Jur. 483.

—— **Separation Order.**]—The court cannot interfere with the rights of a father, unless he renders it essential to the safety and welfare of the children in some serious and important respect, that they should be removed from his custody. *Curtis, In re*, 28 L. J., Ch. 458; 5 Jur. (N.S.) 1147; 7 W. R. 474.

A decree for judicial separation on the ground of cruelty is not in itself sufficient to render him unfit to have the management of them, and the court dismissed the petition of the wife. *Ib.*

—— **Improper Conduct.**]—The court will, under circumstances of improper conduct, interfere to prevent a father from interfering in the education, &c., of his son, being a ward of the court. *Creuze* v. *Hunter*, 2 Cox, 242; 2 Ves. J. 157; 2 R. R. 38.

The court will take an infant out of his father's care if there is danger of his abusing his parental authority. *S. C.*, 2 Bro. C. C. 500, n.

If it is established that the father is to be considered as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children. *Anon.*, 2 Sim. (N.S.) 54.

Reference to Counsel.]—A father claiming from his wife the custody of their child, the court referred it to a barrister to determine as to the proper custody of the child, the wife and the husband consenting to abide by such determination. *Rex* v. *Dobbyn*, 4 A. & E. 644, n.

Right of Mother—Habeas Corpus.]—An infant child in the custody of the mother, brought up by habeas corpus at the father's instance:—Ordered, that the child should remain with the mother; the father's access to be regulated by the master. *Rex* v. *Wilson*, 4 A. & E. 645, n.

—— **Marital Duty.**]—In determining whether the custody of an infant ought to be given to the mother, the court will consider the paternal right, the marital duty, and the interest of the child. The marital duty includes the responsibility so to live that the children shall have the benefit of the joint care and affection of both father and mother. In a case where a father had committed a breach of the marital duty as thus defined:—Held, that the mother ought to retain the custody until further order. *Elderton, In re*, 53 L. J., Ch. 258; 25 Ch. D. 220; 50 L. T. 26; 32 W. R. 227; 48 J. P. 341.

—— **Drunkenness.**]—On the application of a husband in respect of three children, it appeared that the wife had twice left him, taking her children with her, on account of his habitual drunkenness; that on each occasion he agreed that she should maintain and educate the children apart from him; that after the second separation he publicly alleged on oath against his wife charges so injurious that she could not be expected ever to live with him again; that the wife had ample means, while the husband had only a narrow income:—Held, that the wife should retain custody of the children. *Smart* v. *Smart*, 61 L. J., P. C. 38; [1892] A. C. 425; 67 L. T. 510; 56 J. P. 676—P. C.

—— **Child in School with Mother's Consent.**]—The mother, a Roman Catholic, had consented to the child being placed in a Protestant school for destitute children. She had, before being in the infirmary, lived in lodging-houses, had neglected the child, and had lived a drunken and immoral life. The child herself desired to remain in the school:—Held, that the court would not grant a habeas corpus to remove the child. *Turner, In re, Turner, Ex parte*, 41 L. J., Q. B. 142; 25 L. T. 907.

Destitution.]—The court will interfere with paternal rights only in cases of very gross misconduct. Comparative destitution is not a sufficient ground. *Pulbrook, In re*, 11 Jur. 185.

Felony.]—When minor's father was obliged to fly the kingdom, and was indicted for felony, the father was not permitted to have the custody. *Stewart, In re*, Wall. Lyn. 115. And see *Bailey, Ex parte*, infra, col. 1518.

Wishes of Infant.]—On a question with whom infant should reside, infant's inclination must have weight, where no imputation exists against the person with whom she wishes to reside. *Anon.*, 2 Ves. sen. 374.

An infant at the age of ten being brought up from a school, on habeas corpus, at the instance of her mother, the father being dead, although it was deposed that the child was of intelligence, and wished, on religious grounds, to remain in the school, the court refused to examine the child, holding that a guardian for nurture has a legal right to the custody, irrespectively of the wishes of the ward. *Reg.* v. *Clarke, Race, In re*, 7 El. & Bl. 186; 26 L. J., Q. B. 169; 3 Jur. (N.S.) 335; 5 W. R. 222.

—— **Infant Maintained by Uncle.**]—A rich uncle takes his niece, maintains her, and dies, having left her 10,000*l.* The executor continues to keep his niece. The child (of the age of thirteen) appears in court, and denies she is

under any force. The court is of opinion that the father may take his child, but not by force, nor going to or returning from court; and that the father may at all reasonable times have access to his child. *Hopkins, Ex parte*, 3 P. Wms. 152.

Legacy—Condition as to Education.]—A sum of money being left to an infant, with a direction that her education should be committed to the trustees, and a legacy to the father, on condition of his not interfering in it, the condition enforced by requiring his undertaking not to interfere. *Colston* v. *Morris*, Jacob, 257; 6 Madd. 89; 22 R. R. 246.

Removal out of Jurisdiction.]—On the application of a parent residing in India, the court refused to grant a habeas corpus for the removal of a child from the custody of persons here, to whose care it had for a long time been committed, and their custody of the child having been acquiesced in by the parent. *Preston, Ex parte*, 5 D. & L. 233; 2 B. C. Rep. 169; 17 L. J., Q. B. 21; 11 Jur. 1039.

Proceedings in Scotland.]—When the court had appointed a guardian, and settled a scheme for the education of an infant peer, entitled to estates in England and Scotland, it restrained the tutor dative from continuing proceedings in the court of session relative to the education and residence of the infant. *Bute (Marquis)* v. *Stuart*, 2 Giff. 582. Affirmed sub nom. *Stuart* v. *Moore*, 4 Macq. H. L. 1; 7 Jur. (N.S.) 1129; 4 L. T. 382; 9 W. R. 722.

Wife Absconding.]—A husband, whose wife had absconded with his infant children, applied for an order, that the wife's brother, who had assisted her, and had since transmitted to her the income to which she was entitled, might either produce the children or disclose the place of their concealment. On an affidavit of the brother, that the children were not in his custody or under his control, the order was refused. *Spence, In re*, 2 Ph. 247; 16 L. J., Ch. 309; 11 Jur. 399.

Maternal Aunt.]—A maternal aunt of an infant, who is possessed of no property, has no legal right to the custody of the infant. *Medley, In re*, Ir. R. 5 C. L. 84.

Habeas Corpus.]—A habeas corpus was granted for detaining a child under age from her father, and a rule granted for an information nisi. *Rex* v. *Ward*, 1 Wm. Bl. 386.

The court will grant a rule absolute in the first instance to bring up the body of an infant, if it is probable that it may be concealed. *Glover, Ex parte*, 4 D. P. C. 291; 1 H. & W. 508.

The court will grant a habeas corpus in the first instance, to bring up an infant who has absconded from his father, and was detained by a third person without his consent. *Pearsom, In re*, 4 Moore, 366. And see *Rex* v. *Delaval*, 3 Burr. 1434.

The court granted a habeas corpus, at the instance of the father, commanding the mother (from whom the applicant was divorced) and her father to bring the infant into court without any previous demand. *Witte, Ex parte*, 13 C. B. 680.

—— **Felony.**]—Where a father has been convicted of felony, the court will grant a habeas corpus in order to give the mother the custody of an infant. *Bailey, Ex parte*, 6 D. P. C. 311. And see *Stewart, In re*, ante, col. 1516.

When a child has been traced to the actual or virtual custody of a person who has no legal right to that custody, the court will issue a habeas corpus, at the instance of the person having the legal right to the custody, in order that the child may be brought into court, or that it may be ascertained how the child has been disposed of. *Matthews, In re*, 12 Ir. C. L. R. 233.

—— **What Return Sufficient.**]—A return to a writ that a child under fourteen is not detained by or in the custody, power, or possession, or under the care or control of the defendant, or any person employed by him, is insufficient. *Reg.* v. *Roberts*, 2 F. & F. 272.

The parties to whom a writ of habeas corpus was addressed, returned that the infant at the time of issuing the writ was over fourteen years of age and under sixteen:—Held, that the application must be refused, as at the age of fourteen a male infant is at liberty to exercise a discretion as to his own place of abode. *Connor, In re*, 16 Ir. C. L. R. 112.

—— **Issued in Vacation.**]—A habeas corpus was issued in vacation, and returned in court, for a young lady who had been decoyed away from her father, but desired to continue with him. *Rex* v. *Clerke*, 1 Burr. 606.

—— **By Testamentary Guardian.**]—A person who has been appointed by the will of a father to be guardian, stands in loco parentis, and may, in order to obtain possession, claim a writ of habeas corpus, which a common law court has no discretion to refuse, if the applicant is a fit person, and the child too young to choose for itself. *Andrews, In re*, L. R. 8 Q. B. 153; 28 L. T. 353; 21 W. R. 480. *S. C.*, nom. *Edwards, In re*, 42 L. J., Q. B. 99.

—— **Enforcement of Order—Serjeant-at-Arms.**]—By the terms of a separation deed the father had the right to select a school for the boy, and the boy was to spend a portion of his holidays with his mother. At the end of the holidays the mother refused to give up the boy, and disobeyed two orders obtained by the father directing her to deliver the boy at times and places specified. An ex parte application being made by the father, an order was made directing the serjeant-at-arms attending the court to take the boy into his custody and deliver him to the lady named in the previous orders, at her residence or elsewhere. *G.* v. *L.*, 60 L. J., Ch. 705; [1891] 3 Ch. 126; 64 L. T. 732; 40 W. R. 10.

—— **Welfare of Infant — Jurisdiction of Queen's Bench Division.**]—Where an application is made to the queen's bench division by the parent for a writ of habeas corpus for the custody, the court is not, since the Judicature Act, bound, in the absence of misconduct on the part of the parent, to order the child to be delivered up, but may exercise the jurisdiction of the old court of chancery, and inquire whether it is for the welfare of the child that it should be delivered up. The court, under the circumstances, refused to order the child to be delivered

up by the person with whom she was living to the custody of the mother. *Reg.* v. *Gyngall*, 62 L. J., Q. B. 559; [1893] 2 Q. B. 232; 4 R. 448; 69 L. T. 481; 57 J. P. 773—C. A. S. P., *Elliott* (*an infant*), *In re*, 32 L. R. Ir. 504.

b. Agreements respecting.

Validity of.]—A contract, by which a father deprives himself of all his parental control over his child, is contrary to the policy of the law, and void; and such a contract is valid, if the conduct of the father towards his child is so gross that the court would remove the child from his custody. *Swift* v. *Swift*, 34 Beav. 266. Affirmed, 4 De G. J. & S. 710; 34 L. J., Ch. 394; 11 Jur. (N.S.) 458; 12 L. T. 435; 13 W. R. 731.

An agreement by which a father stipulated that the mother of his deceased wife should have the custody of the infant children during three months of every year is bad for want of mutuality, and cannot be enforced. *Kennedy* v. *May*, 7 L. T. 819; 11 W. R. 358.

Revocation of.]—If a father consents to his child remaining with another person, he may at any time revoke such consent, and recover possession of his child by a habeas corpus, although such consent was given in consideration of an agreement by such third person to take charge of the child. *Reg.* v. *Smith*, 1 B. C. C. 132; 22 L. J., Q. B. 116; 17 Jur. 24; 1 W. R. 130.

Separation — Deed of Compromise.]—A wife intended to proceed in the divorce court for a separation. By a deed of compromise it was agreed that the proceedings should be stayed, that two of the children should remain at such schools as the husband should direct, and that their holidays should be passed at such places as the trustees should direct:—Held, that the agreement as to where the holidays of the children should be passed was reasonable, and would be enforced by the court. *Hamilton* v. *Hector*, 40 L. J., Ch. 692; L. R. 6 Ch. 701; 19 W. R. 990.

Effect of.]—A recommendation by letter of the education of infants, with an assurance that the writer was willing to go himself towards its object as far as a certain sum, construed to be a promise to pay that sum for the purpose. *Dowell* v. *Wilson*, Coop. t. Brough. 504.

Illegal Agreement.]—On a suit by the father for possession of the children, the lord chancellor made an order for delivery of the children to their father, and a court in France made an order for carrying it out. An agreement was then signed by the wife in France, and by the husband in England, by which it was stipulated that the youngest child should be left with the mother, and that she would facilitate the husband's proceedings for a divorce:—Held (affirming 22 Beav. 351), that, assuming the agreement to be one which was to be judged of by French law, and that it was valid by French law, it would not be enforced here, inasmuch as the stipulations that the youngest child should be delivered to his mother, and that the wife would facilitate the husband's proceedings for a divorce, were contrary to the laws and policy of England. *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L. J., Ch. 417; 3 Jur. (N.S.) 454; 5 W. R. 387. And see *Besant, In re*, supra, col. 1510.

c. Of Illegitimate Children.

Right of Putative Father.]—Except under special circumstances the putative father is entitled, after the mother's death, to the custody of his illegitimate child, as against a person claiming to have been appointed guardian by its mother, and he is entitled, by any peaceful means to take possession of it, or to resist its being taken from him by others. *Kerr, In re*, 24 L. R., Ir. 59—C. A.

Right of Mother.]—The mother is entitled to the guardianship of her illegitimate children. *Darcy, In re*, 11 Ir. C. L. R. 298.

A woman placed her illegitimate child soon after birth with N. and wife, who were labouring people, intending to pay them for it. She was unable to continue her payments, but N. and wife continued to maintain the child till it was nearly seven years old. The mother, who was a kept mistress, did not propose that the child should live with her, but with a respectable married sister, whose husband was in a station superior to that of N.:—Held, that the mother of an illegitimate infant has a natural right to its custody, which will be regarded by the court. *Reg.* v. *Nash*, *Carey, In re*, 52 L. J., Q. B. 442; 10 Q. B. D. 454; 48 L. T. 447; 31 W. R. 420—C. A.

Mixed Marriage — Christian and Mahommedan.]—Where an Englishwoman married a Mahommedan who was already married, and the children, after a separation, remained with their father till his death, the wife sought to obtain the custody of them, contending that they were illegitimate:—Held, that the mother had no absolute right to the custody, and the court held it was best for them to remain in the custody of the guardians whom the father had appointed. *Ullee, In re*, 54 L. T. 286—C. A.

In the case of the custody of an illegitimate child, regard has always been had in equity to the mother, the putative father, and the relations on the mother's side. *Reg.* v. *Nash* (supra) approved.—By the lord chancellor. The law has placed upon the mother of an illegitimate child obligations which bring with them corresponding rights.—By Lord Herschell. The desire of the mother of an illegitimate child as to its custody ought primarily to be considered. *Barnardo* v. *McHugh*, 61 L. J., Q. B. 721—H. L. (E.)

In determining who is to have the custody of and control over an illegitimate child, the court, in exercising its jurisdiction with a view to the benefit of the child, will primarily consider the wishes of the mother. *Reg.* v. *Nash* (supra) approved.—By Lords Herschell and Field. The authorities do not establish the proposition that the legal rights of the mother of an illegitimate child as to its custody are the same as those of the father of a legitimate child. *Barnardo* v. *McHugh*, 65 L. T. 423; [1891] A. C. 388; 40 W. R. 97; 55 J. P. 628—H. L. (E.)

d. Statutory Jurisdiction.

i. *Under 2 & 3 Vict. c. 54.*

Practice.]—The vice-chancellor has jurisdiction, under 2 & 3 Vict. c. 54, to make orders as to the custody of infants, though the lord chancellor and master of the rolls are alone mentioned

in the act. *Taylor, In re*, 10 Sim. 291 ; 9 L. J., Ch. 399 ; 4 Jur. 983.

Semble, the order may be made ex parte if the necessity of the case so requires. *Ib.*

If, independently of the act 2 & 3 Vict. c. 54, the court can exercise jurisdiction upon the petition of a mother having the custody of her infant child for the continuance of such custody, it may do so, although the petition is intituled in the matter of that act as well as in the matter of the infant. *Tomlinson, In re*, 3 De G. & Sm. 371.

On what Grounds.]—Principles on which access to a child will be granted or refused to a mother petitioning in a court of equity, under the 2 & 3 Vict. c. 54, discussed. *Winsom, In re*, 2 H. & M. 540 ; 11 Jur. (N.S.) 297 ; 13 L. T. 14 ; 13 W. R. 452.

—— **Out of Jurisdiction.**]—The father of infants before a petition was presented by their mother for access to them, &c., under 2 & 3 Vict. c. 54, went with them to reside abroad. The court ordered substituted service of the petition, but at the hearing declined to make the order because the father and infants were resident abroad, and because a suit by the mother for restitution of conjugal rights was pending. *Taylor, In re*, 11 Sim. 178 ; 9 L. J., Ch. 399 ; 4 Jur. 959.

Semble, that where the husband is bonâ fide resident abroad, as the court cannot make an order under this act which could be enforced, it will not interfere. *Ib.*

The court will not make the order where the wife has left her husband without sufficient cause. *Ib.*

The court will not make an order under this act, to give the mother access to her children, pending a suit by the wife in the ecclesiastical court for restitution of conjugal rights. *Ib.*

The vice-chancellor of England has jurisdiction under the act of 2 & 3 Vict. c. 54. *Ib.*

The court has an absolute discretion under 2 & 3 Vict. c. 54, as against the father or a testamentary guardian, to give the custody of children under seven to the mother. *Shillito* v. *Collett*, 8 W. R. 696.

The 2 & 3 Vict. c. 54, has introduced, as controlling the paternal right to the exclusive custody of his infant child, two considerations, viz. of marital duty to be observed towards the wife, and of the interests of the child to be consulted. But if these two objects can be attained consistently with the father's retaining the custody of the child, his common law paternal right will not be disturbed. *Halliday, In re*, 17 Jur. 56.

Right of mother to custody of or access to child under seven years of age, 2 & 3 Vict. c. 54. *Woodward, In re*, 17 Jur. 56 ; 1 W. R. 59.

A husband having separated from his wife, took from her their daughter. He subsequently sued for a divorce, but unsuccessfully. The husband continued to live separate from his wife, and went abroad, and placed the child under the charge of his sister, refusing to allow access by the mother to it, on the ground that this was best for the child. His conduct had throughout been very indulgent to his wife and free from blame :—Held, that the court would not interfere with the father's arrangements for the training of the child. *Winsom, In re*, 2 H. & M. 540 ; 11 Jur. (N.S.) 297 ; 13 L. T. 14 ; 13 W. R. 452.

Semble, that where a child is resident in a foreign country, it does not follow that an order by the court under the 2 & 3 Vict. c. 54, for access to it by the mother cannot be carried into effect. *Ib.*

Husband Divorced.] — Where a wife had obtained a sentence of divorce against her husband, the conduct of her husband appeared clearly to render it improper that he should have the custody of a girl eleven years old, the court made an order for the delivery of all the children to the mother, as the effect of the children being brought up in different custodies would be likely to create factions in the family. *Warde* v. *Warde*, 2 Ph. 786.

This act has invested the court of chancery with a discretionary power, which by its inherent jurisdiction it did not possess, of interfering with the common law right of a father to the custody of his children, such power varying according as the children are under or above seven years of age. *Ib.*

Provision for Education.]—Conduct showing the father to be a person to whose guardianship it would be very objectionable to entrust children :—Held, sufficient ground for depriving him of their custody, and for providing for their maintenance and education, where such a provision can be effectually secured. *Fynn, In re*, 2 De G. & Sm. 457 ; 13 Jur. 483.

But where the only security proposed was a deed of covenant of the infant's mother-in-law to provide for the maintenance and education of the children for life :—Held, that such conduct was not sufficient to enable the court to interfere. *Ib.*

Although the circumstance of the children being in the custody of the mother excludes the operation of the 2 & 3 Vict. c. 54, the provisions of that act are to be regarded in considering an application by her to retain such custody, and to restrain the father from interfering with it. *Ib.*

When Granted.]—It is not necessary in order to enable the mother to apply under this act for the custody of her child that she should have obtained, or be entitled to obtain, a divorce à mensâ et thoro. *Bartlett, Ex parte*, 2 Coll. C. C. 661 ; 15 Jur. 418.

Where the mother of an infant under seven years of age, and having custody of it, is living separate from the father, and has a good defence to a suit by him for restitution of conjugal rights, the court may make an order continuing to the mother the custody, such a case being within the equity of 2 & 3 Vict. c. 54. *Tomlinson, In re*, 3 De G. & S. 371.

When already in Mother's Custody.]—Where the children were in the custody of the mother, semble—that 2 & 3 Vict. c. 54, does not enable her to resist the father's right to have them delivered over to him. *Corsellis* v. *Corsellis*, 1 Dr. & War. 235.

ii. *Under* 24 *&* 25 *Vict. c.* 86, *s.* 9.

In General.]—The 24 & 25 Vict. c. 86, s. 9, has given the court the widest discretion to weigh the comparative advantages or disadvantages of giving the custody of all or any of the children to the one parent or to the other, and no general rule can be laid down. It is the duty of the court to consider all the circumstances of the

particular case. *Symington* v. *Symington*, L. R. 2 H. L. Sc. 415.

Where there appears to be no continuance of immorality, and the husband is attached to his children, and engaged in a profitable business, an order which should take from him the custody of his sons would not be conducive to their future welfare. It is a different matter with regard to the daughters. Their mother, against whom nothing has been proved, is the natural person to have their custody. *Ib.*

iii. *Under* 36 & 37 *Vict. c.* 12.

Jurisdiction.]—Since the passing of the Judicature Act, 1873, the courts of common law have concurrent jurisdiction with the courts of equity with regard to the care and custody of infants; but, in the exercise of that jurisdiction, the rules of equity are to prevail. *Goldsworthy, In re*, 46 L. J., Q. B. 187; 2 Q. B. D. 75.

When the custody of an infant is in question the matter rests absolutely on the discretion of the judge, and the interests of the child are primarily to be considered by him. *Taylor, In re*, 25 W. R. 69.

Primâ Facie Right of Father.] — The court must be satisfied that he has so conducted himself, or placed himself in such a position, as to render it essential to their safety or welfare in some very serious and important respect that the father's rights should be interfered with. *Goldsworthy, In re*, supra.

Mere incontinence, or a habit of intemperance, will not of itself justify the interference of the court. *Ib.*

The discretion of the court as to the custody of an infant is exercised in accordance with the rules of equity under s. 25, sub-s. 10, of the Judicature Act, 1873. One of these rules is incorporated under s. 1 of 36 Vict. c. 12, empowering the court to grant the custody of infants under sixteen to the mother. Evidence that proceedings against the father for bigamy have failed will not compel the court to restore to the father the custody of his child. *Brown, In re*, or *Rowe, In re, Rowe* v. *Smith*, 13 Q. B. D. 614; 51 L. T. 793; 33 W. R. 79.

When given to the Mother.]—A husband having abandoned his wife and kidnapped the only child, and being co-respondent in a pending divorce action charging him with adultery, the court, upon the wife's petition, ordered immediate delivery of the child to her, with liberty of access by the father and paternal grandparents, and liberty to apply as to the maintenance and education of the child on his attaining seven years. *Taylor, In re*, 46 L. J., Ch. 399; 4 Ch. D. 157; 36 L. T. 169; 25 W. R. 69.

Order for, "Until Further Order"—Application to Vary.]—When an order is made under s. 1 of the Infants Custody Act, 1873, "until further order," an application to vary the order should be made by motion before the judge of first instance. Such a motion can be made by the respondent to the original petition. The provision of s. 1 applies only to the original petition. *Holt, In re*, 16 Ch. D. 115; 29 W. R. 341—C. A.

Separation Deed—Religious Education.]—The words "custody or control," in s. 2 of the Infants Custody Act, 1873, comprise all the rights which a father has over his children, including that of directing their religious education. The father, a Roman Catholic, married the mother, a Protestant. A separation deed was executed, containing a declaration that the wife should have the absolute custody and control of the infant until the deed should be mutually put an end to and revoked by the parties. The father had not seen the child for three years and a half. An order had been made in an action to administer the trusts of the separation deed. The father was without means to maintain the child:—Held, that it was for the benefit of the infant to give effect to the agreement in the separation deed; and that it should be enforced accordingly. *Condon* v. *Vollum*, 57 L. T. 154.

Court can set aside Covenant in Separation Deed.]—By a covenant in a separation deed executed after the passing of the Infants Custody Act, 1873, a father agreed that his infant daughter should remain in her mother's custody during eleven months in each year. The mother promulgated atheistical opinions, and refused to allow the child to receive any religious instruction. She also published an obscene book. The child was made a ward of court:—Held, that to bring up the child in the religion of her father was a duty which the court owed to its ward, and was unaffected by the covenant in the separation deed; and also that the refusal of religious instruction to the child and the publication of the obscene book were sufficient grounds for removing her from the custody of the mother. *Besant, In re*, 48 L. J., Ch. 497; 11 Ch. D. 508; 40 L. T. 469; 27 W. R. 741—C.A.

iv. *Under* 49 & 50 *Vict. c.* 27.

Appointment by Mother—Confirmation by the Court.]—Under s. 3, sub-s. 2, of the Guardianship of Infants Act, 1886, the appointment by the mother of guardians should be in form an appointment of guardians "jointly with the father" of the infant; and upon an application under that sub-section, after the death of the mother, to confirm the appointment, the court can make an order under the act in that form only. The court, on such an application, is bound to consider whether the guardians so appointed are proper persons. *G. (an infant), In re*, 61 L. J., Ch. 490; [1892] 1 Ch. 292; 66 L. T. 336.

Rights of Father—Misconduct.]—The position of father and mother in respect of the custody of their children is materially altered by s. 5 of the Guardianship of Infants Act, 1886. *A. and B. (infants), In re*, 66 L. J., Ch. 592; [1897] 1 Ch. 786—C. A.

The court has, with reference to the custody of and access to children, a wide discretion under that section, which must be exercised subject to the requirements of the section. *Ib.*

The court can deprive a father of the custody of his children although he may not have acted in such a way as would have forfeited his rights under the old law. *Ib.*

The court can make an order in favour of a mother, although she has been guilty of misconduct, in cases where both father and mother are equally guilty. *Ib.*

Judicial Separation—Effect of Order.]—The

wife petitioned for a judicial separation on the ground of cruelty; and she also prayed that the court would append to the decree a declaration that the respondent was a person unfit to have the custody of the children of the marriage. The court found that the respondent was a person unfit to have the custody of the children:—Held, that the effect, under s. 7 of the act of 1886, was to put upon him the onus of affirmatively proving himself to be a reformed character, and fit to be intrusted with the children's custody. *Webley* v. *Webley*, 64 L. T. 839.

Divorce—Jurisdiction of Chancery Division.]—A divorce decree was made on the ground of the wife's adultery; and by the decree nisi it was ordered that the infant child should remain in the custody of the petitioner until further order. A summons was taken out by the mother in the chancery division asking for an order for access to the child:—Held, that the divorce court had full power to make orders as to access, and that, whether there was also a discretionary power in the chancery division or not, it would not be exercised when an order dealing with the matter had already been made by the divorce court. *Manders* v. *Manders*, 63 L. T. 627.

Misconduct of Father—No Limit as to Age.]—Where a mother applied by petition to the court for the custody of her boy, aged ten years, on the ground of the misconduct of the father:—Held, that under s. 5 of the Guardianship of Infants Act, 1886, the court had jurisdiction to make such order as it might think fit regarding custody and access, having regard to the welfare of the infant, and to the wishes as well of the mother as of the father. The court has jurisdiction to order the delivery of the infant to the custody of its mother, without fixing any limit of age. *Witten, In re*, 57 L. T. 336.

Declaration as to Unfitness of Guilty Parent—Divorce.]—The court appended to its decree for judicial separation, granted upon the ground of gross misconduct on the husband's part, a declaration, in terms of s. 7 of the Guardianship of Infants Act, 1886, that he was a person unfit to have the custody of the child, notwithstanding evidence that the father was very fond of the child and had never been cruel to her. *Webley* v. *Webley*, supra, approved. *Hitchings* v. *Hitchings*, 67 L. T. 530.

The court appended to a decree nisi for adultery and cruelty an order under s. 7 of the Guardianship of Infants Act, 1886, declaring the respondent, who did not appear to oppose the application, an unfit person to have the custody of the children. *Skinner* v. *Skinner*, 57 L. J., P. 104; 13 P. D. 90; 58 L. T. 923; 36 W. R. 912; 52 J. P. 406.

Application to Rescind or Vary Order—Unfitness of Mother—Custody given to Father.]—A decree for dissolution of marriage having been made on the ground of the husband's adultery and cruelty, the custody of the children was given to the petitioner, and the respondent was ordered to pay the petitioner for her maintenance. Subsequently the respondent applied to rescind or vary the order, and it was shown that the petitioner was no longer a fit person to have charge of her daughter. The court made an order transferring the custody of the daughter to the father, who had married again and was shown to be leading a respectable life. *Witt* v. *Witt*, 60 L. J., P. 63; [1891] P. 163; 64 L. T. 121; 39 W. R. 432; 55 J. P. 184.

E. E. H. B.

INFERIOR COURT.

See COURT.

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INJUNCTION.

[BY R. C. MACKENZIE.]

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A. IN GENERAL.

1. GENERAL PRINCIPLES.

Origin and extent of jurisdiction by injunction. *Goodeson* v. *Gallatin*, Dick. 455.

Principles which regulate the exercise of the jurisdiction by injunction. *Spottiswoode* v. *Clarke*, 2 Ph. 154; 1 Coop. C. C. 254; 10 Jur. 1043.

Injury to Strangers.]—In granting an injunction the court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit and third parties. *Maythorn* v. *Palmer*, 11 Jur. (N.S.) 230; 11 L. T. 261; 13 W. R. 37.

Sufficiency of the Remedy by Damages.]—The grant of an injunction to restrain a person from doing a particular thing is an act dependent on the discretion of the court, and in exercising that discretion a court of equity will consider whether the doing of the thing sought to be restrained must produce an injury to the party seeking the injunction; whether that injury can be remedied or atoned for, and, if capable of being atoned for by damages, whether those damages must be sought in successive suits, or could be obtained once for all. *Doherty* v. *Allman*, 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513. See also *Cooke* v. *Forbes*, 37 L. J., Ch. 178; L. R. 5 Eq. 166; 17 L. T. 371; and *Dollfus* v. *Pickford*, 1 W. R. 220—L. JJ.

Landlord and Tenant.]—Whether, even where a lease gives no right of re-entry, the court, seeing a gross case of waste and breach of covenant, not to be indemnified by damages, would leave the tenant to law, refusing relief, quære. *Gourlay* v. *Somerset* (*Duke*), 1 Ves. & B. 68; 13 R. R. 234.

On Ground not put forward by Plaintiff.]—Where an injunction is applied for upon a distinct ground which fails, it will not in general be granted upon another ground which has not been put forward, but which it appears might have been put forward in the circumstances of the case. *Castelli* v. *Cook*, 7 Hare, 98; 18 L. J., Ch. 148; 13 Jur. 675.

Plaintiff Suing at instigation of Trade Rival of Defendant.]—A plaintiff filed a bill, on behalf of himself and other shareholders in a railway company, to restrain the directors committing a breach of trust. It appeared that he was suing at the instigation of another rival company:—Held, that this circumstance was not of itself sufficient to prevent him obtaining a special injunction on the merits of the case. *Colman* v. *Eastern Counties Ry.*, 10 Beav. 1; 16 L. J., Ch. 73; 11 Jur. 74.

Undertaking equivalent to Injunction.]—An undertaking entered into with a court of equity is equivalent to, and will have the effect of, an injunction, so far that any infringement thereof may be made the subject of an application to the court. *London & Birmingham Ry.* v. *Grand Junction Canal Co.*, 1 Railw. Cas. 224.

Applicant must make Primâ Facie Case.]—On a motion for an injunction as to a matter merely pecuniary, the plaintiff cannot succeed without satisfying the court, not merely that there is a case to be tried, but that there is some probability of the bill not being dismissed at the hearing. *Att.-Gen.* v. *Wigan Corporation*, 5 De G. M. & G. 52; 23 L. J., Ch. 429; 18 Jur. 299; 1 W. R. 203.

Breach of Contract—Parties.]—In a suit for an injunction to prevent a violation of an agreement, the persons alleged to have made the agreement must be parties. *Landed Estates Investment Co.* v. *Weeding*, 21 L. T. 384; 18 W. R. 35.

—— **Stipulation for Liquidated Damages.**]—The court has a discretion to restrain a breach of covenant, though there is a further covenant for payment of 100*l.* as liquidated damages for such breach. *Cole* v. *Sims*, 23 L. J., Ch. 258; 1 W. R. 151.

—— **Injunction as of Right.**]—Where the construction of a contract is clear, and the breach clear, it is not a question of damage; but the mere circumstance of the breach of contract affords sufficient ground for the court to interfere by injunction. *Tipping* v. *Eckersley*, 2 K. & J. 264.

Defendant claiming Right to commit Breach.]—Semble, the court may so interfere, whether the breach has or has not actually been committed, provided the defendant claims and insists on a right to do the act which would constitute such breach. *Ib.*

A defendant who had failed in an action brought against him at law by the plaintiff, for the infringement of a trade mark, but who persisted in asserting his right to continue the infringement, perpetually restrained, and ordered to pay all the costs of the action at law, and of the suit. *Farina* v. *Silverlock*, 4 K. & J. 650.

Where Specific Performance impossible.]—The court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform. *Fothergill* v. *Rowland*, 43 L. J., Ch. 252; L. R. 17 Eq. 132; 29 L. T. 414; 22 W. R. 42. See also *Baldwin* v. *Society for Diffusion of Useful Knowledge*, 9 Sim. 393.

Ambiguous Agreement.] — Where a party agrees not to do a particular act, and there are other terms in the agreement, which are so vague that the court connot enforce them, it will not grant an injunction to restrain the breach of the negative term. *Kimberley* v. *Jennings*, 6 Sim. 340.

Vendor and Purchaser—Purchaser Disabling himself from Completing.]—A vendor of land is not entitled to an injunction to restrain the purchaser from buying another estate, on the ground that to do so will incapacitate him from completing his first purchase. *Syers* v. *Brighton Brewery Co.*, 11 L. T. 560; 13 W. R. 220.

Wrongful Dismissal no Ground for Injunction.]—In the case of a contract for personal service, even when an agent has been wrongfully dismissed by his employers, the court, having no power to compel the agent to fulfil his duties, cannot interfere, by way of injunction, in his favour. *Mair* v. *Himalayan Tea Co.*, L. R. 1 Eq. 411; 11 Jur. (N.S.) 1013; 13 L. T. 586; 14 W. R. 165.

Removal of Nuisance, allowing Time for.]—When a plaintiff has proved his right to an injunction against a nuisance or other injury, the court will not inquire in what way the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to. *Att.-Gen.* v. *Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; 19 L. T. 708; 17 W. R. 240. And see *Kentes* v. *Holywell Ry.*, 28 L. T. 183.

But when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time with liberty to the defendant to apply for an extension of time. *Ib.*

In such a case a reference before the decree to an expert under 15 & 16 Vict. c. 80, s. 42, as to the existence of the injury, or as to the best mode of removing it, is improper. *Ib.*

Party taking Advantage of his own Wrong.]—The court will interfere by injunction to prevent a party availing himself in any manner of a title arising out of a violation of right, or breach of contract or confidence. *Prince Albert* v. *Strange*, 1 Mac. & G. 25; 1 Hall. & Tw. 1; 18 L. J., Ch. 120; 13 Jur. 109.

The cases in which the court refuses to interfere by injunction until the legal right is established at law, have no application to cases in which the court exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right, or breach of contract or confidence. *Ib.*

Execution of Statutory Powers.]—The court ought not, by granting an injunction, indirectly to order the carrying into execution of the powers of an act of parliament. If it can make such order it should make it directly. *Att-Gen.* v. *Dorking Union*, 51 L. J., Ch. 585; 20 Ch. D., 595; 46 L. T. 573; 30 W. R. 579—C. A.

Statutory Remedy.]—The court of chancery will not entertain a suit to enforce making or repairing railway accommodation works, unless recourse has been had in the first instance to justices, where by act of parliament they have jurisdiction in the matter. *Hood* v. *North-Eastern Ry.*, 40 L. J., Ch. 17; L. R. 11 Eq. 116; 23 L. T. 433; 19 W. R. 266.

It is a settled rule that if a statute creates a new right and gives a particular remedy for enforcing it, there is no other remedy. But there are two exceptions to this rule—(1) The ancillary remedy in equity by injunction to protect a right; that is, a mode of preventing that being done which if done would be an offence. (2) The remedy created by s. 25, sub-s. 8, of the Judicature Act. *Cooper* v. *Whittingham*, 49 L. J., Ch. 752; 15 Ch. D. 501; 43 L. T. 16; 28 W. R. 720.

To Prevent Person from Permitting Nuisance beyond his Control.]—Semble, it would be wrong to enjoin a company or an individual from permitting that to be done which is really beyond his control—not beyond his control in this sense, that there is a vis major or an act of God paramount—but beyond his control in the sense that he cannot by any precaution or by any works with reasonable certainty prevent that happening which all contemplate as likely to happen. *Evans* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 57 L. J., Ch. 153; 36 Ch. D. 639; 57 L. T. 198; 36 W. R. 331.

Slight present Injury—Future Damage.]—In an action to restrain the obstruction of ancient lights, where the right of the plaintiff to relief

rests mainly upon damage not suffered at the time, but likely to accrue within a reasonable time, the court will nevertheless grant an injunction to enforce that right, and will not give compensation by way of damages. In cases of this character the possible future application of a plaintiff's premises must be considered in granting an injunction or directing an inquiry as to damages. *Dicker* v. *Popham*, 63 L. T. 379.

Assuming Business Name—Damnum absque injuria.]—The short address "Street, London," was used for many years in sending telegrams from abroad to Street & Co., of Cornhill. A bank adopted by arrangement with the post-office the phrase "Street, London," as a cypher address for telegrams from abroad to themselves: —Held, that the court had no jurisdiction to grant an injunction restraining the bank from using such address, as there was no attempt to interfere with trade, no legal injury done, but simply inconvenience. *Street* v. *Union Bank of Spain and England*, 55 L. J., Ch. 31; 30 Ch. D. 156; 53 L. T. 262; 33 W. R. 901.

Evidence of Public Body—Effect of.]—Where a public body is, under an act of parliament, entrusted with powers and duties for a public purpose, the court will give credit to them as being the best judges of what they want for that purpose. *Att.-Gen.* v. *Great Eastern Ry.*, L. R. 6 Ch. 572; 19 W. R. 788.

A railway company was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect. *Ib.*

Applicant in Default—Stage-Coach Licensing Acts.]—The court granted an injunction to restrain a party from using on his omnibus the same words and devices, being a colourable imitation of those used by the plaintiffs, and held that the not having complied with the requisites of the stage-coach licensing acts, which were merely fiscal, did not preclude the right to sue. *Knott* v. *Morgan*, 2 Keen, 213.

Plaintiff Threatened with Action, to which he has a good Defence—Perpetuating Testimony.]—In an action by underwriters for an injunction to restrain policy-holders from taking any proceedings with reference to a policy of insurance, on the ground that the underwriters had an admittedly good defence to any action that might be brought on such policy, and that the evidence in support of that defence might be lost if the underwriters were not sued at once:—Held, that the plaintiffs' proper remedy was by an action to perpetuate testimony, and that an injunction ought not to be granted. *Brooking* v. *Maudslay*, 57 L. J., Ch. 1001; 38 Ch. D. 636; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296.

Water Company withholding Water—Dispute as to Annual Value.]—Although the statutory remedy provided by s. 68 of the Waterworks Clauses Act, 1847, for the settlement by two justices of disputes as to the annual value of a tenement supplied with water, and the special remedy by penalties given by s. 43 against a company for withholding water, have not ousted the general jurisdiction to restrain the company by injunction from cutting off the supply of water pending proceedings for settling a dispute as to value, such injunction will not be granted on the application of an owner or occupier who will not undertake to commence proceedings with due speed before the justices under s. 68. *Hayward* v. *East London Waterworks Co.*, 54 L. J., Ch. 523; 28 Ch. D. 138; 52 L. T. 175.

Stage Carriage—Use of Manager's Name.]—The plaintiff, as manager of an omnibus company, became, under the provisions of the statutes and rules for the regulation of metropolitan stage-carriages, the licensee of their vehicles. Having ceased to be such manager:—Held, that he was entitled to an injunction to restrain the company from continuing to use his name upon the number plates affixed to their carriages. *Hodges* v. *London Tramways Omnibus Co.*, 12 Q. B. D. 105; 50 L. T. 262; 32 W. R. 616.

Nuisance—Reasonable Use of Property.]—It is not a sufficient defence to an action for an injunction to restrain a nuisance to prove that the nuisance is caused by a perfectly reasonable use of defendant's property. *Reinhardt* v. *Mentasti*, 58 L. J., Ch. 787; 42 Ch. D. 685; 61 L. T. 328; 38 W. R. 10.

The defendant, who was a hotel proprietor, placed in his kitchen and used in the course of his business a large cooking range, with a shaft for hot air, which interfered with the comfort of the plaintiff's house by overheating his wine cellar:—Held, that although the use by the defendant of the range and shaft was perfectly reasonable, the plaintiff was entitled to an injunction to restrain the nuisance caused thereby to him. *Broder* v. *Saillard* (2 Ch. D. 692) followed. *Ib.*

Application to Parliament—Jurisdiction.]—The court has no jurisdiction to restrain a railway company from applying to parliament for an act giving them new powers, and repealing restrictions contained in an act they have already obtained. *Steele* v. *North Metropolitan Ry.*, 15 L. T. 561.

Though it is clear that the court, by means of its jurisdiction in personam, can restrain an application to parliament for a private act, it is almost impossible to conceive a case in which that jurisdiction would be exercised. Injunction which had been granted by Stuart, V.-C., to restrain from further promoting a bill in parliament, dissolved on appeal. *Hartridge and Allender, Ex parte, L. C. & D. Ry., Ex parte*, 20 L. T. 718; 17 W. R. 946—L. JJ.

Railway Company—Dispute as to Possession of Line—Account.]—Disputes having arisen between a railway company and a contractor employed in making the railway, the company insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line and materials, and complete the works themselves; and the contractor resisting such claim, imputing the backward state of the works to the acts of the company, and holding forcible possession; collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other, and the completion

and opening of the railway for traffic being in the meantime delayed, the court, on the application of the company, restrained the contractor from continuing on the line, or interfering with the operations of the company; directed an account of what was due to the contractor for works and materials done and provided, without regard to the formal certificates of the company's engineer, and an issue to try whether the company, at the time they proceeded to enter upon the works and remove the contractor, were lawfully justified in so doing; reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial and the report. *East Lancashire Ry.* v. *Hattersley*, 8 Hare, 72.

Injunction Granted though not Asked for.]—At the hearing an injunction may be granted, although not prayed for by the bill. *Reynell* v. *Sprye*, 1 De G. M. & G. 660; 21 L. J., Ch. 633.

Contract for Personal Service — Contract by Telegraph Company to Supply Tape-recording Instruments.]—Held, that, although, under the circumstances of the case, there had been breaches by the defendants of two contracts, the plaintiff was entitled to damages only, and not to an injunction, the contracts being for personal service in reference to a chattel. *Cochrane* v. *Exchange Telegraph Co.*, 65 L. J., Ch. 334.

The defendant had agreed to act as servant to the plaintiff, and to no other person, for seven years, with power to either party to determine the agreement on payment of 500*l*. Defendant having engaged himself to another master, Wood, V.-C., granted an injunction, which the L.JJ. dissolved on the defendant bringing into court 600*l*. *Thornton* v. *Kendall*, 1 N. R. 391; 11 W. R. 352—L. JJ.

—— **Stipulation not to Dismiss—Stipulation Negative in Form but Positive in Substance.**]—A stipulation in an agreement for service between a carrier and his manager, that the former would not require the latter to leave his employ and determine their agreement, though negative in form, is positive and affirmative in substance, and cannot be enforced by injunction. *Davis* v. *Foreman*, 64 L. J., Ch. 187; [1894] 3 Ch. 654; 8 R. 725; 43 W. R. 168.

—— **Absence of Negative Stipulation.**]—The defendant agreed to become manager of the plaintiff company's works for a certain period, and during that period to "give the whole of his time to the company's business." The agreement was wholly affirmative, and contained no express stipulation that the defendant should not do any particular thing. He being about to set up and become a director of a rival company:—Held, that, there being no negative stipulation in the agreement restraining the defendant from so doing, the court could not grant an injunction. *Montague* v. *Flockton* (L. R. 16 Eq. 189) commented on. *Whitwood Chemical Co.* v. *Hardman*, 60 L. J., Ch. 428; [1891] 2 Ch. 416; 64 L. T. 716; 39 W. R. 433—C. A.

—— **Theatrical Engagement—Contract to Act with a Company for a certain Period—Stipulation against Acting elsewhere.**]—Defendant, an actor, agreed with plaintiff, a theatrical manager, to act and to understudy as a member of plaintiff's company on tour in America for twenty-five weeks, or longer if required, but not more than forty weeks, subject to certain rules, by one of which no member of the company was allowed to act at any other theatre without permission. Shortly after the beginning of the tour plaintiff produced a play in America, in which defendant was not given a part to act, but was called on to understudy. A week later defendant wrote asking plaintiff to cancel the engagement, and this being refused defendant returned to England, and entered into an engagement and acted at a theatre in London. Defendant alleged in his affidavit that plaintiff had verbally promised that defendant should perform in certain parts, but had not kept such promise. On an application for an injunction to restrain defendant from acting at any theatre other than where plaintiff's company played:—Held, that the negative stipulation against acting elsewhere could be enforced by injunction, that the alleged verbal promise could not, in the absence of any circumstances showing want of good faith on plaintiff's part, be considered in construing the contract, that the allotting of parts to defendant was no part of the consideration, that plaintiff had not failed to carry out his part of the contract, and an injunction ought to be granted. *Fechter* v. *Montgomery* (33 Beav. 22) distinguished. *Grimston* v. *Cuningham*, [1894] 1 Q. B. 125.

Where an actor agreed to act for a certain time at a certain theatre, and not elsewhere:—Held, that the court could not enforce the positive part of the contract, and therefore would not restrain a breach of the negative part. *Kemble* v. *Kean*, 6 Sim. 333.

Injunction granted to restrain an actor from playing during the ordinary hours of performance at any other theatre than that at which he has agreed to perform exclusively during the time specified in the agreement. *Webster* v. *Dillon*, 3 Jur. (N.S.) 432; 5 W. R. 867.

Agreement to Serve as Manager in Business—Discretion of Court.]—Where in breach of an agreement by the defendant to serve the plaintiff for fourteen years as manager of his business (which agreement contained no express negative covenants), the defendant left the plaintiff, and started a similar business a few doors off:—Held, that the court had power to grant an injunction, but that the power was discretionary, and the case was not one for its exercise. *Jackson* v. *Astley*, 1 Cab. & E. 181.

See also cases sub tit. CONTRACT.

—— **Agreement by Employed to "Act Exclusively for" Employers—Absence of Negative Covenant—Breach—Injunction.**]—In a contract of personal service a stipulation by the employed to "act exclusively for" his employers does not, in the absence of a negative covenant, express or implied, which is sufficiently clear and definite, confer upon the employers a right to obtain an injunction against the employed to restrain him from entering into the employment of other persons. *Mutual Reserve Fund Life Assoc.* v. *New York Life Insurance Co. and Harvey*, 75 L. T. 528—C. A.

Restrictive Covenant—Occupier with Notice of.]—The owners of the freehold reversion in a

house sued A. and his son B. to restrain them from using the house in such a way as to break a restrictive covenant contained in a lease of it granted by the plaintiff's predecessor in title. The house was vested in B. for a term under an underlease which had been assigned to him. It was not shown that A. had any estate legal or equitable in the house, but there was evidence to show that he was in substance managing the business carried on there in which B. took part: —Held, that the evidence showed A. to be in joint or sole occupation of the house, and to be managing the business in it with notice of the covenants, and that even if he was nothing more than a mere occupier he was liable to an injunction to restrain him from using the house in a way forbidden by the restrictive covenants. *Mander* v. *Falcke*, [1891] 2 Ch. 554; 65 L. T. 203—C. A.

—— **Implied Prohibition.**] — An injunction will be granted to restrain an act which is not expressly, but only impliedly, forbidden by a restrictive covenant. *Hall* v. *Box*, 18 W. R. 820.

Specific Performance of Contract—Threat to Cut off Telephone Wires.]—Where a company agreed to "erect and maintain in working order" certain telephone wires and apparatus, and threatened to cut off the communication, an injunction was granted to restrain the company from so doing. *Keith, Prowse & Co.* v. *National Telephone Co.*, 63 L. J., Ch. 373; [1894] 2 Ch. 147; 8 R. 776; 70 L. T. 276; 42 W. R. 380; 58 J. P. 573.

Dissenting Chapel.]—Injunction granted to restrain trustees of a presbyterian chapel erected for religious worship in accordance with the doctrines of the church of Scotland from electing as minister a person not duly licensed by that church; but refused to restrain them from allowing persons not so licensed to officiate prior to the election. *Milligan* v. *Mitchell*, 1 Myl. & K. 446.

Against Trustee Guilty of Breach of Trust.]—Trustees of a marriage settlement, without power to lay out in land, purchased copyholds to be held on trusts as nearly as possible corresponding with the trusts of the settlement. The husband laid out money on the copyholds, and became bankrupt, and the trustees neglected to prove in respect of part of the fund which he had covenanted to pay. The surviving trustee proposing to sell the copyholds under a power in the deed executed on the purchase, motion granted for injunction to restrain his interference with the property, and for payment into court of the sum due on the husband's covenant. *Wiles* v. *Gresham*, 1 W. R. 514.

Pauper Defendant—Inadequacy of Remedy in Damages.] — Injunction granted to restrain a pauper defendant from committing acts of trespass, on the ground that a right of action for damages against a pauper did not constitute an adequate remedy. *Hodgson* v. *Duce*, 4 W. R. 576.

Nuisance—Award.] — To establish the existence of a nuisance, an award is of no less value (if the court thinks the party well advised in going to arbitration) than a verdict. *Broadbent* v. *Imperial Gas Co.*, 2 Jur. (N.S.) 1132. Affirmed, 26 L. J., Ch. 276; 3 Jur. (N.S.) 221; 5 W. R. 272.

Gas Company—Public Policy.] — Arguments from the inconvenience of preventing a gas company from carrying on their manufacture have no weight against a plaintiff who has established a clear case of nuisance. *Ib.*

While Appeal Pending.]—Injunction to restrain the infringement of a patent granted, notwithstanding that the defendant had got leave to appeal, to a patentee who had obtained a verdict at law. *Lister* v. *Leather*, 3 Jur. (N.S.) 433; 5 W. R. 550.

Breach of Statutory Prohibition.]— Where a statute contains an express prohibition on one railway company, introduced for the benefit of another, the court is bound to enforce the prohibition by injunction, though inconvenience to the public will probably result, and though it is doubtful whether the applicants will derive any benefit. *Cromford, &c., Ry.* v. *Stockport, &c., Ry.*, 3 Jur. (N.S.) 628; 5 W. R. 636.

Railway Company—Sale of Plant of Defaulting Contractor.]—A company will be restrained by injunction from selling plant belonging to a contractor who has made default, where it has power in that case to take possession of the plant at a valuation, and to allow it in account with the contractor, and has also power to use it in the construction of the line, unless it appears that there is a balance of account actually due from the contractor. *Garrett* v. *Salisbury and Dorset Junction Ry.*, L. R. 2 Eq. 358; 14 W. R. 816.

Property Acquired with Notice of Prior Contract as to its Use.]—Where property, either immovable or movable, is disposed of, with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise. *De Mattos* v. *Gibson*, 4 De G. & J. 276.

Discretion of Court—Right to Proceed after Offer of Undertaking.]—The granting of an injunction in a patent action is a matter of discretion, and it will not be granted where the defendant has offered an undertaking which will protect the plaintiff. The plaintiff has a right to have the undertaking given in court. *Jenkins* v. *Hope*, 65 L. J., Ch. 249; [1896] 1 Ch. 278; 73 L. T. 705; 44 W. R. 358.

2. Materiality of Damage.

Possible and Actual Use of Premises Regarded.] —In considering the injury caused by acts of trespass, the possible as well as the actual use of the injured premises will be regarded. *Ardley* v. *St. Pancras Union*, 39 L. J., Ch. 871.

Amount of Damage should be Considered—Reversioner.] —In considering whether an injunction should be granted, the amount of the injury sustained is material. Where a reversioner's possessory rights are being seriously injured by an act for which he would obtain very trifling damages at law, an injunction, being his only adequate remedy, may be granted.

Cooper v. *Crabtree*, 51 L. J., Ch. 544 ; 20 Ch. D. 589 ; 47 L. T. 5 ; 30 W. R. 649—C. A.

Injunction refused where no irreparable injury was shown. *Southampton (Lord)* v. *Birmingham Ry.*, 2 Jur. 1012. *North Union Ry.* v. *Bolton and Preston Ry.*, 3 Railw. Cas. 345. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 3 Macn. & G. 70 ; 20 L. J., Ch. 90 ; 14 Jur. 1125. *Sainter* v. *Ferguson*, 1 Macn. & G. 286 ; 1 H. & Tw. 383 ; 19 L. J., Ch. 170 ; 14 Jur. 255. *Hilton* v. *Granville (Lord)*, 4 Beav. 130 ; Cr. & P. 283 ; 10 L. J., Ch. 398.

In cases of trespass, under colour of title, where the mischief apprehended is irreparable, a court of equity will grant an injunction ; and whether the mischief be irreparable or not, it will by decree, if not by order, upon motion, extend the jurisdiction of preventive justice to all cases of trespass in which damages would be an inadequate and uncertain remedy, and the protection of the right in specie the only mode of doing complete justice. *North Union Ry.* v. *Bolton and Preston Ry.*, 3 Railw. Cas. 345.

What kind of Damage Necessary.]—Except in a case of irreparable damage, or of substantial damage, or, semble, of continuous damage, a court of equity will not interfere by injunction, unless the acts complained of are done under a claim of right. *Martin* v. *Douglas*, 16 W. R. 268.

Where Injunction would do Irreparable Damage.]—The court will not grant an injunction to restrain parties from proceeding to deal with property whose right, if it exists, depends upon the construction of a doubtful statute, where the granting of the injunction would for ever deprive them of an opportunity of exercising the right, especially if no irreparable mischief is to be apprehended from allowing them to proceed. *Att.-Gen.* v. *Liverpool Corporation*, 1 Myl. & C. 171.

Substantial Damage must be Shown.]—The plaintiff must satisfy the court that he has sustained substantial damage from the violation of a legal right to entitle him to an injunction. *Holyoake* v. *Shrewsbury and Birmingham Ry.*, 5 Railw. Cas. 421.

Trivial Trespasses.]—The court will not interfere to prevent trivial trespasses. *Saunders* v. *Smith*, 3 Myl. & C. 711 ; 7 L. J., Ch. 227 ; 2 Jur. 491.

Trivial Obstruction of Watercourse.]—Injunction refused, no damage being shown. *Ingram* v. *Morecraft*, 33 Beav. 49.

Right of Property.]—The jurisdiction of the high court of justice to grant an injunction does not depend on the existence of a right of property requiring protection. *Pollard* v. *Photographic Co.*, 58 L. J., Ch. 251 ; 40 Ch. D. 345 ; 60 L. T. 418 ; 37 W. R. 266.

Interference with Privacy Sufficient.]—Injunction granted to the occupier of a house in London to restrain the occupier of a neighbouring house from violating an agreement as to certain bars in front of the defendant's windows; the complaint being held not too trivial, since it related to an interference with the plaintiff's privacy. *Andover (Lady)* v. *Robertson*, 26 L. T. (O.S.) 23.

Occasional Nuisance.]—Occurrences of nuisance, if temporary and occasional only, are not grounds for the interference of the court of chancery by injunction except in extreme cases. *Swaine* v. *G. N. Ry.*, 4 De G. J. & S. 211 ; 3 N. R. 399 ; 33 L. J. Ch. 399 ; 10 Jur. (N.S.) 191 ; 9 L. T. 745 ; 12 W. R. 391.

Therefore, when a railway company carried down to and deposited on a siding to their line manure, which was occasionally not proper manure, and they occasionally allowed it to remain there longer than it ought to have remained :—Held, in a suit by a neighbouring landowner for an injunction to restrain the nuisance and for damages, that the court could not interfere by way of injunction. *Ib.*

Action by Remainderman.]—A., in 1839, demised land on a building lease for ninety-nine years, with a condition not to carry on any trade in any of the houses, but that the same should be occupied solely as private dwelling-houses. By his will, in 1844, he devised the lands, subject to the lease, to one for life, with remainder to the plaintiff. In 1854 one of the houses was occupied as a school. The tenant for life refused to interfere. Thereupon a bill was filed by the remainderman to prevent the premises from being occupied otherwise than according to the lease, i.e. as a private house. It appeared that there were other schools in the neighbourhood, but it did not appear that the testator had sanctioned any breach or waiver of the covenant :—Held, that the remainderman could not have any remedy on the mere ground of infraction of a special agreement, but must show special damage by reason of such infraction : and the Court being of opinion that no material or substantial damage to the plaintiff was established, the bill was dismissed, with costs. *Johnstone* v. *Hall*, 2 Kay & J. 414 ; 25 L. J., Ch. 462 ; 2 Jur. (N.S.) 780 ; 4 W. R. 417.

Semble, if there had been any injury to the material of the house and premises, or if a grossly noxious trade had been carried on, the plaintiff might be entitled to relief, although claiming in remainder only, and not in possession. *Ib.*

Breach of Covenant—Benefit to Covenantor.]—It is no defence to an application for an injunction to restrain a breach of covenant to say that the covenantee sustains no damage from the breach, for, if the covenantor derives any benefit therefrom, the covenantee may reasonably demand a share of it as the price of his consent. *Wells* v. *Attenborough*, 24 L. T. 312 ; 19 W. R. 465.

Where, however, an injunction would inflict great injury on the defendant, and a delay in granting it would cause little or no loss to the plaintiff, the court will not grant it on an interlocutory application, but will express its opinion and direct the motion to stand over till the hearing. *Ib.*

Right under Contract.]—The question of substantial injury is not material for the purpose of an injunction, when the right etsablished arises

under contract. *Allen* v. *Seckham*, 47 L. J., Ch. 742.

Building Land—Covenant to erect Houses of certain Value.]—A plaintiff bought certain plots on a building estate subject to certain restrictions; the defendant subsequently bought other plots with a restriction as to the value of the houses to be erected, but he proposed to build houses of less value:—Held, that the plaintiff in such a case is not obliged to prove damage in order to obtain an injunction. *Collins* v. *Castle*, 57 L. J., Ch. 76; 36 Ch. D. 243; 57 L. T. 764; 36 W. R. 300.

Breach of Statutory Provision—No Proof of Actual Damage necessary.] — Where an act of parliament contains a provision for the special protection or benefit of an individual, he may enforce his rights thereunder by an action, without either joining the attorney-general as a party or showing that he has sustained any particular damage. The Plymouth, Devonport, and Districts Tramways Act, 1882, authorised the making of tramways in the adjoining boroughs of P. and D., and provided that the defendant company should not, without the consent of the corporations of P. and D., use for public traffic any of the tramways mentioned in the act until the whole system was completed, and if either corporation should at any time complain to the board of trade that the company were not carrying out this provision, the board might direct an inquiry in the manner prescribed by the act, and the company was to abide by every order made consequent on such inquiry by the board. The company had opened and worked a tramway in P. without the requisite consent, and the corporation of D. moved for an interim injunction to restrain the company from working the section opened until the whole system in both boroughs was complete:—Held, that the injunction could be granted, as there was nothing in the section of the private act to take the case out of the jurisdiction under the Judicature Act, 1873, to grant an injunction, and that the plaintiffs were entitled to complain of the breach of the conditions imposed by the private act, without showing that they had thereby sustained any actual damage. *Devonport Corporation* v. *Plymouth and Devonport Tramways Co.*, 52 L. T. 161; 49 J. P. 405—C. A. *See Price* v. *Bala and Festiniog Ry.*, 50 L. T. 787.

Lessor and Lessee—Breach of Covenant not to Assign — Bankruptcy.] — The Court will not restrain the assignees in bankruptcy of a lessee from parting with the lease contrary to a covenant therein, unless irreparable damage is likely to result from the assignment. *Dyke* v. *Taylor*, 30 L. J., Ch. 281; 7 Jur. (N.S.) 83; 3 L. T. 717; 9 W. R. 403—L.JJ.

Ancient Lights — Plaintiff with Limited Interest.]—An injunction to restrain interference with ancient lights will not be granted on the application of a tenant from year to year under notice to quit, who has sustained no serious damage. *Jacomb* v. *Knight*, 2 N. R. 295; 8 L. T. 621; 11 W. R. 812—L.JJ.

Not every interference with access of light will entitle a plaintiff to an injunction. Material damage must be shown. *Curriers' Co.* v. *Corbett*, 2 Dr. & Sm. 355; 12 L. T. 169; 13 W. R. 1056.

Breach of Covenant.] — Before the court will refuse to enforce a covenant it must be satisfied that no substantial damage can arise from the breach. *Lloyd* v. *L. C. & D. Ry.*, 34 L. J., Ch. 401; 11 Jur. (N.S.) 380; 12 L. T. 363; 13 W. R. 698—L.JJ.

Offer by Plaintiff to Accept Money for Abstaining from Proceedings.]—Little weight will be attached to the argument that the plaintiff, by offering to accept a sum of money as the price of abstaining from taking proceedings, has shown that he does not apprehend irreparable damage. *Ainsworth* v. *Bentley*, 14 W. R. 630.

Nuisance.]—Where a nuisance is not temporary or trifling, but is likely to be serious and to lessen the value of the estate, an injunction will be granted. *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, 35 L. J., Ch. 382; L. R. 1 Ch. 349; 12 Jur. (N.S.) 308; 14 L. T. 154; 14 W. R. 562.

Interference with Trade—Action by Non-Traders.]—An association of shipowners and others formed for the protection of the shipping trade, but not carrying on such trade or owning goods in its corporate capacity, together with a firm of shipowners, brought an action against a dock company for an injunction to restrain them from imposing certain regulations and charges, as being ultra vires, and for a declaration that they were invalid until confirmed as required by statute:—Held, that the plaintiff firm were not entitled to an injunction without proof of special damage accruing to themselves, but that under the circumstances they were entitled to a declaratory judgment under Order XXV. r. 5. *London Association of Shipowners* v. *London and India Docks Joint Committee*, 62 L. J., Ch. 294; [1892] 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195—C. A.

Waste—Remedy in Damages Sufficient.]—On an information filed by the attorney-general praying that the defendant might be restrained from cutting trees or underwood within a royal forest:—Held, that, though the vert of a forest is a necessary part of the forest, still, as no irreparable injury to the vert was shown, the act of the defendant, assuming the locus in quo to be within the forest, was a trespass in the nature of waste, which might be compensated in damages, and therefore that no injunction could be granted. *Att.-Gen.* v. *Hallett*, 16 M. & W. 569; 16 L. J., Ex. 131.

—— **Injury to Inheritance.**]—To obtain an injunction against a defendant on the ground of waste, the plaintiff must prove that what the defendant is doing is prejudicial to the inheritance; if it improves the value of the land it is not waste. "Ameliorating waste" discussed. *Meux* v. *Cobley*, 61 L. J., Ch. 449; [1892] 2 Ch. 253; 66 L. T. 86. See also *Grand Canal Co.* v. *McNamee*, 29 L. R., Ir. 131—C. A.

Small Excess in Height of Building.]—Although a court of equity has power to restrain parties from using a building which has been erected in a form that is in violation of the terms of a contract, or of an act of parliament, yet a small excess in the height of a building

beyond that to which it might lawfully have been raised, where no irreparable injury arises from such excess in height, would not be a case in which the court would interfere to restrain the use of the building after it had been erected. *Dover Harbour (Warden)* v. *S. E. Ry.*, 9 Hare, 493 ; 21 L. J., Ch. 886.

3. Threatened Damage.

Public Bodies.]—Injunction, at the instance of parliamentary commissioners for cleansing and improving the river Witham and its navigation, and the drainage of the adjacent lands, against the erection or use of a steam engine, by parliamentary trustees for draining a particular district, applied for on the ground of probable damage to the banks of the river, into which an increased body of water was thereby expected to be thrown ; and, also, on the ground of apprehended injury to the drainage of the lands, within the jurisdiction of the commissioners, refused. Principles upon which the court proceeds in interposing by injunction between public companies or trustees in cases of apprehended mischief or nuisance. *Ripon (Earl)* v. *Hobart*, 3 Myl. & K. 169 ; Coop. t. Brougham, 333 ; 3 L. J., Ch. 145.

Unless an actual injury results to a private individual himself from the excessive exercise of the powers of a company, he is not entitled to an injunction. *Ware* v. *Regent's Canal Co.*, 28 L. J., Ch. 153 ; 5 Jur. (N.S.) 25 ; 7 W. R. 67.

Infringement of Legal Right.]—When an injunction is sought in aid of a legal right, the court is bound to grant it if the legal right is established. *Fullwood* v. *Fullwood*, 47 L. J., Ch. 459 ; 9 Ch. D. 176 ; 38 L. T. 380 ; 26 W. R. 435.

The circumstance that a party is commencing operations avowedly for a purpose which another conceives to be injurious to him and illegal, does not warrant the latter in applying for an injunction, unless the circumstances of the case at the time when the motion is made are such as to enable the court either to form its own opinion as to the legality of the meditated purpose, or to put that question into a course of immediate trial. *Haines* v. *Taylor*, 2 Ph. 209 ; 11 Jur. 73.

No Intention to do Acts sought to be Restrained.]—To warrant the court in granting or continuing an injunction, it must be reasonably satisfied that there is an intention on the part of the defendant to do the acts sought to be restrained, or at least that there is probable ground for believing that, unless the injunction is granted, there is danger of such acts being done ; and it is not a sufficient ground for granting an injunction that if there is no such intention it will do the defendant no harm. *Dunn* v. *Bryan*, Ir. R. 7 Eq. 143.

The court will not interfere to restrain future acts of a wrongdoer, unless it is plain that they will be of a wrongful nature. *Aldebert* v. *Leaf*, 3 N. R. 455.

Imminent or Apprehended Injuries.]—Unless in a very clear case the court will not, with the previous decision of a jury, restrain by a perpetual injunction the erection of buildings which it is alleged will obstruct ancient lights. *Hertz* v. *Union Bank of London*, 24 L. T. (o.s.) 186 —L.J.

The court has jurisdiction by injunction to protect property from an act threatened, which, if completed, would give a right of action ; and an injunction will be granted if the person threatened is free from blame, and shows that an action for damages would be no adequate redress. *Austria (Emperor)* v. *Kossuth*, 3 De G. F. & J. 217 ; 30 L. J., Ch. 690 ; 7 Jur. (N.S.) 639 ; 4 L. T. 494 ; 9 W. R. 712.

Excavations—Danger to Adjoining Houses.]—The court will restrain excavations which threaten danger to adjoining houses, though the actual resulting damage may be small. *Dent* v. *Auction Mart Co.*, 35 L. J., Ch. 555 ; L. R. 2 Eq. 338 ; 12 Jur. (N.S.) 447 ; 14 L. T. 827 ; 14 W. R. 709.

Building—Hiding from View Goods in a Shop.]—But the court will not restrain the erection of buildings which merely prevent goods displayed in a shop from being seen from places whence they would previously have been seen. *Smith* v. *Owen*, 35 L. J., Ch. 317 ; 14 W. R. 422.

Threatened Act alleged to be Violation of Legal Right.]—In order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, the plaintiff must show that the act must result in a violation of such right. *Pattison* v. *Gilford*, 43 L. J., Ch. 524 ; L. R. 18 Eq. 259 ; 22 W. R. 673.

Threatened Interference with Right of Shooting.]—The owner of an estate, the shooting over which had been let for a term of years, issued particulars of sale of the estate in thirteen lots, stating that the estate contained several plots of accommodation and building land suitable for the erection of villas and residences, and describing one lot in particular as well situated for the erection of a house. The particulars showed that it was intended to make a road through the estate and dedicate it to the public ; but gave full notice of the right of shooting :—Held, that the court would not, at the instance of the owner of the right of shooting, interfere to prevent the intended sale. *Ib.*

To Restrain Parting with Legal Estate.]—In an action by an equitable mortgagee for sale or foreclosure the court granted an interim injunction to restrain dealing with the legal estate till the next motion day, on an ex parte application by the plaintiff ; there being ground for believing that the defendants intended to part with the legal estate pendente lite. *London and County Banking Co.* v. *Lewis*, 21 Ch. D. 490 ; 47 L. T. 501 ; 31 W. R. 233—C. A.

Threatened Breach of Agreement to keep Farm Properly Stocked.]—An injunction will not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper and sufficient stock of sheep, horses, and cattle. *Phipps* v. *Jackson*, 56 L. J., Ch. 550 ; 33 W. R. 378. See also *Fleming* v. *Snook*, 5 Beav. 250.

Past Infringement of Patent—Intention to

Infringe.]—In August, 1882, A. set up in B.'s factory four machines of his own make to be taken and paid for if they worked to B.'s satisfaction. They were used till April, 1883, when B., being dissatisfied with them, took them down, laid them in his yard, called on A. to take them away, and never used them again. A. did not take them away till January, 1885. In March, 1887, P., who had obtained a judgment against A. that A.'s machines were an infringement of a patent belonging to him, claimed royalties from B. B. replied that P. could satisfy himself by calling at B.'s mill that B. was using neither P.'s nor A.'s machines, and had no intention of so doing. Further correspondence took place, and B. denied all liability, alleging that he had not bought the machines from A., who had set them up on trial, and as they did not work well had to take them down, and that B. had not used and was not using any machine which infringed P.'s patent. In January, 1888, P. brought his action in the chancery of the county palatine against B. for an injunction and an account or damages. B. put in a defence denying infringement, and stating that if he ever had used machines infringing the patent such user had been discontinued long before the action, as the plaintiff knew, and that B. never threatened or intended and did not threaten or intend to use any apparatus infringing the patent. The vice-chancellor granted an injunction and an inquiry as to damages:—Held, on appeal, that though B. had infringed the patent, it was not to be inferred from the circumstances that he had any intention to infringe it again, and that P., if he had made such inquiry as he ought, would have discovered this; that there was, therefore, no case for an injunction, and that (the court of the county palatine having only the old chancery jurisdiction) damages could not in that case be given. The judgment of the vice-chancellor was therefore discharged, but as B. had not given full information, which would probably have prevented litigation, the action was dismissed without costs, the defendant receiving only his costs of the appeal. *Millington* v. *Fox* (3 My. & Cr. 338) distinguished. *Proctor* v. *Bayley*, 59 L. J., Ch. 12; 42 Ch. D. 390; 61 L. T. 752; 38 W. R. 100—C. A.

Apprehended Repetition of Nuisance—Refusal to give Undertaking.]—An action was brought by inhabitants of houses abutting on an open and unbuilt-on area of land situate in the centre of a town, adjoining the market-place, and known as Market-square, for an injunction to restrain the owner thereof from using, or causing or permitting the same to be used for the purpose of any sports, exhibitions, entertainments, or otherwise, whereby a nuisance might be occasioned to the annoyance and injury of the plaintiffs. It appeared that in June, 1889, the defendant's agent licensed S. to use Market-square for holding a public show for several days, S. paying 6*l*. The show consisted of a large circular roundabout worked by a steam-engine, which engine also worked an organ; a large circular mechanical switchback worked by another steam-engine, which worked a second organ; a shooting gallery; and a boxing booth. Whilst the show was going on, the plaintiffs complained to the defendant's agent, and a correspondence ensued, which resulted in the defendant's agent declining to give an undertaking, and expressing his intention of allowing persons to use Market-square for public shows:—Held, that, as the defendant contended that he had the right to do the thing complained of, and had refused to give an undertaking, the inference was that there would be a repetition of the nuisance; and that therefore the plaintiffs were justified in bringing the action, and were entitled to an injunction. *Phillips* v. *Thomas*, 62 L. T. 793.

Nuisance—Smallpox Hospital—Interim injunction.]—An interim injunction will not be granted in a quia timet action, unless the plaintiff makes out a strong case of probability that the apprehended mischief will in fact arise:—Quære, whether, in the case of an hospital, the health of the public at large may not be considered to some extent as against the merely local inconvenience. *Att.-Gen.* v. *Manchester Corporation*, 62 L. J., Ch. 459; [1893] 2 Ch. 87; 3 R. 427; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.

To Restrain Persons from Acting under Faculty when Granted.]—It is an abuse of the process of the court to ask for an injunction to restrain the vicar and churchwardens of a parish from acting under a faculty which has not yet been granted by an ecclesiastical court. *Proud* v. *Price*, 63 L. J., Q. B. 61; 9 R. 40; 69 L. T. 664; 42 W. R. 102—C. A.

Trade Mark—Providing Instruments of Fraud.]—The court will restrain a man from providing others with the means of committing fraud, and will not wait till the fraud is completed. A printer will therefore be restrained from printing and selling labels in fraudulent imitation of the plaintiff's trade-marks. *Farina* v. *Silverlock*, 1 Kay & J. 509; 3 W. R. 532. (Reversed on other point, 4 W. R. 731.)

Public Nuisance.]—The court will not interfere on a case of merely prospective nuisance by draining towns into public rivers. The nuisance must be actual and existing, not future, however strongly the apprehension of damage may be supported by scientific evidence. *Att.-Gen.* v. *Kingston-on-Thames Corporation*, 11 Jur. (N.S.) 597; 12 L. T. 665; 13 W. R. 888. See also *Att.-Gen.* v. *Forbes*, 2 Myl. & Cr. 123.

Mandatory Injunction.]—The court will grant a mandatory injunction to prevent risk of irreparable injury to adjoining property from the presence of a combustible substance, where the danger is pressing and there is ground for an indictment. Plaintiffs put on terms to indict forthwith. *Hepburn* v. *Lordan*, 34 L. J., Ch. 293; 11 Jur. (N.S.) 122, 254; 13 W. R. 368, 1004.

Restraining Sale of Goods.]—Application to stay disposal of personals must show specific right to property, and danger of same being lost. *Ximenes* v. *Franco*, Dick. 149.

Misapplication of Corporate Property.]—A municipal corporation regulated by 3 & 4 Vict. c. 108, promoting a local improvement bill by a petition to which they have affixed the corporate seal, will be restrained from applying any of their trust property towards the expenses of the bill without the subsequent sanction of parlia-

ment, even before any such property has been actually so applied, if the liability has been incurred. *Att.-Gen*, v. *Waterford Corporation*, Ir. R. 9 Eq. 522—C. A.

4. Balance of Convenience to be Regarded.

In granting an injunction the court must look at the balance of convenience. *Att.-Gen.* v. *Dorking Union*, 51 L. J., Ch. 585; 20 Ch. D. 595; 46 L. T. 573; 30 W. R. 579—C. A. S. P., *Read* v. *Richardson*, 45 L. T. 54—C. A.

Upon an application for an interlocutory injunction, the court should take into account the balance of convenience; and if, on the one hand, irreparable injury may be caused by withholding the injunction, while, on the other hand, any injury occasioned by the injunction can be compensated by damages, the court will grant the injunction, upon the plaintiff undertaking to abide any order as to damages that may afterwards be made in the suit. *Cork Corporation* v. *Rooney*, 7 L. R., Ir. 191.

Injunction to restrain the defendants from entering into an agreement with another railway company, which would be a violation of or inconsistent with a subsisting agreement between the plaintiffs and defendants, refused; the inconvenience to arise from granting the injunction being greater than the inconvenience to arise from refusing it. *Shrewsbury and Chester Ry.* v. *Shrewsbury and Birmingham Ry.*, 1 Sim. (N.S.) 410; 20 L. J., Ch. 574; 15 Jur. 548.

The plaintiff, by virtue of a grant from the crown, made 36 Hen. 8, claimed, as lord of the manor of C., to be entitled to the beach or shore of the sea between high- and low-water mark. The defendants, the surveyor of highways, took the stones to mend the highway of the parish. Upon a bill filed by the plaintiff against them, the defendants put in their answer, denying the right claimed by the plaintiff, and insisting upon their right to take the stones by custom, by prescription, and also under the Highways Act, 5 & 6 Will. 4, c. 50. Upon a motion to dissolve the injunction obtained by the plaintiff:—Held, that the rights claimed by the plaintiff were legal, and must be decided by an action; that the court must consider which of the two parties was likely to sustain more injury; that, notwithstanding the want of distinct evidence respecting injury, the court, to prevent a possible mischief, would grant an injunction, and give the plaintiff leave to bring an action, but it refused to say that he must do so. *Clowes* v. *Beck*, 20 L. J., Ch. 505.

The court will not, by interlocutory injunction, restrain one of the parties to a contract from an act for which, if wrongful, the plaintiff can obtain compensation in damages at the hearing of the cause, and where the contract is one of which specific performance cannot be decreed as against the plaintiff. *Garrett* v. *Banstead and Epsom Downs Ry.*, 11 Jur. (N.S.) 591; 12 L. T. 654; 13 W. R. 878.

Where on motion for an interlocutory injunction the rights of the parties are doubtful on the evidence, the court will act on the consideration of the comparative injury which may arise from granting or withholding the injunction. *Ib.*

On a motion for an interim injunction, the court, holding that the plaintiffs had shown an intention to preserve and not to abandon their ancient lights, and that there was a fair question of right to be tried at the hearing, and considering that the balance of convenience was in favour of granting an injunction rather than allowing the defendants to complete their building with an undertaking to pull it down if required to do so, granted an injunction till the hearing. *Newson* v. *Pender*, 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243—C. A.

Upon an interlocutory motion to restrain the defendant from diverting the flow of water in a river, the court, upon the balance of convenience, refused an injunction until the plaintiff should have established his right at law. *William* v. *Heath*, 1 L. T. 267.

Defendants proposing to alter their landing-place, plaintiffs objected that under their act the defendants could not do so. The court, being satisfied that the alteration would be a public convenience, refused to interfere, whether or not the defendants were authorised by their act. *Ryde Commissioners* v. *Isle of Wight Ferry Co.*, 30 Beav. 616.

Breach of Covenant — Mistake.]—Where a breach of covenant is threatened the court will not refuse to interfere on the ground that there has been a mistake by both parties in the form of the covenants, or on the ground of inconvenience to the public. *Lloyd* v. *L. C. & D. Ry.*, 34 L. J., Ch. 401; 11 Jur. (N.S.) 380; 12 L. T. 363; 13 W. R. 698—L.JJ.

Railway Company.]—Injunction refused to restrain railway company from taking land, where compensation would be given, and the stopping of the works would be a public inconvenience. *Wood* v. *Charing Cross Ry.*, 33 Beav. 290.

Restraining Action for Breach of Covenant.]—Where a lessee had covenanted not to erect any new buildings without leave, and lessor brought ejectment for a breach, but the breach was such that it could be remedied in a day:—Held, on the balance of convenience, that an injunction to restrain the action ought to be granted. *Haigh* v. *Waterman*, 16 L. T. 375.

5. Delay and Acquiescence.

Where party allows and acquiesces in erection of a nuisance, he shall be stayed in action at law. *Anon.*, 2 Eq. Abr. 522.

An injunction, although the facts in support of it are sufficient, will not be granted unless the application is made speedily. *Isaacson* v. *Thompson*, 41 L. J., Ch. 101; 20 W. R. 196. And see *Clover* v. *Roydon*, 43 L. J., Ch. 665; L. R. 17 Eq. 190; 29 L. T. 639; 22 W. R. 254. *Gaskin* v. *Balls*, 13 Ch. D. 342; 28 W. R. 552—C. A. *Goodson* v. *Richardson*, 43 L. J., Ch. 790; L. R. 9 Ch. 221; 30 L. T. 142; 22 W. R. 337.

Effect of delay on suit for injunction. *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212; 28 L. J., Ch. 153; 5 Jur. (N.S.) 25; 7 W. R. 67.

Remedy Barred by Acquiescence.]—A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors, and with the purchasers of the other lots entitled to

the benefit of the covenant, not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an "off" licence, to restrain him from breaking his covenant, and for damages. The plaintiff had known for three years before the action was commenced that the defendant was using his house as a beershop, and had himself bought beer at the shop. There was evidence that some of the houses built on other lots had been for some time used as shops notwithstanding the covenant, and that some of the houses near the plaintiff's house were occupied, not each by a single tenant, but by two families at weekly rents:—Held, that the change in the character of the neighbourhood was not in itself a ground for refusing relief to the plaintiff, as the change was not caused by his conduct; but that the plaintiff had lost the right to enforce his covenant either by injunction or damages through his acquiescence in the proceedings of the defendant. *Bedford (Duke)* v. *British Museum (Trustees)* (2 My. & K. 552) explained. *Sayers* v. *Collyer*, 54 L. J., Ch. 1; 28 Ch. D. 103; 51 L. T. 723; 33 W. R. 91; 49 J. P. 244—C. A.

Per Fry, L. J.:—An amount of acquiescence on the part of the plaintiff which would not be sufficient to bar his action, may be sufficient to induce the court to give damages instead of an injunction. *Ib.*

The plaintiff and the defendants held under the same superior lease which contained a covenant that nothing should be hung or exposed for sale or otherwise outside the premises. The defendants had committed a breach of the covenant, and there was such an unreasonable user of the highway as to amount to a public nuisance, and the plaintiff had sustained some damage. During the eighteen years for which the nuisance had existed, the plaiutiff had only once complained about it to the defendants:—Held, that there was such acquiescence on the part of the plaintiff in the nuisance that an injunction would not be granted. *Gaunt* v. *Fynney* (L. R. 8 Ch. 8) followed. *Rogers* v. *G. N. Ry.*, 53 J. P. 484. See also *Rochdale Canal Co.* v. *King*, 1 W. R. 278.

Delay.]—A delay of fourteen months by a plaintiff in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to such acquiescence as to disentitle him to an injunction. *Northumberland (Duke)* v. *Bowman*, 56 L. T. 773.

Effect of delay on the part of a plaintiff in equity, seeking to stay a proceeding at law. *M'Lure* v. *Ripley*, 2 Macn. & G. 276, n.

Where there has been delay in the assertion of a legal right, and the damage sustained is slight, the court will not grant an injunction. *Wintle* v. *Bristol, &c. Ry.*, 6 L. T. 20; 10 W. R. 210.

The prosecution of an action by surveyors against a railway company for a large balance not restrained where the bill filed by the company sought a discovery as to documents in order for the defence, and the injunction had not been applied for till more than a year after action. *S. E. Ry.* v. *Martin*, 1 H. & Tw. 69; 2 Ph. 758; 18 L. J., Ch. 103; 13 Jur. 1; 12 id. 1062.

Public Right—Growing Nuisance.]—Though the public can lose their right to an injunction by laches, this does not apply to the case of a gradually growing nuisance. *Att.-Gen.* v. *Bradford Navigation Co.*, 35 L. J., Ch. 619; 15 L. T. 9; 14 W. R. 579.

Public Convenience — Breach of Statutory Contract.]—In an action brought to obtain a mandatory injunction to compel the defendants to pull down a goods station and cattle shed which they had erected 140 yards from Bala station, in the face of an act which provided "that at that station there should be no goods or cattle station:" the plaintiff had not objected to the buildings till they were nearly completed, owing to his being abroad at the time, and ignorant of their erection until his return. The defendants contended that the buildings in question had not been erected "at" the station, as they were 140 yards off; that, if they had been, it was for the public convenience they should be there, and that the plaintiff was precluded by his acquiescence from now obtaining a mandatory injunction to remove:—Held, that by sub-s. 6 the defendants had made a statutory contract not to do what the court was of opinion they had done, so that the question of public convenience did not apply, and that the acquiescence of the plaintiff was not such as would preclude him from obtaining the injunction, but that the court would grant one, compelling the defendants to remove the buildings as prayed. *Price* v. *Bala and Festiniog Ry.*, 50 L. T. 787.

Patent.]—A special injunction, on notice, to prevent the infringement of a patent refused, on the ground of delay, notwithstanding the court had a strong impression in favour of the plaintiff's right. *Bridson* v. *Benecke*, 12 Beav. 1.

Bankrupt.] — After repeated acts of acquiescence of the bankrupt in the validity of a commission, and the dismissal of a former petition by him to the lord chancellor to supersede it, the court will restrain him from bringing actions against his assignees. *White, Ex parte*, 4 Deac. & C. 279; 2 Mont. & Ayr. 104; 4 L. J., Bk. 50.

Laches.—A court of equity frequently refuses an injunction, where it acknowledges a right, when the conduct of the complaining party has led to the state of things which occasions the application. *Saunders* v. *Smith*, 3 Myl. & C. 711; 7 L. J., Ch. 227; 2 Jur. 491.

Effect of laches in depriving a party of his remedy by injunction. *Blakemore* v. *Glamorganshire Canal Navigation Co.*, 1 Myl. & K. 154; 2 L. J., Ch. 95; *Ward* v. *Higgs*, 12 W. R. 1074.

If the parties complaining of an interruption in their enjoyment of an easement, fail to institute proceedings to stop it until the new building has been completed, the court will not grant an injunction to restrain the interruption, but will leave them to their remedy at law. *Cooper* v. *Hubbuck*, 7 Jur. (N.S.) 457; 9 W. R. 352.

Laches may be a defence to an application for an injunction by way of information as well as upon a bill. Effect of a protest in negativing laches. *Att.-Gen.* v. *Sheffield Gas Consumers*

Co., 3 De G. M. & G. 304 ; 22 L. J., Ch. 811 ; 17 Jur. 677 ; 1 W. R. 185.

Injunction refused to the owner of land on which a railway company having statutory powers were about to enter, because by his silence and conduct he had permitted the company to carry on their works on the supposition that they were entitled to enter. *Greenhalgh* v. *Manchester and Birmingham Ry.*, 3 Myl. & Cr. 785 ; 8 L. J., Ch. 75.

A broad gauge railway company were shareholders in a mixed gauge railway company, who, by their act, were bound to construct their line throughout on the broad gauge, and as to part on the narrow gauge also. In March, 1852, they filed a bill, stating that the mixed gauge railway company were about to construct the line throughout on the narrow gauge, although their funds were insufficient to enable them to do this, and also to comply with their act as to laying down the broad gauge. The bill sought an injunction to restrain the opening of any part of the narrow gauge line, and the further construction upon that gauge, until the broad gauge was complete. In April, 1852, the injunction was refused. From that time contests were carried on in parliament between the two companies, ending in the rejection of certain bills solicited by the mixed gauge company. From August, 1852, to January, 1853, correspondence was carried on between them as to traffic arrangements. Principles on which the court acts in refusing applications, either original or by way of appeal, on the ground of laches. Effect of objection in excluding laches. *G. W. Ry.* v. *Oxford, Worcester, and Wolverhampton Ry.*, 3 De G. M. & G. 341.

In January, 1853, the broad gauge company filed a new bill, and sought an injunction to restrain the opening by the mixed gauge railway of any portion of the line upon the narrow gauge before the broad gauge was completed. In the same month they moved for an injunction in the new suit, and also appealed from the refusal of the injunction in April, 1852 :—Held, that both motions were too late. *Ib.*

When a corporation with power to prescribe the line of road within which future building should be erected, allowed the defendant to make some progress with the building of his church, which projected beyond the line afterwards prescribed by the corporation, a motion for an injunction to compel him to put the walls back within the line was refused. *Folkestone Corporation* v. *Woodward*, 42 L. J., Ch. 782 ; L. R. 15 Eq. 159 ; 27 L. T. 574 ; 21 W. R. 97.

An action was instituted to restrain a local board from taking proceedings for the recovery of a penalty from the plaintiff for having advanced his building beyond the line of frontage. His case was that it would be inequitable to allow such proceedings to be taken, the plans having been laid before the local board, and the board having stood by and allowed the plaintiff to expend his money. An application by the plaintiff for an injunction was refused. *Kerr* v. *Preston Corporation*, 46 L. J., Ch. 409 ; 6 Ch. D. 463 ; 25 W. R. 264.

Trespass — Delay — Motion to Commit.]—Though the court will not restrain an action of trespass by a party through whose estate a canal is cutting, for deviating from the line, because he has lain by, and rested upon his legal rights ; yet, if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so without a trial by jury in a disputed case and directing an issue at law. *Agar* v. *Regent's Canal Co.*, G. Coop. 77 ; 14 R. R. 217.

Infringement of Patent.]—Where plaintiff knew of infringement in August, and wrote to defendant complaining in November, but did not file his bill till the following July, interlocutory injunction refused on the ground of delay. *Bovill* v. *Crate*, L. R. 1 Eq. 388.

Riparian Owners—Pollution of Stream.]—See *Att.-Gen.* v. *Halifax Corporation*, 21 L. T. 52 ; 17 W. R. 1088.

Agreement, Violation of, by both Parties.]—A party seeking relief by injunction must state in his bill the whole of the agreement in respect of which he seeks relief. The court will not grant relief by injunction when there has been for a considerable time a violation of the agreement by both plaintiff and defendant. *Sheard* v. *Webb*, 2 W. R. 343.

Patent—Right to an Account.]—Relief in respect of the infringement of a patent refused on the ground of delay. An account is an ancillary remedy, and is the equitable way of estimating damages where it has been necessary to interfere by injunction. *Smith* v. *L. & S. W. Ry.*, 1 Kay, 408 ; 2 Eq. R. 428 ; 23 L. J., Ch. 562 ; 2 W. R. 310.

Sale of Land—Stipulation for certain Works.]—A vendor of land, who on the agreement for sale in 1847 had stipulated for certain works to be done by the purchaser on the land sold :—Held, in 1854, to be entitled to an injunction to restrain a breach of the agreement, the works having then been lately commenced. *Foster* v. *Birmingham, Wolverhampton and Dudley Ry.*, 2 W. R. 378.

Acquiescence in Breach of Agreement in Restraint of Trade.]—Injunction to restrain breach of covenant in restraint of trade refused to plaintiff, who had for two years delayed to take proceedings. *Scarisbrick* v. *Tunbridge*, 3 Eq. R. 240.

Delay in commencing Proceedings to restrain Action at Law.]—See *Beck* v. *Dean*, 3 Jur. (N.S.) 14 ; 5 W. R. 105.

Nuisance—Chancery Amendment Act (21 & 22 Vict. c. 27).—A delay of two-and-a-half years from the time of certain alterations in a roadway will disentitle a plaintiff to relief in equity, though he suffered no damage during that time, and took proceedings promptly as soon as he was damnified. Where there is a plain common law remedy the jurisdiction of the court is not extended by the Chancery Amendment Act. *Wicks* v. *Hunt*, 1 John. 372.

Breach of Covenant.]—Where a landlord has relaxed, in favour of some of his tenants, a covenant entered into for the benefit of all, he cannot obtain an injunction to restrain the other tenants from infringing it. *Roper* v. *Williams*, Turn. & R. 18.

Purchase of Railway Stock after Acquiescence by Vendor.]—The purchaser of railway stock will not, by the acquiescence of his vendor in illegal dividends, be precluded from objecting to similar dividends in the future. *Bloxam* v. *Metropolitan Ry.*, L. R. 3 Ch. 337 ; 18 L. T. 41 ; 16 W. R. 490.

Breach of Partnership Articles.]—By articles of partnership, the partnership (which was for twenty-one years) was to be carried on for fourteen years under the style of A. & Co., and for the last seven years under the style of A. & B. During the fourteen years, and for more than a year after, the name of A. alone was stamped upon certain manufactures. Injunction to restrain the use of any other name than that of A. during the remainder of the term, refused. *Powell* v. *Allarton*, 4 L. J., Ch. 91.

Piracy of Publication—Delay.]—Injunction refused. *Lewis* v. *Chapman*, 3 Beav. 133.

Plaintiff encouraging Nuisance.]—A party may so encourage another in the erection of a nuisance as to give that other an equity to restrain him from recovering damages at law for the nuisance when completed. *Williams* v. *Jersey* (*Earl*), Cr. & Ph. 91 ; 10 L. J., Ch. 149.

Remedy not Barred.]—Where, under an agreement containing mutual grants, the plaintiffs had been put in possession of what was granted to them, and enjoyed it for several years, while the defendants took no steps to require the performance of the stipulation for their benefit, but allowed the time to expire within which it should have been performed, the court granted an injunction to restrain the defendants from disturbing the plaintiffs' enjoyment. *G. N. Ry.* v. *Lancashire and Yorkshire Ry.*, 1 Sm. & G. 81.

A plaintiff brought an action to recover damages for an injury to his business, occasioned by the erection of gas-works. The action was referred to arbitration ; nearly two years elapsed before the award was made, in the course of which time alterations in the mode of carrying on the business complained of were effected ; two months after the date of the award the injunction was applied for :—Held, that there had not been any such acquiescence as to deprive the plaintiff of his right to the injunction. *Imperial Gas Light Co.* v. *Broadbent*, 7 H. L. Cas. 600 ; 29 L. J., Ch. 377 ; 5 Jur. (N.S.) 1319.

Mere lapse of time will not be a bar to the granting of an injunction, unless it would be a bar to the legal right. *Fullwood* v. *Fullwood*, 47 L. J., Ch. 459 ; 9 Ch. D. 176 ; 38 L. T. 380 ; 26 W. R. 435.

To an action for an injunction to restrain a defendant from representing that the business carried on by him was the same as that carried on by the plaintiff, it was objected that the plaintiff had known for between two and three years before issuing his writ the facts on which he relied :—Held, that this delay was no bar to the action. *Ib.*

Distinction between the effect of acquiescence, upon a motion for an injunction and on a demurrer. In the former case, acquiescence merely prevents the special protection by injunction, but in the latter it must be such as to disentitle the plaintiff to any relief whatever. *Gordon* v. *Cheltenham Ry.*, 5 Beav. 229.

Though A. may be disentitled by acquiescence to an injunction to stop B.'s manufactory, which is noxious to the neighbourhood, yet it does not consequently follow that B. is entitled to an injunction to prevent A.'s recovering damages at law. Equity may leave both parties to their legal rights. *Bankart* v. *Houghton*, 27 Beav. 425 ; 28 L. J., Ch. 473 ; 5 Jur. (N.S.) 282 ; 7 W. R. 197.

Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage. *Ib.*

Injunction to prevent, on the ground of acquiescence, a party injured by copper works, from enforcing a judgment recovered by him for damages at law, refused, with costs. *Ib.*

Held, that certain ratepayers who had delayed from December to April, to take proceedings to restrain an improper application of the ratepayers' money by commissioners under a paving act were not thereby deprived of their right to an injunction. *Att.-Gen.* v. *Eastlake*, 11 Hare, 205 ; 17 Jur. 801 ; 1 W. R. 323.

Interlocutory Application—Trial.]—To deprive a plaintiff of a legal right at the hearing of the cause, a case of acquiescence must be shown much stronger than such as would be a sufficient defence to an interlocutory application by him, and must amount not only to positive licence, but to an implication of an actual grant. *Patching* v. *Dubbins*, 1 Kay, 1 ; 17 Jur. 1113.

In a suit for an injunction, a stronger case of acquiescence is necessary to cause the bill to be dismissed at the hearing, than that which will suffice to prevent the plaintiff from obtaining an interlocutory injunction. *Johnson* v. *Wyatt*, 3 N. R. 270 ; 33 L. J., Ch. 394 ; 9 Jur. (N.S.) 1333 ; 9 L. T. 618 ; 12 W. R. 234.

A plaintiff's right to an interlocutory injunction is not barred by laches, when he has forborne in a reasonable hope of an accommodation, and the defendant has not incurred expense or injury through the delay. *Lee* v. *Haley*, 18 W. R. 181.

The court will not grant an interlocutory injunction if the plaintiff, having sufficient notice of the defendant's intention to commit the act sought to be restrained, is guilty of unreasonable delay in applying to the court. *Salisbury* v. *Metropolitan Ry.*, 39 L. J., Ch. 429 ; 18 W. R. 484.

Interim Injunction Granted.]—If it appears that there has been unnecessary delay, an interim injunction only will be granted. *Carew* v. *Yates*, 1 W. R. 11.

Damage after Acquiescence.] — Acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended. *Western* v. *M'Dermot*, 35 L. J., Ch. 190 ; 12 Jur. (N.S.) 366. Affirmed on appeal, 36 L. J., Ch. 76 ; L. R. 2 Ch. 72 ; 15 L. T. 64 ; 15 W. R. 265.

To restrain Proceedings.]—An injunction to stay a trial at law will not be granted on the eve of the trial, where there has been delay on the part of the plaintiff in equity in making the application ; but the lapse of time before the application is made is not an objection to grant-

ing it, if the trial be not near. *Holme* v. *Brown*, 9 Hare (App.) xxix.

See also under Interlocutory Injunctions, A. g. 2, infra, col. 1555.

6. Who May be Bound.

General Rule.]—Injunction is not binding on a person not a party in the cause. *Iveson* v. *Harris*, 7 Ves. 256.

Against a Stranger.]—Order made in a summary way to restrain a person, not a party to the suit, to whom the receiver had let a farm, part of the estates in the cause, from moving hay, straw, &c., therefrom. *Walton* v. *Johnson*, 15 Sim. 352 : 12 Jur. 299.

Injunction against tenant in possession, not a party, to stay waste. *Att.-Gen.* v. *Ancaster* (*Duke*), Dick. 68.

The court will not grant an injunction to restrain waste against persons specifically who are not parties defendants to the bill ; but they may be restrained as workmen or servants of the defendants, if they fill that character. *Freeman* v. *Burke*, 7 Ir. Eq. R. 282.

For Benefit of Stranger.]—Where there is a case for special injunction, and the injunction will operate for the benefit of parties not before the court, the absence of those parties, though made the ground of demurrer to the bill, will not prevent the court from interposing. *Const* v. *Harris*, Turn. & R. 514 ; 24 R. R. 108.

Injunction cannot be extended to protect one who is not a party to the suit in equity. *Gadd* v. *Worral*, 2 Anstr. 555.

Where a bill is filed by some "on behalf, &c.," an injunction which restrains proceedings against persons not named parties to the record is irregular, per the Lord Chancellor. *Armitstead* v. *Durham*, 11 Beav. 556 ; 13 Jur. 330.

Assignee of Obligee.]—Quære, whether the proceedings of an assignee in the name of the obligee are stayed by an injunction which restrains only the obligee, his counsellors, and agents. *Montague* v. *Hill*, 4 Russ. 128.

Against Devisee.] — Perpetual injunction against defendant devisee where testator has had injunction and decree against him in same cause. *Lowe* v. *Jolliffe*, Dick. 390.

Against Under-Sheriff Refusing to Execute Writ.]—A., after judgment in ejectment and a writ of possession taken out against him, brings a bill, and has an injunction on a dedimus ; this injunction was allowed to extend to the under-sheriff, who had refused to execute the writ, and was in contempt to an attachment in the king's bench before the bill filed. —— v. *Emerton*, 1 Vern. 25.

Under Tenants.]—Where a landlord filed a bill against his immediate tenant to restrain him from cutting turf for sale, on a valuable bog appurtenant to the lands demised, and the tenant put in an answer stating, that he had never himself been in the actual occupation of any portion of the lands ; that he never by himself or any of his agents had committed the waste charged by the bill, and that if his subtenants had cut turf for sale or otherwise, he was unable to restrain them from so doing, the practice having existed previously to the lands coming into his possession :—Held, that although it did not appear whether those tenants held from year to year or had any greater interest, the injunction could not issue as they were not before the court. *Norbury* v. *Alleyne*, 1 Dr. & Wal. 337.

Public Health Act, 1875—District Board—Successors in Title.]—A decree was made in 1875 against the corporation of B., as the sanitary authority of B., granting a perpetual injunction to restrain them from allowing sewage to flow into a river so as to be injurious to health or a nuisance to the plaintiffs ; but the injunction was suspended for five years, to give the corporation an opportunity to execute certain works. After the expiration of that period the plaintiffs desired to enforce the injunction, but in the meantime the B., T., and R. district board had been constituted under the Public Health Act, 1875 (38 & 39 Vict. c. 55), as the sanitary authority of the district, in the place of the corporation of B. The plaintiffs brought an action against the B., T., and R. board, claiming a declaration that they were entitled to the same benefit of the decree as against the defendants in the present action as if they had been defendants in the former suit. The defendants demurred :—Held, that the B., T., and R. board were not made by the Public Health Act subject to any liabilities of their predecessors except those attaching under the act, and were, therefore, not bound by the decree against them ; and that, there being no allegation of any nuisance committed by the B., T., and R. board, the plaintiffs had no cause of action, and the demurrer must be allowed. *Att.-Gen.* v. *Birmingham Drainage Board*, 50 L. J., Ch. 786 ; 17 Ch. D. 685 ; 44 L. T. 906 ; 29 W. R. 793 ; 46 J. P. 36—C. A.

Granting, on all Defendants Resigning Office.]—A bill having been filed against a local board of health alleging that it was committing a nuisance, and praying for an injunction to restrain it, all the members of the board resigned. There being no defence to the suit, the injunction was granted in the terms of the first paragraph of the prayer of the bill. *Hardinge* v. *Southborough Local Board*, 32 L. T. 250.

Adding Plaintiff—Where Original Plaintiff going Abroad.]—In an action for an injunction to restrain the defendants from using certain premises as a small-pox hospital, application was made under Ord. XVI. r. 13, by the plaintiff, to join another person, with his consent, who was an inhabitant of the same neighbourhood, on the ground that since the action was brought the original plaintiff had given up business, and was going abroad. The application was refused on the ground that the cause of action was injury to the plaintiff's own property only, and it was not "necessary, in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action," that any other person should be added as plaintiff within Ord. XVI. r. 13. *Dalton* v. *St. Mary Abbotts, Kensington*, 47 L. T. 349.

Covenant in Restraint of Trade—Breach by Covenantor's Tenant.]—Where breaches of a covenant in restraint of trade are being com-

mitted by the covenantor's tenant, who is not a party, an injunction may be granted against the covenantor, his servants and agents, but not against the tenant. *Hodgson* v. *Coppard*, 30 L. J. Ch. 20; 7 Jur. (N.S.) 11; 9 W. R. 9..

7. INTERLOCUTORY AND INTERIM INJUNCTIONS.

An interlocutory order for an injunction cannot be considered in argument as affecting the ultimate decision of a cause. *Drew* v. *Harman*, 5 Price, 319.

On an interlocutory application for an injunction, the court will only act prospectively, and with a view to keep matters in statu quo, and will not, unless in a very special case, grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined. *Blakemore* v. *Glamorganshire Canal Navigation Co.*, 1 Myl. & K. 154; 2 L. J., Ch. 95.

It is not necessary, for the purpose of supporting an interlocutory injunction for restraining proceeding in another court, that a case should be shown which would entitle the plaintiff to relief at all events; it is sufficient if the court finds, upon the evidence then before it, a case which makes the transaction a proper subject of investigation in a court of equity. After long acquiescence under such an order, the court will not readily entertain an application for dissolving it. *Glascott* v. *Lang*, 3 Myl. & C. 451; 8 Sim. 358; 2 Jur. 909.

In matters of great importance, which can only be properly determined at the hearing, the court is in favour of restraining destructive operations until the hearing. *Att.-Gen.* v. *Great Eastern Ry.*, 25 L. T. 867.

Injunction to stay waste only, granted on interlocutory application. *Kettle* v. *Corbin*, Dick. 314.

In no case does the court grant injunction of course till hearing. *Potter* v. *Chapman*, Ambl. 99; Dick. 146.

Exceeding Prayer.]—An injunction granted upon an interlocutory application cannot exeed that prayed by the bill. *Munro* v. *Wivenhoe and Brightlingsea Ry.*, 4 De G. J. & S. 723; 12 L. T. 562, 655; 13 W. R. 880.

General Rules.]—In a suit to restrain the publication of private letters, the court granted an interlocutory injunction, although the plaintiff did not fully prove his title to relief, on the ground that to refuse an injunction would be to determine the whole suit on an interlocutory application. *Andrew* v. *Raeburn*, L. R. 9 Ch. 522; 31 L. T. 73; 22 W. R. 564.

Where an injunction would inflict great injury on the defendant, and a delay in granting it would cause little or no loss to the plaintiff, the court will not grant it on an interlocutory application. *Wells* v. *Attenborough*, 24 L. T. 312; 19 W. R. 465.

Upon an interlocutory application the court will not decide a disputed question of title, but if it is satisfied that injury is threatened or apprehended, and the evidence that such is the case is not distinctly rebutted, an injunction will be granted. *Crosse* v. *Duckers*, 27 L. T. 816; 21 W. R. 287.

The court will not permit a defendant to take advantage of an act done with the intent to defeat possible equitable rights of the plaintiff, and will grant an injunction accordingly; and when a defendant, alleged by the plaintiff to have held under a lease, stipulating that hay was to be eaten down on the land, removed a large quantity off the land after differences had arisen as to his tenancy, the court restrained him from selling and disposing of the hay so removed. *Ib.*

An injunction to restrain an action against the surety refused upon an interlocutory application, in a state of circumstances not showing a sufficient probability that such a case would be proved, on further investigation, as would entitle the surety to be protected by a perpetual injunction at the hearing. *Dawson* v. *Lawes*, 1 Kay, 280; 2 Eq. R. 230; 23 L. J., Ch. 434; 2 W. R. 213.

Difficulty in Compensating—Undertaking to Keep Account.]—Injunction to restrain sales of cattle in competition with ancient market refused, on defendant's undertaking to keep an account. *Elwes* v. *Payne*, 48 L. J., Ch. 831; 12 Ch. D. 468; 41 L. T. 118; 28 W. R. 234—C. A.

Lease—Breach of Covenant.]—Where the covenants in a lease are clear, and the breach is also clear, and irreparable injury is likely to arise, the court will interfere by interlocutory injunction. If these conditions are not fulfilled, the court will weigh the considerations of convenience for granting or refusing the injunction. *Wilkinson* v. *Rogers*, 3 N. R. 347; 10 Jur. (N.S.) 162; 9 L. T. 696; 12 W. R. 284—L.JJ.

Effect of Delay.]—The court will not grant an interlocutory injunction if the plaintiff, having sufficient notice of the defendant's intention to commit the act sought to be restrained, is guilty of unreasonable delay in applying to the court. *Salisbury* v. *Metropolitan Ry.*, 39 L. J., Ch. 429; 18 W. R. 484.

In a suit to restrain the user of names in trade in a fraudulent manner, the right to an interlocutory injunction is lost by a delay in filing the bill of nine or ten months since the discovery of the user. *Isaacson* v. *Thompson*, 41 L. J., Ch. 101; 20 W. R. 196.

Cases (as of waste) in which delay in applying for an injunction may not be deemed to preclude the parties aggrieved from obtaining that relief upon an interlocutory application. *Att.-Gen.* v. *Eastlake*, 11 Hare, 205; 17 Jur. 801; 1 W. R. 323.

Balance of Convenience.]—On motion for interlocutory injunction, the claim of the plaintiff being doubtful on the evidence, the court will act upon the consideration of the comparative inconvenience which may arise from granting or withholding the injunction. *Hadley* v. *London Bank of Scotland*, 11 Jur. (N.S.) 554; 12 L. T. 747; 13 W. R. 978.

Therefore, where a plaintiff sues for specific performance of a contract for the sale of land, and there is a question whether any contract exists, the court will not restrain the owner of the land from dealing with it until a suit for specific performance of the contract has been disposed of. *Ib.*

Upon an application for an interlocutory injunction, the court should take into account the balance of convenience; and if, on the one hand,

irreparable injury may be caused by withholding the injunction, while, on the other hand, any injury occasioned by the injunction can be compensated by damages, the court will grant the injunction, upon the plaintiff undertaking to abide any order as to damages that may afterwards be made in the suit. *Cork Corporation* v. *Rooney*, 7 L. R., Ir. 191.

Libel—Exhibition of Portrait Model of Man tried for and acquitted of Murder.]—An interlocutory injunction restraining the publication of a libel until the trial of the action will not be granted where there are conflicting affidavits as to whether the plaintiff has or has not consented to such publication. Circumstances under which an interlocutory injunction in actions of libel should be granted considered. *Monson* v. *Tussaud*, 63 L. J., Q. B. 454; [1894] 1 Q. B. 671; 9 R. 177; 70 L. T. 335; 58 J. P. 524—C. A.

Per Lopes and Davey, L.JJ.: The case of *Bonnard* v. *Perryman* ([1891] 2 Ch. 260) has established, as a rule of practice, that such an injunction shall not be granted except in cases where a verdict for the defendant would be set aside as unreasonable. Per Lord Halsbury: The case of *Bonnard* v. *Perryman* cannot restrict the discretion to be exercised on the facts of each case as to whether it is "just and convenient," within s. 25 of the Judicature Act, 1873, to grant such an injunction. Per Lord Halsbury and Davey, L.J.: There is no distinction, as regards the power of granting an interlocutory injunction, between a case of libel affecting trade or property and one affecting character. *Ib.*

Trade Union — Picketing.]—Picketing—that is, watching or besetting the house or place of business of any person, or the approach thereto, within the meaning of s. 7, sub-s. 4, of the Conspiracy and Protection of Property Act, 1875—excepting when such picketing is for the limited purpose of obtaining or communicating information, according to the proviso to that section, is illegal, and will be restrained by interlocutory injunction. *Lyons* v. *Wilkins*, 65 L. J., Ch. 601; [1896] 1 Ch. 811; 74 L. T. 358; 45 W. R. 19; 60 J. P. 325—C. A.

Noxious Trade.]—Though a very strong case be made in support of an interlocutory motion to restrain an alleged noxious manufactory, the court will reserve the question until the trial, which will therefore be advanced. *Att.-Gen.* v. *Charles*, 11 W. R. 253.

Against Publication of Magazine.]—*See* RESTRAINING PUBLICATION, post.

See also *Saxater* v. *Foster*, Cr. & Ph. 302.

Over next Motion Day.]—When an interim injunction is granted over the next motion day or until further order, it signifies that the injunction may be dissolved before the day fixed, but cannot be extended beyond that period except with the leave of the court. *Bolton* v. *London School Board*, 47 L. J., Ch. 461; 7 Ch. D. 766; 26 W. R. 549. *S. C.*, 38 L. T. 277.

No Irreparable Damage—Doubtful Cause of Action.]—Several shipping merchants whose vessels traded regularly and all the year round to and from certain Chinese ports, formed themselves into a conference, and agreed to allow a rebate every six months of five per cent. on all freights to those merchants who shipped their goods exclusively on conference vessels, and issued a circular notice that any shipment of goods on a non-conference vessel would render the shipper liable to forfeit the rebate on all his shipments in the conference vessels. The result was that the plaintiffs, part owners of non-conference vessels, trading to the same ports, had to ship goods at an unremunerative rate to counteract the loss of the rebate, and sustained damage, for which they sued. On an application for an interim injunction to restrain the issue of the circulars, and to restrain the defendants so acting as to prevent the plaintiffs shipping goods from those ports at a remunerative rate:—Held, that there being no evidence of danger of irreparable injury to the plaintiffs, and the cause of action being on the affidavits not free from doubt, the court ought not to grant an interim injunction. *Mogul Steamship Co.* v. *McGregor*, 54 L. J., Q. B. 540; 15 Q. B. D. 476; 53 L. T. 268; 15 Cox, C. C. 740; 5 Asp. M. C. 467; 49 J. P. 646.

Forfeiture of Lease—Equitable Relief.]—A mining company, admitting the forfeiture of their lease at law, sought relief in equity, on the ground of accidental stoppage of works, substituted performance of certain covenants, and implied acquiescence on the part of the lessor's agent. There appearing reasonable grounds for the exercise of equitable jurisdiction, an interim injunction was granted, the plaintiffs undertaking to abide by any order the court might make at the hearing, and to allow judgment to go at law. *North Stafford Steel, Iron, and Coal Co.* (*Burslem*) v. *Camoys* (*Lord*), 6 N. R. 345.

Plaintiff out of Jurisdiction.]—The court will grant an ad interim injunction on the application of a plaintiff out of its jurisdiction, notwithstanding he has filed no affidavit in support of his bill. *Hamilton* v. *Board*, 1 N. R. 379.

Sale of Timber.]—Interim order granted on application of heir ex parte paternâ to restrain heir ex parte maternâ, who was in possession and had obtained administration, from selling timber. *Anwyl* v. *Owens*, 1 W. R. 205.

Obstruction of Lights.]—Where plaintiff and defendant held adjoining pieces of land under a common landlord, and plaintiff had, with the licence of the landlord and without objection by the defendant, erected a manufactory, interim injunction granted to restrain defendant, pending a trial at law, from so building as to obstruct plaintiff's lights. *Crook* v. *Wilson*, 3 W. R. 378.

Nuisance—Reversioner.]—Where the owner of houses, who lives at a distance from them, complains of nuisance to the inhabitants of the houses, the court will not grant an interim injunction unless there is evidence from the occupiers. *Cleeve* v. *Mahany*, 9 W. R. 882.

Temporary Nuisance.]—Where there is reason to believe that a nuisance is only temporary an interim injunction will not be granted. *Ib.*

Letters of Credit—Restraining Dealing.]—Where marginal letters of credit had been used

for purposes different from that for which they had been issued, an interim injunction was granted to restrain transfer or payment. *Maitland* v. *Chartered Mercantile Bank of India*, 12 L. T. 372.

Granted on Terms.]—Where it is manifest from the pleadings that issues have been raised in a cause which must necessarily be discussed at the hearing, the court will grant an interim injunction upon terms. *Coleman* v. *West Hartlepool Ry.*, 3 L. T. 847.

Stakeholder—Principal out of Jurisdiction.]—The court will grant an interim injunction to restrain a stakeholder from paying over a fund in medio to the principal possessing the legal interest in it, although that principal is absent, and not amenable to its jurisdiction. *Gladstone* v. *Musurus Bey*, 1 N. R. 178; 32 L. J., Ch. 155; 9 Jur. (N.S.) 71; 7 L. T. 477; 11 W. R. 180.

8. MANDATORY INJUNCTIONS.

General Rules.]—There is no real distinction between the conditions under which the court grants mandatory and those under which it grants other injunctions. *Smith* v. *Smith*, 44 L. J., Ch. 630; L. R. 20 Eq. 500; 32 L. T. 787; 23 W. R. 771.

When the court is satisfied that a wrong has been wilfully done, and that there has been no delay or acquiescence on the part of the plaintiff, an injunction will be granted as readily in a mandatory form as in any other. *Ib.*

All injunctions should be issued with care and caution, and it is a mistake to suppose that extra care and caution are required where the form of the injunction is mandatory. *Ib.*

The power to grant mandatory injunctions is one which ought to be exercised with the greatest possible caution. *Isenberg* v. *East India House Estate Co.*, 3 De G. J. & S. 263; 3 N. R. 345; 33 L. J., Ch. 392; 10 Jur. (N.S.) 221; 9 L. T. 625; 12 W. R. 450.

The rule in *Jessel* v. *Chaplin* (2 Jur. (N.S.) 931; 4 W. R. 610) followed as to the form in which a mandatory injunction should be granted where a building is ordered to be removed. *Smith* v. *Smith*, ubi supra.

In granting a mandatory injunction where there is no proof of substantial damage, the court will consider whether the defendants insist on their right to carry on the works objected to; that is, whether they insist not only on maintaining the wrong which they have committed, but on a right to do an increasing wrong in the future. *Att.-Gen.* v. *Acton Local Board*, 52 L. J., Ch. 108; 22 Ch. D. 231; 47 L. T. 510; 31 W. R. 153.

Semble, the court has jurisdiction to grant a mandatory injunction on interlocutory applications as well as at the hearing. *Bonner* v. *G. W. Ry.*, 24 Ch. D. 10; 48 L. T. 623—per Fry, L.J.

Not granted unless the defendants have done an act which has caused injury, and given a right of action, to a private individual—per Brett, L.J. *Glossop* v. *Heston Local Board*, 49 L. J., Ch. 89; 12 Ch. D. at p. 121; 40 L. T. 736; 28 W. R. 111; 44 J. P. 36—C. A.

Light and Air—Material Damage.]—A mandatory injunction to preserve a right to light and air will not be granted unless there has been a substantial, material, or serious infringement of the right. *Beadel* v. *Perry*, 19 L. T. 760; 17 W. R. 185.

Discretion.]—The court as to granting or refusing to grant a mandatory injunction, will consider how far if granted it would affect the defendant. But in the first place, the court must consider the plaintiff's position, whose rights have been interfered with, and is bound to protect his rights unless by so doing it should inflict such a hardship upon the defendant as would amount to injustice. *Myers* v. *Catterson*, 59 L. J., Ch. 315; 43 Ch. D. 470; 62 L. T. 205; 38 W. R. 488.

The assistance afforded by the court of chancery by way of mandatory and prohibitory injunction in aid of specific performance is a jurisdiction the exercise of which is eminently discretionary, and ought to be guided and measured by what substantial justice requires as between the parties. *Low* v. *Innes*, 4 De G. J. & S. 286.

Liberty should not be given to a plaintiff, in a suit for a mandatory and prohibitory injunction in aid of specific performance of a building agreement, to apply to the court in the event of the defendant's erecting any wall or building which should prevent free access of light and air. Either the application for such liberty is premature, in which case the liberty ought not to be given; or, if reason for the application afterwards arises, it must be the subject of independent proceedings. *Ib.*

Where serious injury will be inflicted upon property which is the subject of an action unless the defendant continues to act in a particular manner, which he can do with comparatively little trouble and risk, but which the plaintiff cannot do at all, as where a colliery will be drowned unless the person in possession under an agreement for a lease continues to pump, the interim preservation of the property will be secured by the issue of a mandatory injunction, restraining the defendant from ceasing to act in that particular manner—e.g. to pump out the colliery. *Strelley* v. *Pearson*, 49 L. J., Ch. 406; 15 Ch. D. 113; 43 L. T. 155; 28 W. R. 752.

Upon a motion for an interlocutory injunction to restrain an interference with light and air, the defendant gave an undertaking to pull down any building thereafter erected or proceeded with, and to abide by any order as to damages; whereupon the court made no order upon the motion. The defendant subsequently completed his buildings. At the trial of the action, when a mandatory injunction was asked for, it was proved that the defendant's buildings obstructed the plaintiff's ancient lights:—Held, that it was a proper case for the court to grant a mandatory injunction, and not to award damages in lieu thereof, under the discretion given by Lord Cairns' Act. *Greenwood* v. *Hornsey*, 55 L. J., Ch. 917; 33 Ch. D. 471; 55 L. T. 135; 35 W. R. 163.

Injury complete before Writ issued.]—The fact that a building which obstructs ancient lights has been completed before writ issued, will not prevent the granting of a mandatory injunction for its removal. The material point for consideration is the state of the new building when the plaintiff first complains. *Lawrence* v.

Horton, 59 L. J., Ch. 440; 62 L. T. 749; 38 W. R. 555; *Goodson* v. *Richardson*, 43 L. J., Ch. 790; L. R. 9 Ch. 221; 30 L. T. 142; 22 W. R. 337; *Smith* v. *Smith*, ante, col. 1559.

Injunction against stopping lights until trial of the right, which was directed on the motion: court will never, on motion, make an adverse order to undo what has been done. *Ryder* v. *Bentham*, 1 Ves. 543.

A defendant having, after express notice, erected a porch in breach of a covenant entered into by him, was upon interlocutory motion ordered to remove the erection, although the same had been completed before the filing of the bill. *Morris* v. *Grant*, 24 W. R. 55.

The court will in some cases, by an injunction in a negative form, compel parties who have begun to take away the rights of others to restore them in some measure before the hearing of the cause. *Spencer* v. *London and Birmingham Ry.*, 8 Sim. 193; 7 L. J., Ch. 281.

A plaintiff having upon the trial of an action established his title to a right of way, which the defendant, with full notice of his claim, had obstructed by building over it a solid and expensive structure:—Held, that he was entitled to a mandatory injunction compelling the defendant to remove such obstruction, even though the defendant offered him a substituted right of way. *Krehl* v. *Burrell*, 47 L. J., Ch. 353; 7 Ch. D. 551; 38 L. T. 407. *S. C.* in C. A., 48 L. J., Ch. 252; 11 Ch. D. 146; 40 L. T. 637; 27 W. R. 805.

Erection of Buildings after Notice—Attempt to Anticipate Injunction.]—The defendant in an action to restrain him from building so as to darken the plaintiff's lights, upon receiving notice of motion for injunction, put on a number of extra men, and by working night and day ran up his wall to a height of nearly forty feet before receiving notice that an ex parte interim injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights:—Held, that, as the defendant had endeavoured to anticipate the action of the court by hurrying on his building, what he had erected ought to be at once pulled down, without regard to the ultimate result of the action. *Daniel* v. *Ferguson*, [1891] 2 Ch. 27; 39 W. R. 599—C. A.

Evading Service of Writ—Continuance of Building Operations.] — Interlocutory mandatory injunction granted to pull down buildings erected by the defendant after the issue of a writ in an action for an injunction of which the defendant had notice, though he succeeded in evading service of the writ. *Daniel* v. *Ferguson*, supra, followed. *Von Joel* v. *Hornsey*, 65 L. J., Ch. 102; [1895] 2 Ch. 774; 73 L. T. 372—C. A.

Serious Damage—Injury Complete—Easements.]—Relief by way of mandatory injunction is confined to cases of probability of extreme or very serious damage. But the court has no general rule against granting such relief where the damage has been completed before the filing of the bill. There is no difference in this respect between injury to easements and to other rights. Every case must depend upon its own circumstances. *Durell* v. *Pritchard*, 35 L. J., Ch. 223; L. R. 1 Ch. 244; 13 L. T. 545; 14 W. R. 212.

Serious Injury.]—The court will grant a mandatory injunction only in cases of extreme and serious injury. *Sparling* v. *Clarson*, 17 W. R. 518.

Nuisance and Contract.]—The principles of the court as to granting mandatory injunctions considered, with reference to the difference between cases of nuisance and cases of contract, and to a suit being by an individual or by the attorney-general. *Att.-Gen.* v. *Mid-Kent Ry. and S. E. Ry.*, L. R. 3 Ch. 100.

Delay and Acquiescence.]—A mandatory injunction ought not to be granted to compel the pulling down of a building, which had been allowed to remain for five years without complaint. *Gaskin* v. *Balls*, 13 Ch. D. 324; 28 W. R. 552—C. A.

If a plaintiff is guilty of no acquiescence or delay, he will be entitled to a mandatory injunction, though the works complained of may have been completed before the filing of the bill. *Goodson* v. *Richardson*, 43 L. J., Ch. 790; L. R. 9 Ch. 221; 30 L. T. 142; 22 W. R. 337. S. P., *Smith* v. *Smith*, ante, col. 1559. *Holmes* v. *Upton*, L. R. 9 Ch. 214, n.

Water-Pipes laid in Soil of Highway.]—When water-pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, and not being required to establish his right at law. *Goodson* v. *Richardson*, 43 L. J., Ch. 790; L. R. 9 Ch. 221; 30 L. T. 142; 22 W. R. 337.

The facts that the soil under the highway was of no value to the owner, and that his motive for applying to the court was not connected with the enjoyment of his land, held not to be reasons against the granting of the injunction. *Ib.*

Running Stream—Riparian Owners—Obstruction.]—Where the defendant, one of the riparian owners of a running stream, has obstructed the flow of water, but on the evidence it seems probable that the water received by the plaintiff, the other riparian owner, will not be substantially diminished in quantity or quality, the court will not grant a mandatory injunction. *Edleston* v. *Crossley*, 18 L. T. 15.

Injunction Refused till after Answer.]—Injunction granted from further digging a ditch, but court will not order it to be filled up till after answer. *Anon.*, 1 Ves. J. 140.

Mandatory Injunction to undo what was done Refused, but future Acts Restrained.]—A railway company had become owners of a canal by purchase, and they were bound, by several statutes, to keep it open and navigable. The plaintiff was the owner of a mill abutting upon a sort of bay in the canal, which he alleged formed part of the canal itself. This fact was denied by the defendants, who built a wall across the bay, so as to make the canal of the same width there as in other parts. The plaintiff filed his bill for an injunction to make the defendants undo what had been done, and to prevent them doing more:—Held, that the court could not make the defendants undo anything done, but that the plaintiff was entitled to an injunction

to restrain them from proceeding to do more, on the plaintiff undertaking to bring an action at law to try the disputed right. *Bradbury* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 15 Jur. 1167.

Where a building which interfered with the plaintiff's right to light and air, or any other easement, had been actually completed before bill filed, the court of chancery would not, in the absence of fraud, grant either a mandatory injunction or damages under 21 & 22 Vict. c. 27, but would leave the plaintiff to his remedy at law. But if any part was unfinished when the bill was filed the court had jurisdiction, and would grant an injunction as to that part, and an inquiry as to damages as to the finished part. *Lawrence* v. *Austin*, 11 Jur. (N.S.) 576; 13 W. R. 981.

Works Completed.]—Quære, whether a mandatory injunction will be granted ordering the removal of works already completed. *Curriers' Co.* v. *Corbett*, 2 Dr. & Sm. 255; 12 L. T. 169; 13 W. R. 1056.

Not asked for.]—Semble, per Turner, L.J., where a merely preventive remedy is sought a mandatory injunction will not be granted. *Ib.*

Letters Addressed to Agent at Principal's Office—Compelling Agent to rescind Order to Post-Office.]—B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. L. brought an action to restrain B. from giving notice to the post-office to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—Held, that the defendant had no right to give a notice to the post-office, the effect of which would be to hand over to him letters of which it was probable that the greater part related only to L.'s business; and that the case was one in which a mandatory injunction compelling the defendant to withdraw his notice could properly be made, the plaintiff being put under an undertaking only to open the letters at certain specified times, with liberty for the defendant to be present at the opening. *Hermann Loog* v. *Bean*, 53 L. J., Ch. 1128; 26 Ch. D. 306; 51 L. T. 442; 32 W. R. 994; 48 J. P., 708—C. A.

Building in Breach of Covenant—Pulling down Building — Material Damage.]—When houses were set out in a regular plan and each purchaser of a house covenanted with the former owners of the whole not to erect any building in advance of the general line of frontage:—Held, that a purchaser of one of such houses to whom the benefit of such covenants were assigned, was entitled to a mandatory injunction to compel the purchaser of another house to pull down a bay window built in breach of such covenant, even without showing material damage. *Manners (Lord)* v. *Johnson*, 45 L. J., Ch. 404; 1 Ch. D. 673; 24 W. R. 481.

To Evicted Tenant to Remove Timber.]—Injunction granted ordering defendant to remove logs of timber left by him on premises of which he had agreed to give up possession at the end of his lease, and from which he was evicted by a writ of possession. *Guinness* v. *Fitzsimons*, 13 L. R. Ir. 71.

Restoration of Fence wrongfully broken down—Uneducated Defendant—Form of Order.]—In an action to restrain a defendant from permitting certain fences to remain broken down and removed, the court ordered the defendant, who was in an humble position in life, to restore and replace the fences which he had broken down and removed, instead of making a negative order restraining him from permitting the fences to remain broken down and removed. *Bidwell* v. *Holden*, 63 L. T. 104.

Obstructing Flues—Interlocutory Motion.]—Plaintiff had for years used flues for the passage of smoke; defendant, who alleged himself to be part owner, disputing his right to do so. Defendant having placed tiles on the chimney pots to obstruct the passage of the smoke, mandatory injunction granted, on interlocutory application, to compel defendant to remove the tiles. *Hervey* v. *Smith*, 1 Kay & J. 389.

Farming Covenant.]—The court will not grant a mandatory injunction to compel a farmer to farm in accordance with his covenant. *Musgrave* v. *Horner*, 31 L. T. 632; 23 W. R. 125.

Interlocutory Application — Landlord and Tenant—Breach of Covenant.]—The court will, upon an interlocutory application, when no substantial question remains to be tried, grant a mandatory injunction to rebuild a staircase where rooms, together with the use of the staircase, have been demised to the plaintiff, and the lessor has pulled down the staircase. *Allport* v. *Security Co.*, 64 L. J., Ch. 491; 13 R. 420; 72 L. T. 533.

Mining Lease—Compelling Lessee to continue Working.] Semble, the lessee would be relieved from the expense of working an unprofitable mine, on paying the lessor for all the coal under the land. *Ridgway* v. *Sneyd*, 1 Kay, 627.

Discontinuing Business.]—The court has no jurisdiction to restrain a party from discontinuing the business of an inn; but it may restrain him from doing acts which would make it impossible for him or any other person to carry it on. *Hooper* v. *Broderick*, 9 L. J., Ch. 321.

Mining Tenant.]—Tenant of a mine restrained, on motion, from permitting a communication with an adjoining mine to continue open, and water to flow through, the intention being to compel the defendant to close the communication. *Mexborough (Earl)* v. *Bower*, 7 Beav. 127.

Against Railway Company.]—Mandatory injunction in effect compelling railway company to pull down certain walls, built for the purpose of preventing another railway company from crossing their line. *Great North of England, &c. Junction Ry.* v. *Clarence Ry.*, 1 Coll. C. C. 507.

9. JUDICATURE ACT, 1873 (36 & 37 VICT. c. 66), EFFECT OF S. 25, SUB-S. 8 OF.

The extensive jurisdiction of granting injunctions originally given to the common law courts by the C. L. P. Act, 1854, ss. 79, 81 and 82, is now vested, by virtue of the Judicature Act, 1873, in the high court of justice. All acts, therefore, which a common law court, or a court of equity only, could formerly restrain by injunction, can now be restrained by the high court. *Beddow* v. *Beddow*, 47 L. J., Ch. 588; 9 Ch. D. 89; 26 W. R. 570.

The jurisdiction of granting injunctions thus vested in the high court is practically unlimited, and can be exercised by any judge of the high court in any case in which it is right or just to do so, having regard to settled legal reasons or principles. *Ib.*

Section 25, sub-s. 8, of the Judicature Act, 1873, does not alter the former practice as to injunctions, but is only intended to do away with certain technical objections. *Fletcher* v. *Rodgers*, 27 W. R. 97.

The principles on which the court acts in granting injunctions are not extended by the provisions of the Judicature Act, which enable the court to grant injunctions where it is "just or convenient," which must be read "just as well as convenient." *Day* v. *Brownrigg*, 48 L. J., Ch. 173; 10 Ch. D. 294; 39 L. T. 553; 27 W. R. 217.

The words "just or convenient," in s. 25 of the Judicature Act, 1873, do not mean that the court is to grant an injunction simply because the court think it convenient; they mean that the court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles; but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears that the court ought to interfere. Though it has been said that, as a general rule, the court only interferes where there is some question as to property, it would seem that the interference of the court is not absolutely confined to that now; there may be cases in which the court would interfere even where personal status is the only thing in question. *Aslatt* v. *Southampton Corporation*, 50 L. J., Ch. 31; 16 Ch. D. 148; 43 L. T. 464; 29 W. R. 117.

The Judicature Act, 1873, s. 25, sub-s. 8, has not altered the principles on which the court acts in granting injunctions. *Gaskin* v. *Balls*, 13 Ch. D. 324; 28 W. R. 552.

The power of the court to grant injunctions has been enlarged by the Judicature Act, 1873, s. 25, sub-s. 8. *Thomas* v. *Williams*, 49 L. J., Ch. 605; 14 Ch. D. 864; 43 L. T. 91; 28 W. R. 983. But see *Dick* v. *Brooks*, 15 Ch. D. 25.

A suit was commenced in September, 1875, for rescinding an agreement and for an injunction to restrain a common law action. Upon the plaintiff moving for an injunction the defendant entered into an undertaking. The motion was renewed on the 11th of November, 1875, and it was ordered to stand over till the cause came on for trial, the undertaking by the defendant being continued. On the causes coming on for trial, the court, having regard to the provisions of the Judicature Act, 1873, s. 24, sub-s. 5, directed the cause to stand over until the action in the common law division was decided. *Edwards* v. *Noble*, 24 W. R. 390.

The powers of the court in granting an injunction, either at the hearing or upon an interlocutory application, have been extended by s. 28, sub-s. 8, of the Judicature (Ireland) Act; and the only limit to the jurisdiction is that the court must be satisfied that it is just and convenient that the order should be made. The court has now jurisdiction to grant an injunction to give effect to a legal right. *Cork Corporation* v. *Rooney*, 7 L. R., Ir. 191.

Equitable Defence.]—An action on a promissory note was commenced in the court of queen's bench before the Judicature Acts came into operation. After those acts came into operation the defendant issued a writ in the chancery division claiming specific performance of a parol agreement for value not to sue, and that the court should direct a stay of proceedings in the action. Upon motion accordingly in the chancery division for a stay of proceedings:—Held, that the court was in effect asked to grant an injunction or prohibition, which the court had no power to do, and that the alleged agreement was matter for defence, and ought to be pleaded, and gave no ground for a stay of proceedings. *Garbutt* v. *Fawcus*, 45 L. J., Ch. 133; 1 Ch. D. 155; 33 L. T. 617; 24 W. R. 89.

Lord Cairns' Act.]—Lord Cairns' Act (21 & 22 Vict., c. 27) remained in force notwithstanding the passing of the Judicature Acts. *Fritz* v. *Hobson*, 49 L. J., Ch. 321; 14 Ch. D. 542; 42 L. T. 225; 28 W. R. 459.

—— **Effect of Repeal.**]—Though Lord Cairns' Act has been repealed since the passing of the Judicature Acts by 46 & 47 Vict. c. 49, s. 3, the repeal does not affect the powers of the court, inasmuch as the Judicature Acts re-enacted those powers, and consequently Lord Cairns' Act became obsolete. *Chapman* v. *Auckland Union*, 58 L. J., Q. B. 504; 23 Q. B. D. 294; 61 L. T. 446; 53 J. P. 820—C. A.

Jurisdiction — Quo Warranto — School Board Election.]—The court has jurisdiction under the Judicature Act, 1873, s. 25, sub-s. 8, to restrain by injunction a school board from declaring a member in default and proceeding to the election of a new member. *Richardson* v. *Methley School Board*, 62 L. J., Ch. 943; [1893] 3 Ch. 510; 3 R. 701; 69 L. T. 308; 42 W. R. 27.

10. DAMAGES.

a. Action for.

Amendment—Claim for Injunction.]—Where an action is framed as an action for damages, it is not convenient to turn it into an action for injunction by giving leave to amend. *Halsey* v. *Brotherhood*, 51 L. J., Ch. 233; 19 Ch. D. 386; 45 L. T. 640; 30 W. R. 279—C. A.

Damages and Injunction.]—Damages and injunction are two different forms of remedy against the same wrong; and the facts which must be proved to entitle a plaintiff to the first of these remedies must equally be proved to entitle him to the second. *White* v. *Mellin*, 64 L. J., Ch. 308; [1895] A. C. 154; 11 R. 141;

72 L. T. 334 ; 43 W. R. 353 ; 59 J. P. 628—H. L. (E.)

b. In Lieu of Injunction.

Jurisdiction to Grant.]—The court will not enter into the question of damages when the case is one which could be more effectually disposed of at law ; Lord Cairns' Act only gives the court of chancery jurisdiction to give damages in a case where a bill is properly filed, and 25 & 26 Vict. c. 42 does not make it compulsory on the court so to do. *Swaine* v. *G. N. Ry.*, 4 De G. J. & S. 211 ; 3 N. R. 399 ; 33 L. J., Ch. 399 ; 10 Jur. (N.S.) 191 ; 9 L. T. 745 ; 12 W. R. 391.

On a bill for an injunction, the court refused the injunction and directed an inquiry as to damages. *Wedmore* v. *Bristol Corporation*, 1 N. R. 120, 187 ; 7 L. T. 459 ; 11 W. R. 136.

The court may entertain a question of damages when the damage appears substantial, though an injunction is refused. *Johnson* v. *Wyatt*, 3 N. R. 270 ; 33 L. J., Ch. 394 ; 9 Jur. (N.S.) 1333 ; 9 L. T. 618 ; 12 W. R. 284.

A bill prayed for an injunction against the infringement of his patent by the defendant, for an account of profits, and for damages. After the filing of the bill, but before the hearing of the cause, the patent expired. The infringement being proved, the court held that its jurisdiction related back to the time of the filing of the bill, and awarded damages under 21 & 22 Vict. c. 27. *Davenport* v. *Rylands*, 35 L. J., Ch. 204 ; L. R. 1 Eq. 302.

Injunction or Damages—Principles on which Courts act.]—The principles upon which the courts act in deciding whether or not to award damages in lieu of an injunction under Lord Cairns' Act, in cases of injury to property, are as follows. If the defendant, in the injury he is inflicting, is doing an act which will render the property of the plaintiff absolutely useless to him unless it is stopped, then, inasmuch as the only compensation which could be given to the plaintiff would be to compel the defendant absolutely to purchase the property, the court will not, in the exercise of the discretion given to it by the act, withhold an injunction. Where, however, the injury is less serious, and the court considers that the property may still remain the property of the plaintiff, and be still substantially as useful as it was before the defendant's acts, and that the injury, therefore, is of such a nature as can be compensated by money without taking away the property from the plaintiff, the court has and will exercise a discretion to award damages in place of an injunction. *Holland* v. *Worley*, 54 L. J., Ch. 268 ; 26 Ch. D. 578 ; 50 L. T. 526 ; 32 W. R. 749 ; 49 J. P. 7.

—— **Lord Cairns' Act—Repeal.**]—The court has power under Lord Cairns' Act to refuse an injunction, although no case is established for granting damages in substitution for the injunction, and in such a case may dismiss an action to enforce a covenant with costs. *Sayers* v. *Collyer*, 52 L. J., Ch. 770 ; 24 Ch. D. 180 ; 48 L. T. 939 ; 32 W. R. 200 ; 47 J. P. 741.

Although Lord Cairns' Act (21 & 22 Vict. c. 27) is repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 3, under section 5 the jurisdiction conferred thereby is still in force — Per Baggallay, L.J. *Ib.*

Lord Cairns' Act—Jurisdiction.]—Lord Cairns' Act did not confer upon the court of chancery any jurisdiction to award damages in a case where no wrongful act had been committed by the person against whom an injunction was sought. Therefore, where an action is brought for an injunction in respect of a threatened injury, and no actual wrong has been committed by the defendant, the court has no jurisdiction to give damages in substitution for such injunction. *Dreyfus* v. *Peruvian Guano Co.*, 43 Ch. D. 316 ; 62 L. T. 518 ; 6 Asp. M. C. 492—C. A.

Damage after Action brought.]—Where there is jurisdiction to grant an injunction, damages may be given in lieu, for injury which has occurred since the commencement of the action. *Warwick and Birmingham Canal* v. *Burman*, 63 L. T. 670.

Where Notice of Action for Damages is required by Statute.]—The plaintiffs brought an action for an injunction to restrain the continuance of a nuisance arising from certain sewage works of the defendants, who were acting as the rural sanitary authority, and for damages. The defence, so far as material, was that a month's notice of action had not been given as required by section 264 of the Public Health Act, 1875. The judge, who tried the action without a jury, refused to grant an injunction, considering that the circumstances at the time of the trial were such that an injunction was not then necessary for the plaintiffs' protection, but awarded the plaintiffs 25*l.* damages :—Held, that, as the action was substantially and bonâ fide brought for an injunction, and as the damages were given in substitution for an injunction, notice of action was not required under the statute. *Chapman* v. *Auckland Union*, 58 L. J., Q. B. 504 ; 23 Q. B. D. 294 ; 61 L. T. 446 ; 53 J. P. 820—C. A.

For Maliciously Inducing Breach of Contract.]—In an action against a third person, who maliciously induced another to break his contract of exclusive personal service with an employer, in which the employed was also a defendant, but as against him the plaintiff claimed only an injunction, and not damages, it was held that damages might, in the discretion of the court, be given under Lord Cairns' Act (21 & 22 Vict. c. 27), and that the jury, therefore, should be directed by the judge, in the event of a verdict for the plaintiff, to find such damages as should be awarded ; first, if the court should think it a proper case both for injunction and damages ; and secondly, if the court should think it a proper case for damages only, and not for an injunction. *Bowen* v. *Hall*, 50 L. J., Q. B. 305 ; 6 Q. B. D. 333 ; 44 L. T. 75 ; 29 W. R. 367 ; 45 J. P. 373—C. A.

Plaintiff Entitled to Perpetual Injunction.]—Where a plaintiff has established his right to a perpetual injunction against the defendant the court has no power under Lord Cairns' Act to oblige him against his will to accept damages in lieu of the injunction. *Krehl* v. *Burrell*, 48 L. J., Ch. 252 ; 11 Ch. D. 146 ; 40 L. T. 637 ; 27 W. R. 805—C. A.

For Injury Already Completed.]—Where a

building which interfered with the plaintiff's right to light and air, or any other easement, had been actually completed before bill filed, the court of chancery would not, in the absence of fraud, grant either a mandatory injunction or damages under 21 & 22 Vict. c. 27, but left the plaintiff to his remedy at law. But if any part was unfinished when the bill was filed the court had jurisdiction, and would grant an injunction as to that part, and an inquiry as to damages as to the finished part. *Lawrence* v. *Austin*, 11 Jur. (N.S.) 576; 13 W. R. 981. See also *Hindley* v. *Emery*, 35 L. J., Ch. 6; L. R. 1 Eq. 52; 11 Jur. (N.S.) 874; 13 L. T. 272; 14 W. R. 25.

Where the injury has been completed before bill filed, and plaintiff has in the first instance asked for damages, the court will not, even if the injury is substantial, grant a mandatory injunction, but will direct an inquiry as to damages. *Gort* (*Viscountess*) v. *Clark*, 18 L. T. 343; 16 W. R. 569—L.JJ.

Where damages are claimed in substitution for an injunction to restrain a wrongful act commenced before the issue of the writ, and continued afterwards, if the wrongful act has come to an end before the trial, the court has jurisdiction, under s. 3 of Lord Cairns' Act (21 & 22 Vict. c. 27) to assess the whole of the damages accrued. *Davenport* v. *Rylands* (35 L. J., Ch. 204; L. R. 1 Eq. 302) followed. *Fritz* v. *Hobson*, 49 L. J., Ch. 321; 14 Ch. D. 542; 42 L. T. 225; 28 W. R. 459.

Acquiescence.]—The court will, in a case where the legal right is alone in question, coupled with facts which amount to a qualified consent and acquiescence, award damages instead of granting an injunction to restrain proceedings by a railway company with works which have done and might do further damage to a neighbouring landowner. *Lockwood* v. *L. & N. W. Ry.*, 19 L. T. 68.

Where, therefore, a railway company had trespassed on the plaintiff's land by removing his boundary wall, and was proceeding to build another wall, partly on his and partly on their own land, the court directed an inquiry in chambers to assess the amount of damage done, having previously refused an application for an injunction to restrain the re-building of the wall. *Ib.*

Breach of Covenant.]—Land was sold, subject to a covenant entered into with a neighbouring landowner, that "no buildings, except dwelling-houses," to front a certain road, should be built thereon. The purchaser threw the land into his garden, and enclosed it, by erecting thereon, along the side of the road, a wall, 8 ft. 6 in. high, for the greater part, but carried up in one part to the height of 11 ft. 6 in., for the purpose of forming the back of vineries and a greenhouse. In a suit for an injunction, to restrain the wall from continuing:—Held, that no substantial injury being caused, the court awarded damages instead of granting an injunction in respect of the breach. *Bowes* v. *Law*, 39 L. J., Ch. 483; L. R. 9 Eq. 636; 22 L. T. 267; 18 W. R. 640.

Discretion of Court.]—Where a plaintiff in other respects fails in equity, the court has not, under 25 & 26 Vict. c. 42, any jurisdiction, and has, under 21 & 22 Vict. c. 27, a discretion to refuse to entertain the question of damages. *Durell* v. *Pritchard*, 35 L. J., Ch. 223; L. R. 1 Ch. 244; 12 Jur. (N.S.) 16; 13 L. T. 545; 14 W. R. 212.

Under 21 & 22 Vict. c. 27, it is discretionary with the court whether it will award damages or leave the plaintiff to obtain them at law. *Ib.*

Under 25 & 26 Vict. c. 42, where a plaintiff has at the time of filing his bill no ground for equitable relief, the suit is improperly brought into equity, within the meaning of the act, and the court will leave the question of damages to a court of law. *Ib.*

Contemporaneous Suit for Injunction and Action for Damages.]—A. filed a bill in equity against B. for the cancellation of bills of exchange, drawn by B., and accepted by A. in part performance of a contract, of which B. failed to perform his part, and for an injunction to restrain B. from parting with or suing on the bills; and, pending the suit, A. commenced an action against B. for damages for breach of the contract:—Held, that the suit and action were not for the same matter, and an order to elect obtained by B. was discharged. *Anglo-Danubian Co.* v. *Rogerson*, 36 L. J., Ch. 667; L. R. 4 Eq. 3; 16 L. T. 262; 15 W. R. 729.

Where Specific Performance Impossible.]—Although relief by award of damages, under 21 & 22 Vict. c. 27, is in the nature of consequential relief, yet the court has jurisdiction to grant it, notwithstanding that it may not be in a position at the hearing to grant an injunction or a specific performance on which the right to damages depends. *Cory* v. *Thames Ironworks and Shipbuilding Co.*, 8 L. T. 237; 11 W. R. 589.

Damages Awarded though not Prayed.]—*Cotton* v. *Wyld*, 32 Beav. 266.

Lord Cairns' Act.]—The 21 & 22 Vict. c. 27, does not diminish the rights of suitors; therefore, a plaintiff in equity, who would before the act have been allowed at the same time to sue the defendant at law for damages, may still do so, although he might, under the act, pray for and obtain damages in the suit. *M'Rae* v. *L. B. & S. C. Ry.*, 37 L. J., Ch. 267; 18 L. T. 226.

When, at the time of filing a bill, the plaintiffs were entitled to an injunction against a railway company to restrain them from using their land, damages were awarded to them at the hearing, although no injunction was in fact obtained, and the plaintiffs' interest in the land had meanwhile determined. *Ib.*

Where other Relief Refused.]—A court of equity will not direct an inquiry as to damages where it refuses other relief. *Martin* v. *Douglas*, 16 W. R. 268.

Therefore, where D., when building a house, inserted some tassels and bond timbers, to the depth of a few inches, into the flank wall of an adjoining house belonging to M., and rested the lintel of a door upon a wall, not disputing M.'s right to compensation for such user, an injunction or an inquiry as to damages was refused. *Ib.*

Where Injunction cannot be Granted.]—A plaintiff cannot recover damages by a suit in equity, where it is practically impossible for him, at the time of filing his bill, to obtain an injunc-

tion to restrain the wrong complained of. *Betts* v. *Gallais*, 22 L. T. 841.

A plaintiff filed a bill on the 8th January, 1868, which prayed for an injunction to restrain the infringement of a patent, and for damages. The patent expired on the 13th January, 1868 :— Held, that, as it was practically impossible for him to obtain an injunction before the expiration of the patent, it was not a fit case for the interference of a court of equity. *Ib.*

Inquiry as to Damages.]—The power conferred by Lord Cairns' Act, s. 5, on the court of chancery, of directing an inquiry as to damages, was not intended to be exercised concurrently with the ancient jurisdiction of the court for granting an inquiry as to profits. Therefore a plaintiff cannot obtain an inquiry both as to damages and also as to profits. He must be put to his election between the two inquiries. *De Vitre* v. *Betts*, 42 L. J., Ch. 841 ; 21 W. R. 705.

Injunction Granted where Damages in Lieu asked for.] — In an action by mill-owners, riparian proprietors, to restrain the discharge of water containing acid into a stream, where the defendant asked that damages in lieu of an injunction might be given, an injunction was granted. *Pennington* v. *Brinsop Hall Coal Co.*, 46 L. J., Ch. 773 ; 5 Ch. D. 769 ; 37 L. T. 149.

In a claim by the plaintiffs, as riparian proprietors, and as having prescriptive right to use of water, for injunction and damages :—Held, that there was evidence of actual damage, but that, even if there had been merely evidence of injury to the riparian and prescriptive rights of the plaintiffs, an injunction and not damages would still have been awarded. *S. C.*, 25 W. R. 874.

Jurisdiction — Lord Cairns' Act.] — The jurisdiction given by Lord Cairns' Act to the court of chancery to award damages in lieu of an injunction is not limited to cases where a mandatory injunction is claimed, but extends to all cases in which an injunction is sought to prevent a continuing nuisance. Per A. L. Smith, L.J. : If the injury to the plaintiff's legal right (1) is small, (2) is capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) the case is one in which it would be oppressive to the defendants to grant an injunction, damages in lieu of an injunction may be awarded. But there may be cases in which, although these four requirements exist, the defendant by his conduct has disentitled himself from asking that damages may be assessed in substitution for an injunction. *Shelfer* v. *City of London Electric Lighting Co.*, 64 L. J., Ch. 216 ; [1895] 1 Ch. 287 ; 12 R. 112 ; 72 L. T. 34 ; 43 W. R. 238—C. A.

Discretion — Lord Cairns' Act — Ancient Lights — Obstruction.] — Where the plaintiff's ancient lights have been obstructed to a substantial extent by a new building, and will be still further obstructed by the carrying out of the building scheme, the plaintiff primâ facie is entitled to an injunction to restrain such further obstruction, the court having no discretion to award damages in lieu thereof. The court awarded damages in respect of the obstruction caused by the part of the building already erected. *Dreyfus* v. *Peruvian Guano Co.* (43 Ch. D. 316) and *Holland* v. *Worley* (26 Ch. D. 578) discussed. *Martin* v. *Price*, 63 L. J., Ch. 209 ; [1894] 1 Ch. 276 ; 7 R. 90 ; 70 L. T. 202 ; 42 W. R. 262—C. A.

Appeal against Award of Damages.] — A plaintiff, who had obtained an injunction against a nuisance and an inquiry as to damages, objected to the amount of damages awarded, and to the way in which they had been assessed :— Held, that it not having been shown that the court had acted on any wrong principle in arriving at the amount of damages, an appeal against the award must be dismissed with costs. *Ball* v. *Ray*, 30 L. T. 1 ; 22 W. R. 283.

Damages for Nuisance, where Injunction Claimed.]—Injunction suit to restrain the defendants from causing a nuisance, by the working of their patent for making bricks and tiles under a covered area, to the plaintiff and her dwelling-house. The bill prayed an injunction, but did not ask any inquiry as to damages. The plaintiff at the hearing was willing to take damages instead of an injunction :—Held, that a nuisance was proved, and that the plaintiff was entitled to damages although she had not prayed for them by her bill. *Crawford* v. *Hornsea Steam Brick and Tile Co.*, 45 L. J., Ch. 432 ; 34 L. T. 923.

Decree Indorsed on Title-deeds.]—A memorandum of a decree, giving damages instead of an injunction in respect of a nuisance, directed to be indorsed on the plaintiff's title-deed. *Ib.*

Damages, how Calculated.] — Damages in equity under Lord Cairns' Act, s. 2, for loss occasioned by pulling up a railway, will be computed upon a general view of the whole case and an estimate, and allowance will be made of such a sum as may be considered a recompense for the loss sustained. Parties who make a claim for damages in equity must by evidence establish the facts on which they base their claim. *Mold* v. *Wheatcroft*, 30 L. J., Ch. 598.

c. Undertaking as to.

General Rules.]—Semble, that it is almost universally the practice, on granting an interlocutory injunction, to require an undertaking to be answerable in damages. *Chapell* v. *Davidson*, 8 De G. M. & G. 1.

It is the settled practice of the court, upon granting an interlocutory injunction upon notice, to require the plaintiff to give an undertaking as to damages. *Wakefield* v. *Buccleugh* (*Duke*), 11 Jur. (N.S.) 523 ; 12 L. T. 628 ; 13 W. R. 856.

Where the damage which may accrue to a defendant is of a vague and uncertain nature, the court, before granting an injunction, in respect of selling or dealing with a chattel, will require from the plaintiff seeking such injunction an undertaking to make good any such damage. *Adamson* v. *Wilson*, 10 L. T. 24.

An undertaking as to damages ought to be given by a plaintiff who obtains an interlocutory order for an injunction, not only when the order is made ex parte, but even when it is made upon hearing both sides. *Teign Valley Ry.* v. *Southwood*, 19 W. R. 690—L.JJ.

An interlocutory injunction ought to be made

upon an undertaking as to damages. *Graham* v. *Campbell*, 47 L. J., Ch. 593 ; 7 Ch. D. 490 ; 38 L. T. 195 ; 26 W. R. 336—C. A.

Since Lord Cairns' Act, s. 2, empowering the court to award damages in cases in which it has jurisdiction to entertain an application for an injunction against the commission of any wrongful act, the court will be more strict than ever in requiring the plaintiff, as a condition previous to his obtaining an interim injunction against the infringement of a patent, to abide by any order it may make as to damages. *Tuck* v. *Silver*, 1 Johns. 218.

May be sent by Post.]—The court permitted an undertaking as to damages, on an ex parte injunction obtained by a company, to be signed by an officer of the company on a separate piece of paper and transmitted to the registrar. *Pacific Steam Navigation Co.* v. *Gibbs*, 13 L. T. 431; 14 W. R. 218.

Injunction wrongly granted.]—Where a plaintiff obtains an interlocutory injunction, upon giving an undertaking in damages, the defendant is entitled to the benefit of the undertaking even though it should afterwards be decided that the injunction was wrongly granted, owing to the mistake of the court itself. Dictum of Jessel, M.R., in *Smith* v. *Day* (21 Ch. D. 421), disapproved. *Griffith* v. *Blake*, 53 L. J., Ch. 965 ; 27 Ch. D. 474 ; 51 L. T. 274 ; 32 W. R. 833 —C. A.

Where an injunction is wrongly granted, an undertaking as to damages given by the plaintiff is equally enforceable whether the mistake was in point of law or in point of fact. In such a case the court has no discretion to refuse an inquiry as to damages unless the damages alleged would be too remote if the defendant were suing in respect of them upon a breach of contract. *Hunt* v. *Hunt*, 54 L. J., Ch. 289.

What Losses.] — An army surgeon, living apart from his wife, was under orders to sail for Egypt, and proposed to take some of his children with him. The wife obtained an injunction to restrain him from so doing, the judge considering that he would be acting in contravention of the separation deed between them. The court of appeal took a different view of the effect of the separation deed, and dissolved the injunction. The husband applied for an inquiry as to damages occasioned to him by the injunction, in enforcement of an undertaking as to damages given by the wife, alleging loss of free passages to Egypt for the children, loss of pay, and expenses caused by his stay in London :—Held, that the inquiry must be granted. *Ib.*

Where Plaintiff is a Married Woman.]—An undertaking as to damages, required from a married woman in respect of her separate estate. *Holden* v. *Waterlow*, 15 W. R. 319.

An application was made on behalf of a married woman for an injunction restraining the Bank of England, until further order, from permitting the transfer of a sum of new three per cent. annuities, standing in the names of the executors of a testator, and to which the married woman claimed to be beneficially entitled. An injunction was granted for a fortnight on the usual undertaking of the married woman to be answerable in damages. The registrar refused to draw up the order on the sole undertaking of the married woman as to damages :—Held, that the sole undertaking of the married woman must be accepted. *Prynne, In re*, 53 L. T. 465.

Where an interlocutory injunction is granted upon the application of a married woman, her sole undertaking as to damages is sufficient. *Pike* v. *Cave*, 62 L. J., Ch. 937; 68 L. T. 650.

Action by Corporation.]—The court will not grant an injunction upon the application, ex parte, of a limited company, except upon the undertaking of some responsible person to be answerable in damages. *Anglo-Danubian Co.* v. *Rogerson*, 10 Jur. (N.S.) 87 ; 1 N. R. 185.

Where a corporation obtains an interim injunction, the court will, in a proper case, allow the usual undertaking in damages to be given by the corporation itself, and not require the undertaking to be given by some responsible person on behalf of the corporation ; and the same rule applies where the plaintiff is a local board. *East Molesey Local Board* v. *Lambeth Waterworks Co.*, 62 L. J., Ch. 82 ; [1892] 3 Ch. 289 ; 67 L. T. 493.

Restraining Sale of Shares — Dismissal of Action at Trial—Measure of Damages.]—The plaintiff, claiming certain shares as his property, obtained, on giving the usual undertaking as to damages, an interlocutory injunction restraining the shareholder and his mortgagees from parting with the shares. Before the trial, a summons by the mortgagees, asking that the shares might be sold and the proceeds paid into court, was successfully opposed by the plaintiff and the shareholder. At the trial the action was dismissed :—Held, that, in ascertaining the amount of damages under the undertaking, all the facts must be considered, including the fluctuations of the market during the continuance of the injunction ; and that the amount payable by the plaintiff was not the difference between the price of the shares when the action was dismissed and the highest price at which they had been quoted during that period ; but the difference between the price when the injunction was granted and the price when the summons asking for a sale was issued. *Mansell* v. *British Linen Bank*, 61 L. J., Ch. 696 ; [1892] 3 Ch. 159 ; 67 L. T. 171.

Patent Action—Threats.]—In an action for the alleged infringement of a patent an order was made restraining the plaintiff until judgment in the action from threatening legal proceedings in respect of such infringement :—Held, that the order was in the nature of a final order, and therefore an undertaking as to damages ought not to be inserted. *Fenner* v. *Wilson*, 62 L. J., Ch. 984 ; [1893] 2 Ch. 656 ; 3 R. 629 ; 68 L. T. 748 ; 42 W. R. 57.

Limited Company—Undertaking by Counsel.]—The ordinary undertaking as to damages where the plaintiff obtains an injunction on an ex parte motion is properly given by the plaintiff's counsel, although the plaintiff is a limited company. *Manchester and Liverpool Banking Co.* v. *Parkinson*, 60 L. T. 47.

Enforcement—Delay.]—An application to enforce an undertaking to be answerable in damages on the granting of an injunction, ought to be made within a reasonable time after it is ascertained that the injunction has been im-

properly granted. Unexplained and unreasonable delay in making such an application will be a sufficient ground for refusing it. *Hall, Ex parte, Wood, In re*, 52 L. J.. Ch. 907; 23 Ch. D. 644; 49 L. T. 275; 32 W. R. 179—C. A.

Damage—Detention of Ship.]—Where, on obtaining an injunction against the use of a ship by an owner, an undertaking for damages is given, the measure of damages would include the loss of profit by the detention of the ship. *De Mattos* v. *Gibson*, 28 L. J.. Ch. 165; 5 Jur. (N.S.) 347; 7 W. R. 152. *S. C.*, 1 John. & H. 79; 30 L. J., Ch. 145; 7 Jur. (N.S.) 282; 3 L. T. 121.

Loss of Prospective Tenant.]—An injunction to restrain the defendant from building so as to prevent access of light and air to the plaintiff's windows was granted ex parte on the 4th of November, 1879, and on the 27th of November was continued until the trial or further order, the plaintiff giving the usual undertaking as to damages. On the 18th of February, 1880, the court of appeal discharged the order. On the 11th of November, 1880, a perpetual injunction as to access of air was granted; but on the 21st of June, 1881, the court of appeal dismissed the action with costs. On the 16th of February, 1882, the defendant gave notice of motion for an inquiry as to damages, which was refused by Bacon, V.-C. The only damage alleged was that the defendant had agreed to let part of the property with the new buildings to a tenant, and was prevented from carrying this out by the injunction preventing his building. It was not proved, however, that there was any binding agreement to take a lease, nor did it appear that the injunction interfered with the erection of the buildings to such an extent as would have entitled the intended tenant to throw up the agreement if binding:—Held, by the court of appeal, that an inquiry as to damages ought not to be granted. *Smith* v. *Day*, 21 Ch. D. 421; 48 L. T. 54; 31 W. R. 187—C. A.

Trivial Damage—Delay.]—The question considered at what time the application for an inquiry as to damages ought to be made:—Held, that even if there had been a binding agreement by the proposed tenant to take a lease, and the injunction had so interfered with the building as to entitle the tenant to be off the bargain, damages ought not to be granted in respect of it, for that damages must be confined to the immediate natural consequences of the injunction, under the circumstances which were within the knowledge of the party obtaining the injunction. *Ib.*

The court is not bound to grant an inquiry as to damages whenever the defendant has sustained some damage by the granting of the injunction; but it has a discretion, and may refuse any inquiry if the damage is trivial or remote, or if there has been great delay in making the application. *Ib.*

After Notice to Discontinue.]—When a plaintiff in an action, having obtained an injunction upon the usual undertaking as to damages, has given notice to discontinue his action under Ord. XXIII. r. 1, the court retains its jurisdiction in the matter so far as relates to the question of these damages, and will direct an inquiry as to their amount on motion. *Newcomen* v. *Coulson*, 47 L. J., Ch. 429; 7 Ch. D. 764; 38 L. T. 275; 26 W. R. 350.

In such a case a delay, after discontinuance, of nearly eleven months was not held a bar to the defendant's right to an inquiry. *Ib.*

Interest on Purchase-money Given in Lieu of Inquiry.]—C. having, through D. his agent, agreed to sell a property to F., G., alleging a prior contract for sale to himself, commenced an action against C., D., and F. for specific performance, and, in default, for damages against C. and D., and obtained an interlocutory injunction restraining C. and F. from completing the sale, G. giving the usual undertaking as to damages. Malins, V.-C., held that no contract had been entered into with G., and dismissed the claim with costs as against F., but as against C. and D. without costs, considering the conduct of D. blamable, and refused to give any inquiry as to damages. C. and D. appealed, on the ground that the dismissal ought to have been with costs, and that an inquiry as to damages ought to have been granted. G. presented a cross appeal asking for damages against C. and D. The court of appeal agreed with the vice-chancellor that there was no contract between C. and G., but did not agree with him in his unfavourable view of D.'s conduct:—Held, that C. was entitled to damages under the undertaking, for that, unless under special circumstances, effect ought to be given to such an undertaking when an injunction turns out to have been wrongly granted; but that in the present case, as the only possible damage was that C. had been delayed in receiving the purchase-money, an inquiry would not be directed, but C. should receive from the plaintiffs interest at 5*l.* per cent. on the purchase-money, minus any interest actually made by him, the amount to be verified by affidavit. *Graham* v. *Campbell*, 47 L. J., Ch. 593; 7 Ch. D. 490; 38 L. T. 195; 26 W. R. 336.

Crown not exempt from.]—The court will not, in favour of the crown, depart from established practice, therefore in the case of an action by the crown to restrain the defendants from proceeding to construct certain tramways, the court refused to grant an interim injunction against the defendants unless the crown would consent to be bound by the usual undertaking as to damages. *Secretary of State for War* v. *Chubb*, 43 L. T. 83.

Costs of Inquiry reserved.]—Where in an action to restrain the defendant from polluting a stream and for damages, judgment was given for the plaintiff with costs, and an inquiry as to damages ordered, the costs of such inquiry were reserved in order that the court might exercise control over the manner in which the inquiry was conducted, and prevent the costs being unduly increased by the plaintiff. It is the usual practice to send such an inquiry to the chief clerk and not to a referee. *Slack* v. *Midland Ry.*, 50 L. J., Ch. 196; 16 Ch. D. 81; 43 L. T. 434; 29 W. R. 302.

Extent of.]—An undertaking as to damages is the price which a person asking for an injunction has to pay for it; and such an undertaking should not be confined to the damages that may be sustained only by the party enjoined, but should extend to all the defendants asking for it. *Tucker* v. *New Brunswick Trading Co.*, 59 L. J., Ch. 551; 44 Ch. D. 249; 63 L. T. 69; 38 W. R. 741—C. A.

But the court has no power to extend an undertaking given by a plaintiff so as to cover damages that may be sustained by a party who never asked for it when the injunction was granted. *Ib.*

Effect of, when Action Dismissed without Costs.—Where a plaintiff has, upon obtaining an injunction, given an undertaking as to damages, and upon the hearing of the cause his bill is dismissed, but without costs, the court will refuse a motion for assessment of damages, on the ground that any damage which the defendant might have incurred would arise out of the institution of a suit which itself has pronounced to have been rightly instituted. *Bingley* v. *Marshall*, 9 L. T. 144 ; 11 W. R. 1018.

When Action not Dismissed, but Injunction Dissolved.]—An injunction was granted, on the usual undertaking to be answerable in damages. The injunction having been dissolved, the defendant moved to dismiss for want of prosecution. and for a reference to ascertain the amount of damages. The plaintiff undertook to speed :— Held, that this was not the proper time for obtaining a reference as to damages. *Southworth* v. *Taylor*, 28 Beav. 616 ; 29 L. J., Ch. 868.

Damages, how to be Assessed.]—Where an interim injunction has been granted, upon an undertaking as to damages, and the bill is subsequently dismissed, the court has jurisdiction to make an order for the assessment of the damages, by a jury or otherwise. The ground of the jurisdiction is, that the party who gives the undertaking puts himself in the power of the court ; not in the suit alone, but actually and wholly independent of the suit ; the undertaking being an absolute one that he will be liable, in a particular event, for any damages that may be sustained. *Newby* v. *Harrison*, 1 John. & H. 678 ; 30 L. J., Ch. 863 ; 7 Jur. (N. S.) 981 ; 5 L. T. (N. S.) 12 ; 9 W. R. 849.

Application, when to be made.]—Where a plaintiff, undertaking to abide by any order as to damages, obtained an interlocutory injunction to restrain the defendant from proceeding with certain erections, but his bill was dismissed at the hearing, the court refused an application by the defendant at the dismissal of the bill, for an inquiry as to damages sustained by reason of his having been restrained by the injunction for the space of a year, but without prejudice to any application he might make as to damages on the plaintiff's undertaking, upon the production of sufficient evidence to justify an inquiry. *Butt* v. *Imperial Gas Light and Coke Co.*, 14 L. T. 349 ; 14 W. R. 508.

Violation of Copyright—Injunction Continued on Undertaking.]—Ex parte injunction against violation of copyright had been continued, on defendant's motion to dissolve, upon plaintiff's undertaking to abide by the order of the court as to giving compensation to the defendant. Defendant held entitled to an inquiry as to the damage sustained. *Novello* v. *James*, 24 L. J., Ch. 111 ; 1 Jur. (N.S.) 217 ; 3 W. R. 127.

In Patent Action.]—The undertaking in damages usually inserted in an order granting an interim injunction should not be inserted in an interim order in a patent action restraining one of the parties from publishing threats of legal proceedings for infringement of his alleged patent. *Fenner* v. *Wilson*, 62 L. J., Ch. 984 ; [1893] 2 Ch. 656 ; 3 R. 629 ; 68 L. T. 748 ; 42 W. R. 57.

d. Effect.

Entry after.]—It is said in *Tilley* v. *Bridge* (2 Vern. 519) that an injunction does not prevent an entry ; but see per master of rolls in *Curtis* v. *Curtis*, 2 Bro. C. C. 631.

Foreign Attachment.]—Foreign attachment stayed by injunction. *Mildred* v. *Neate*, Dick. 279.

Authority to Receiver Pending.]—Receiver authorised to let the shooting upon certain terms, pending an injunction, upon trial of issue respecting the warren. *Blanchard* v. *Cawthorn*, Coop. t. Brougham, 113.

Party in Custody under Legal Process.]—On an injunction obtained, the court will not discharge the party out of custody if taken on legal process. *Willis* v. *Daniel*, 1 Anstr. 36,

Against Administrator.]—Semble, injunction restraining administrator from transferring intestate's stock into his own name, will, by equitable construction, operate to prevent his parting with any of the intestate's outstanding estate which has previously come to his hands. *Scott* v. *Becher*, 4 Price, 346 ; 18 R. R. 722,

Bail Bond.]—Where bail is put in above, an injunction to stay proceedings against the principal extends to proceedings against the bail ; where bail is only put in below, such an injunction extends to proceedings on the bail bond. *Stone* v. *Tuffin*, Ambl. 32.

Operates from the Order.]—Injunction when sealed at the next seal operates from the order, not from the sealing. *Rattray* v. *Bishop*, 3 Madd. 220.

B. IN WHAT CASES GRANTED.

1. Restraining Proceedings in other Courts.

As to Restraining Proceedings in Foreign Courts.]—*See* International Law.

Where the legislature has pointed out a special tribunal for determining a question, as a general rule no other court ought to restrain the proceedings before it ; but where the question has come before another court in independent proceedings in which it is necessary to decide the whole matter between the parties, the court may in such case restrain the proceedings elsewhere by injunction in order to save expense. *Stannard* v. *St. Giles, Camberwell*, 51 L. J., Ch. 629 ; 20 Ch. D. 190 ; 46 L. T. 243 ; 30 W. R. 693—C. A.

Where Admission Alleged to have been Obtained by Duress.]—The owners of two privateers seized upon a ship, as a lawful prize, it appearing by her papers that she had carried provisions to the enemy, and the captain signed a note acknowledging that they had justly confiscated his cargo ; afterwards, the captain brought his

bill for an injunction to stay a suit in the admiralty court, on the lawfulness of the transaction, suggesting that some of the papers were lost, and that if the note should be produced which he was compelled to give he should be cast at law. The court denied the injunction; for if it was to be granted on such pretences, it would defeat the statute respecting prizes, and if the admiralty found that the note was obtained by duress and imprisonment, they could suppress it of their own authority. *Anon.*, 3 Atk. 350.

Enforcing Wife's Equity to Settlement.]—A man suing for his wife's jointure in the spiritual court, will be restrained by an injunction in equity, till he has made a competent provision for her. *Tanfield* v. *Davenport*, Toth. 114.

Legacy.]—Where there is a trust, or anything in the nature of a trust, notwithstanding the ecclesiastical court has an original jurisdiction in legacies, yet the court of equity will grant an injunction. *Anon.*, 1 Atk. 491.

An injunction does not deny, but admits, the jurisdiction of the court of common law, and the ground on which it issues is, that they are making use of their jurisdiction contrary to equity. So, where a trustee is suing in the ecclesiastical court for payment of cestui que trust's legacy into his own hands, or, in the case of a portion, where the husband is suing for it there before settlement made, the court of equity will, upon the same grounds, restrain them from proceeding. *Hill* v. *Turner*, 1 Atk. 516.

Custom of Inferior Court.]—By the custom of an inferior court, on an affidavit of debt, an attachment issued against the goods of the defendant below; and unless he could procure bail to pay such debt, damages, expenses, and costs as should be awarded against him, the defendant below could not enter an appearance, or have a trial of the action on the merits. A party so circumstanced filed a bill for an injunction, stating that he was not indebted to the defendant in equity, who had brought the action in the inferior court:—Held, that the court had no power to grant the injunction. *M'Anaspie* v. *Dickson*, 13 Ir. Eq. R. 216.

Semble, the proper course is a writ of error to the court of queen's bench or common pleas. *Ib.*

Quære, whether such a custom be valid. *Ib.*

Restraining Action in County Court.]—Legatees who had mortgaged their legacies restrained from suing the executors in the county court, the fund being ordered to be brought into court. *Neighbour* v. *Brown*, 26 L. J. Ch. 670.

In Lieu of Prohibition.]—The jurisdiction to grant prohibition is now conferred by the judicature acts upon every judge of the high court; but, by virtue of the Judicature Act, 1873, s. 24, sub-s. 7, and s. 25, sub-s. 8, the court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior court. *Hedley* v. *Bates*, 49 L. J., Ch. 170; 13 Ch. D., 498; 42 L. T. 41; 28 W. R. 365. Explained in *Stannard* v. *St. Giles, Camberwell*, ante, col. 1578.

Lord Mayor's Court.]—The plaintiffs made advances to S. & Co., on an agreement for the consignment of shipments to them from an agent of S. & Co. at H., who promised the plaintiffs to consign them accordingly. A shipment having been made, the agent directed the plaintiffs to insure a part of the cargo intended for them, and informed S. & Co. thereof, which they communicated to the plaintiffs. After the shipment, but before the consignment, the resident partner in the house at H. died, and his representative made the consignment to B., under whose orders, and by whom, it was sold, and the proceeds received by him; and S. & Co., being creditors of the firm of H., attached their goods in B.'s hands, in the mayor's court:—Held, that the plaintiffs' title being equitable, and not legal, they were entitled to the aid of the court of equity in the trial of their rights, and that the proceedings in the mayor's court should be restrained by injunction. *Cotesworth* v. *Stephens*, 4 Hare 185.

Liverpool Court of Passage.]—Injunction issued by the admiralty division to restrain one of the officers of a tug, to which an award of 3,500*l.* had been made in a salvage action in the high court, from proceeding with an action for distribution of salvage instituted by him in the Liverpool court of passage against the owners of the tug. "*The Theresa*," 11 R. 681; 71 L. T. 342; 7 Asp., M. C. 505.

Palatine Court.]—Special injunction granted to stay proceedings in an action in the C. P. at Lancaster. *Hine* v. *Fiddes*, 2 Sim. & S. 370.

Powers of County Palatine Court.]—The vice-chancellor of the county palatine has no jurisdiction to grant an injunction to restrain proceedings in the high court, and therefore he ought not to take an undertaking to discontinue them, and an undertaking so taken will accordingly be discharged. *Alison, In re, Johnson, In re*, 47 L. J., Ch. 755; 8 Ch. D. 1; 38 L. T. 304; 26 W. R. 450—C. A.

Powers of County Court.]—The County Courts Act, 1865 (28 & 29 Vict. c. 99), s. 2, confers upon the judge of a county court all the powers and authorities, for the purposes of that act, possessed by a judge of the court of chancery, which at that time included the power of restraining by injunction an action in a superior court of common law. Such a power has been taken away from the court of chancery by s. 24, sub-s. 5, of the Judicature Act, 1873 (36 & 37 Vict c. 66), and is therefore impliedly taken away also from a county court judge, who has moreover expressly conferred upon him by the same act (s. 89) the same powers as are possessed by the high courts of justice. *Cobbold* v. *Pryke*, 49 L. J, Ex. 8: 4 Ex. D. 315; 28 W. R. 259.

Unqualified Tribunal.]—Two railway companies were empowered by a special act to enter into a working agreement, but no provision was made respecting arbitration. The agreement made under this act contained a clause providing that any difference between the companies should be determined by arbitration, in accordance with the provisions of the Railway Arbitration Act, 1859. Differences having arisen, one of the companies called upon the railway commissioners to decide the differences under the 8th section of the Regulation of Railways Act, 1873. The

other company accordingly issued a writ for an injunction against the first company, which was amended by making the railway commsssioners parties, and asking for a prohibition :—Held, that the railway commissioners had no jurisdiction to undertake the arbitration, and a prohibition was issued accordingly. *G. W. Ry.* v. *Waterford and Limerick Ry.*, 50 L. J., Ch. 513 ; 17 Ch. D. 493 ; 44 L. T. 723 ; 29 W. R. 826—C. A.

Bankruptcy.]—A. sold and delivered goods to B., who before payment became bankrupt. A. then brought an action for the price of the goods against C., alleging that B. had bought them on the joint account of B. and C., or on account of C. as undisclosed principal. The defendant C. thereupon served the trustee in the bankruptcy with a third-party notice under Ord. XVI. r. 18, claiming indemnity out of the bankrupt's estate in respect of the contract, but the trustee obtained an order in bankruptcy restraining all proceedings upon the notice :—Held, that the order must be discharged, as the court of bankruptcy could not dispose of the whole matter, and the case was one expressly provided for by Ord. XVI. r. 18. *Smith, Ex parte, Collie, In re*, 45 L. J., Bk. 116 ; 2 Ch. D. 51 ; 34 L. T. 603 ; 24 W. R. 310—C. A.

Action for Trespass—Plea of Licence.]—To a count for cutting down and carrying away timber growing on the plaintiff's land, the defendant pleaded that the former owner, whose devisee the plaintiff was, had by agreement bargained and sold certain timber growing thereon to the defendant, upon the terms that in a certain event the defendant might from time to time enter, cut down, and carry it away at an agreed price ; that, after the happening of the event and in the testator's lifetime, the defendant entered, cut down, and carried away, and paid for part of the timber sold, and that his entering, cutting down and carrying away other part thereof, in pursuance of the agreement, after the testator's death, and within a reasonable time, constituted the alleged trespass :—Held, that the plea was bad, upon the ground that a court of equity would not grant an unconditional injunction to restrain the action, and that a common law judgment for the defendant would not do final justice between the parties. *Wakley* v. *Froggatt*, 2 H. & C. 669 ; 33 L. J., Ex. 5 ; 9 Jur. (N.S.) 1248 ; 9 L. T. 340 ; 12 W. R. 86.

Present Claim inconsistent with that made in former Action.]—In 1812 an assurance society granted a policy for 5,000*l.* to W. on his life, which was forfeited in 1816 for non-payment of premiums. A fresh policy was granted to W. in 1817 on the same terms as the forfeited policy. In the meantime a bye-law of the society had been passed, whereby the holders of policies granted in 1817 were prevented from participation in certain bonuses to which holders of policies granted in 1812 were entitled. After the death of W., in 1855, his executors accepted payment of 8,000*l.* as due on the policy of 1817. In 1860 one of the executors filed a bill alleging that the policy of 1817 was accepted on condition that the assured should be entitled to the same rights as he would have been under the policy of 1812, and praying for an order for the payment of the further bonuses. The bill was dismissed, and the executor brought an action against the society to recover the further bonuses. The society filed a bill to restrain the action :—Held, that the former suit having been brought on the footing that the policy of 1812 was void, the defendant could not be allowed to bring an action on that policy. *Tredegar* v. *Windus*, 44 L. J., Ch. 268 ; L. R. 19 Eq. 607 ; 32 L. T. 596 ; 23 W. R. 511.

Held, also, that the right of the society to plead the decree in equity in the action did not prevent the court from granting the injunction. *Ib.*

Equitable Plea already Pleaded at Law.]—Where a defendant pleaded unsuccessfuly an equitable plea, grounded not on equitable principles, but on the course and practice of a court of equity :—Held, that he was not prevented by the decision at law from filing a bill on the same grounds for an injunction to restrain proceedings in the action. *Phelps* v. *Prothero*, 7 De G. M. & G. 722 ; 25 L. J., Ch. 105 ; 2 Jur. (N.S.) 311 ; 4 W. R. 189.

A. pleaded an equitable plea to an action against him on a promissory note in which he had joined as surety, and on the 29th of May a verdict was found against him on the plea. On the 6th June he filed a bill for an injunction to restrain further proceedings in the action, and on the 12th June the injunction was refused by Wood, V.-C. On the 15th June judgment was entered up ; after which A. gave notice of appeal from the decision of the vice-chancellor :—Held, that the plaintiff had conclusively elected to be bound by the action, and that he was therefore precluded from trying the matter over again in a court of equity. *Terrell* v. *Higgs*, 1 De G. & J. 388 ; 4 Jur. (N.S.) 41 ; 5 W. R. 746.

A. executed a deed, in which he and B. were named as sureties, but which B. did not execute. The creditor brought an action on the deed against A., who pleaded the non-execution by B. as a plea on equitable grounds. This plea was met in such a way that a decision at law might probably have turned on a mere point of pleading :—Held, that the pendency of the plea was no reason why a court of equity should decline to interfere by injunction to restrain the prosecution of the action. *Evans* v. *Bremridge*, 8 De G. M. & G. 100 ; 25 L. J., Ch. 334 ; 2 Jur. (N.S.) 311 ; 4 W. R. 350.

The plaintiff sold two leasehold houses, one to the defendant and another to L. The conveyance to the defendant contained, by mistake, a part of the property intended to be sold to L. but which the defendant believed he was purchasing. Upon a bill filed against the defendant by L., he was directed to reconvey to L. that portion which by mistake was included in the assignment to him. The defendant then brought an action against the vendor for damages made under his covenant against incumbrances. An equitable plea was pleaded by him, and he filed a bill for an injunction to restrain the action, but the injunction was refused. *Wild* v. *Hillas*, 28 L. J., Ch. 170 ; 7 W. R. 82.

But if a defendant pleads an equitable plea, he cannot come for an injunction to restrain the action upon the same ground which is the subject of the plea, provided the court of law can give such relief as a court of equity will give. *Waterlow* v. *Bacon*, 35 L. J., Ch. 643 ; L. R. 2 Eq. 514 ; 12 Jur. (N.S.) 614 ; 14 L. T. 724 ; 14 W. R. 855.

But if it cannot, then the equitable plea is no bar to the defendant coming to a court of equity, subject, however, to the costs of the plea being controlled by the court of equity. *Ib.*

A court of equity will restrain an action for damages where the defence relied upon is an alleged agreement between the parties for the performance of certain acts to which a court of law cannot give effect. *Ib.*

Equitable Plea not Pleaded.]—The 17 & 18 Vict. c. 125, s. 83, giving a right to plead an equitable defence, is only permissive, and not compulsory; and a defendant who has not exercised his option of pleading an equitable plea, may come for an injunction to restrain the action, as he might have done before that act. *Gompertz* v. *Pooley*, 4 Drew. 448; 28 L. J., Ch. 484; 5 Jur. (N.S.) 261; 7 W. R. 275. S. P., *Kinsford* v. *Swinford* 28 L. J., Ch. 413; 5 Jur. (N.S.) 261; 7 W. R. 215.

Proceedings which would interfere with or determine Pending Suit.]—In a suit by three shareholders against the directors to restrain proceedings for recovering the amount of certain calls, an injunction had been granted upon terms of plaintiffs paying the amount into court. The directors' solicitor, a shareholder, obtained judgment by default against the company for his bill of costs, and commenced proceedings against two of the plaintiffs for the amount due:—Held (following *Taylor* v. *Hughes*, 2 Jo. & Lat. 24) that, the defendant (the solicitor) not having denied that the proceedings had been taken for the purpose of harassing and impeding the plaintiffs in their suit, the plaintiffs were entitled to an injunction to restrain proceedings against them on the judgment, which proceedings would greatly interfere with, if not wholly determine, the pending suit. *Horn* v. *Kilkenny, &c. Ry.*, 1 Kay & J. 399; 24 L. J., Ch. 241; 3 W. R. 226.

Action against Executors.]—If a cause for the administration of assets has been heard for further directions, and the executors have paid their balances into court, an injunction will be granted to restrain an action against the executors for breach of a covenant in a lease granted to their testator, and the master will be directed to ascertain the damages. *Sutton* v. *Mashiter*, 2 Sim. 513.

Action at Law pending Suit for same Matter.] A court of equity in which a suit was pending would have stopped an action for trespass vi et armis. *York Corporation* v. *Pilkington*, 2 Atk. 302; 9 Mod. 273.

Injunction granted on Terms.]—See *Irving* v. *Harrison*, 3 L. J. (o.s.) Ch. 48.

Criminal Proceedings.]—Whilst suits in equity are depending, plaintiffs indict defendant's agent at the sessions where they themselves are judges, for a breach of the peace. Order made to restrain plaintiffs from proceeding at the sessions till the hearing of the cause and further order. *York Corporation* v. *Pilkington*, 2 Atk. 302; 9 Mod. 273.

There is no restraining power in courts of equity over criminal prosecutions. *Ib.*

Where bill is brought to grant possession, if after that plaintiff prefers indictment for forcible entry, this court will stop proceedings upon such indictment. *Ib.*

No general jurisdiction in equity to enjoin or regulate proceedings upon indictment, but circumstances may give it; as where prosecuted by relators in an information as plaintiffs, they are subject to control by order personally affecting them; but not the defendants. *Att.-Gen.* v. *Clearer*, 18 Ves. 211.

Although there may be cases in which the court of chancery will interfere to restrain criminal proceedings taken by a plaintiff in equity against the defendant to the suit in respect of the matters to which the suit relates, yet the court will not so interfere where the remedies in the proceedings in the criminal court are for a purely criminal charge. *Saull* v. *Browne*, 44 L. J., Ch. 1; L. R. 10 Ch. 64; 31 L. T. 493; 23 W. R. 50; 13 Cox C. C. 30.

Unless the cases raised and the objects sought are identical, the court will not prevent a plaintiff in the court of chancery from proceeding in a criminal court against the defendants to the suit in chancery. *Ib.*

Held, that a remedy in the police court, which was the personal punishment of the defendants, was so distinct from a remedy in chancery, which was the recovery of property, that the court of chancery would not restrain the criminal proceedings, and that the discretion to stay such proceedings rested with the magistrates. *Ib.*

A court of equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an act of parliament for a breach of its enactments. *Kerr* v. *Preston Corporation*, 46 L. J., Ch. 409; 6 Ch. D. 463; 25 W. R. 264.

2. Restraining Criminal and Quasi-Criminal Acts.

Though the court of chancery has no jurisdiction to prevent the commission of acts which are merely criminal or illegal, yet its function is to protect property, and therefore it will restrain acts which are of a criminal nature, if they are also of such a nature as to injuriously affect rights of property. *Springhead Spinning Co.* v. *Riley*, 37 L. J., Ch. 889; L. R. 6 Eq. 551; 19 L. T. 64; 16 W. R. 1138.

Certain members of a trade union, employed at a spinning company's mill, took offence at a reduction of their wages and left their masters' service. The association then posted in the district, and advertised in the local papers, a placard or notice, which was in substance a warning to all workmen not to seek to renew their work at the mill until the dispute was settled. The company filed a bill to restrain the printing and publishing of the notices, charging that they were part of a scheme to prevent persons, by threats and intimidation, from hiring themselves to the plaintiffs, and that persons had, in fact, been so intimidated; that the plaintiffs' business was materially injured thereby, the value of their goodwill depreciated, and the corpus of their property irreparably damaged:—Held, that the acts of intimidation complained of, though punishable as a statutable offence, were yet within the jurisdiction of equity, as tending to the destruction of property. *Ib.*

Distress by a Stranger.]—Defendant, having assigned leasehold estate to plaintiff, afterwards brought an action of ejectment and was non-

suited. He subsequently distrained on the tenants, was fined by a magistrate, and then distrained again. Injunction refused. *Best* v. *Drake*, 1 W. R. 229.

Opening of Railway prohibited by Board of Trade.]—Where an act has been declared by a competent authority to be illegal, the court will, at the instance of the attorney-general, restrain that act, without examining the grounds on which it was declared illegal. *Att.-Gen.* v. *Oxford, Worcester, and Wolverhampton Ry.*, 2 W. R. 330.

3. Between Co-Defendants.

Motion by a plaintiff for an injunction to restrain an action brought by one defendant against a co-defendant, granted. *Kingham* v. *Maisey*, 2 Sim. 41.

Under special circumstances, an injunction was granted, on the application of a defendant, against a co-defendant. *Edgecumbe* v. *Carpenter*, 1 Beav. 171; 8 L. J., Ch. 17.

Special injunction to restrain proceedings in ejectment between two defendants, refused, where the plaintiff's landlord might have made himself defendant at law. *Moses* v. *Lewis*, Jac. 502.

A railway company, before a decree was obtained, moved for an injunction to restrain co-defendants (the plaintiff's trustees) from prosecuting an action, on the ground that the object sought by it was identical with relief prayed by the bill against the company and the plaintiff's trustees. The motion also asked that all the proceedings in the suit might be stayed; but it was on both points refused, with costs. *Russell* v. *L. C. & D. Ry.*, 9 Jur. (N.S.) 1007; 9 L. T. 14; 11 W. R. 983.

4. In Aid of Legal Right.

Trespasses.]—The court will not interfere to prevent trivial trespasses; and does not exercise its jurisdiction by injunction for the purpose of acting on legal rights, but interposes in order either to enforce legal rights, or to prevent mischief, until the time shall arrive when those legal rights may be ascertained. *Saunders* v. *Smith*, 3 Myl. & C. 711; 7 L. J., Ch. 227; 2 Jur. 491, 536.

Delay.]—When the court has interfered in aid of a legal right, by granting an injunction upon the terms of the plaintiff's bringing an action, it will deprive the plaintiff of the injunction, if he does not commence and proceed with his action with due promptness; but it will not do this if the defendant has been supine in the case. *Bickford* v. *Skewes*, 4 Myl. & C. 498; 8 L. J., Ch. 188; 3 Jur. 379, 818.

And see 10 Sm. 193.

Doubtful Right.]—Probability of right is sufficient to sustain an injunction. *Tonson* v. *Walker*, 3 Swanst. 679.

Certainty.]—The legal right must be certain. *Bramwell* v. *Halcomb*, 3 Myl. & Cr. 737.

Plaintiff Improperly in Possession.]—Where the plaintiff has, by tortuous means, got into possession of property, pending a suit to establish his equitable title to it, the court will not stay legal proceedings against him for the recovery of possession. *Grafton* v. *Griffin*, 1 Russ. & M. 336.

Irremediable Mischief.]—Where the rights of the plaintiff and the defendant are legal, the plaintiff, in asking for an injunction to protect him from a violation of his alleged legal rights, ought to show that the right has been established, or if he has no means of establishing it, that the right is primâ facie well founded, and that irremediable mischief will ensue pending the establishment of the right. *Hilton* v. *Granville (Lord)*, 4 Beav. 130; 10 L. J., Ch. 398; Cr. & Ph. 283.

On an application for an injunction to restrain an alleged irreparable injury, by taking away stones from the sea-shore, the court, considering that the plaintiff was most likely to suffer by its non-interference, granted the injunction; and although the plaintiff's title was purely legal, and was not clearly made out, it refused to put him on the terms of bringing an action to try it, but merely gave him liberty so to do. *Clowes* v. *Beck*, 13 Beav. 347; 20 L. J., Ch. 505.

Nuisance—Conflicting Evidence.]—The jurisdiction of the court of chancery in cases of nuisance existed for the purpose of protecting a legal right, and was not an original jurisdiction; and if no reason was shown why the plaintiff had not proceeded in the first instance to establish his right at law, the court would not, on conflicting affidavits, try the question of nuisance. *Semple* v. *London & Birmingham Ry.*, 1 Railw. Cas. 120. See *S. C.*, 9 Sim. 209; 2 Jur. 560.

When Granted.]—Where equitable relief by way of injunction is sought in aid of a legal right, the court, unless such right is clear, will not, except with the consent of both parties, declare the legal rights and grant a perpetual injunction founded on such declaration, but will require the question to be tried at law. *Cardiff Corporation* v. *Cardiff Waterworks Co.*, 4 De G. & J. 596.

Defendant Submitting — Declaration as to Future Acts.]—Where a defendant submits to a perpetual injunction restraining him from the specific acts complained of by the bill, as being in violation of a legal instrument, the court will not make any further declaration of the legal rights existing between the parties, with reference to possible future acts, but will leave those matters to be decided when they arise, either by a court of law or by the court of chancery under 25 & 26 Vict. c. 42. *Att.-Gen.* v. *Boyle*, 10 Jur. (N.S.) 309; 10 L. T. 290; 12 W. R. 368.

Pending Application to Parliament—Form of Order.]—When notice has been given to the court by the defendant of a pending application to parliament when an injunction has been submitted to, it should so appear in the order, to clear the defendant of any impropriety in making such application. *Ib.*

Nuisance — Trial by Jury.]—The question what is a nuisance is one peculiarly fitted for the investigation of a jury; and in an ordinary case, where the issue of a suit in equity depends upon a legal right, that right must be ascertained in an action before any relief can be granted by a court of equity. *Att.-Gen.* v. *United Kingdom*

Electric Telegraph Co., 31 L. J., Ch. 329; 8 Jur. (N.S.) 583; 5 L. T. 338; 10 W. R. 167.

Where, therefore, a company was, at the suit of the attorney-general and a private person, sought to be restrained from going on with their works, and the erection of posts and wires on waste and other lands adjoining property and elsewhere, on the ground of their thereby creating a nuisance and being guilty of a trespass, the court directed those questions to be tried at law, but retained the bill until after such trial. *Ib.*

Threatened Violation.]—In order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, the plaintiff must show that the act must result in a violation of such right. *Pattison* v. *Gilford*, 43 L. J., Ch. 524; L. R. 18 Eq., 259; 22 W. R. 673.

The owner of an estate, the shooting over which had been let for a term of years, issued particulars of sale of the estate in thirteen lots, stating that the estate contained several plots of accommodation and building land suitable for the erection of villas and residences, and describing one lot in particular as well situated for the erection of a house. The particulars showed that it was intended to make a road through the estate and dedicate it to the public; but gave full notice of the right of shooting:—Held, that the court would not, at the instance of the owner of the right of shooting, interfere to prevent the intended sale. *Ib.*

Upon an interlocutory application the court will not decide a disputed question of title, but if it is satisfied that injury is threatened or apprehended, and the evidence that such is the case is not distinctly rebutted, an injunction will be granted. *Crosse* v. *Duckers*, 27 L. T. 816; 21 W. R. 287.

As of Right.]—When an injunction is sought in aid of a legal right, the court is bound to grant it if the legal right is established. *Fullwood* v. *Fullwood*, 47 L. J., Ch. 459; 9 Ch. D. 176; 38 L. T. 380; 26 W. R. 435.

Plaintiff must show Violation of Right.]—If a plaintiff applies for an injunction in respect of a violation of a common law right, and the existence of that right, or the fact of its violation, is denied, he must establish his right at law; but having done that, he is, except under special circumstances, entitled to an injunction to prevent a recurrence of that violation. *Imperial Gas Light & Coke Co.* v. *Broadbent*, 7 H. L. Cas. 600; 29 L. J., Ch. 377; 5 Jur. (N.S.) 1319.

Award.]—For such a purpose the award of an arbitrator is equivalent to a verdict. *Ib.*

Increase of Damage after Reference.]—If, between the time of the case being referred and the award being made, there has been an alteration in the mode of carrying on the business complained of, it may, if in diminution of the cause of injury, be shown as an answer to the application for an injunction; but if in increase of the cause of injury, it need not be the subject of a fresh proceeding at law; that is matter for the discretion of the court of equity. *Ib.*

Where Legal Right Doubtful.]—The principle upon which the court acts in granting or refusing an injunction, where the legal right of the plaintiff as against the defendant is open to doubt. *Electric Telegraph Co.* v. *Nott*, 2 Coop. C. C. 41; 11 Jur. 157.

Where there is any doubt as to the exclusive legal title of a party claiming an injunction in aid of that legal title, the court will not exercise jurisdiction without giving an opportunity of trying the legal title by proceeding at law. *Bramwell* v. *Halcomb*, 3 Myl. & C. 737.

Observations on granting injunctions before the legal right is ascertained. *Ollendorff* v. *Black*, 4 De G. & Sm. 209; 20 L. J., Ch. 165; 14 Jur. 1080.

Preserving Status Quo.]—The object of the interference of a court of equity by interlocutory injunction between two parties who are at issue upon a legal right, is solely the protection of the property in dispute until the legal right shall have been ascertained, and therefore such an injunction ought always to be accompanied by a provision for putting the question into a course of speedy investigation at law. *Harman* v. *Jones*, Cr. & Ph. 299.

After twenty years Adverse Possession.]—Bill by a party out of possession of real estates, against the party in possession, and claiming by title adverse to that of the plaintiff, stating that the defendant had been in possession for twenty years, and that the plaintiff had only recently discovered his title to the premises, and had commenced an action of ejectment against the defendant, and praying an injunction to restrain the defendant from committing acts of trespass alleged to be productive of irreparable waste. Demurrer to the bill allowed, with costs. *Davenport* v. *Davenport* (*Lady*), 7 Hare, 217; 18 L. J., Ch. 163; 13 Jur. 227.

A party out of possession, claiming real estate by title simply adverse to that of the party in possession, cannot be heard in a court of equity upon an application to restrain the party in possession from committing acts of trespass productive of irreparable waste, until he has established his title at law. *Ib.*

5. Against Exercise of Legal Right.

Principles on which the court of chancery acts on an application for an injunction to restrain a party from prosecuting a legal right. *Dalglish* v. *Jarvie*, 2 Mac. & G. 231; 2 Hall & Tw. 437; 20 L. J., Ch. 475; 14 Jur. 945.

An injunction will be granted to restrain assignees from proceeding in an action, where they have not an equitable as well as a legal right. *Booth*, *Ex parte*, 4 Deac. & C. 211; 2 Mont. & Ayr. 93.

On a bill to restrain the exercise of a legal right, it is the duty of the plaintiff to satisfy the court that there are substantial grounds for doubting the existence of the legal right. *Sparrow* v. *Oxford, Worcester & Wolverhampton Ry.*, 9 Hare, 441. Affirmed 2 De G. M. & G. 94; 21 L. J., Ch. 731; 16 Jur. 703.

Semble, the court will in no case interfere, upon an interlocutory application to prevent a party from enforcing a legal right, without putting the party applying upon such terms as will enable the court to do justice to the party restrained, in the event of the plaintiff in equity failing to make out a case for equitable relief at the hearing. *Saxater* v. *Foster*, Cr. & Ph. 302.

A court of equity will not, upon an alleged equity, interfere with an admitted legal right, unless there be a manifest certainty that, at the hearing, the plaintiff will be entitled to relief; therefore, where the title to relief, set forth in the bill, was not so clear, the court refused to continue the injunction, except upon the terms of the plaintiff giving judgment in the action, and paying the sum sued for into court. *Playfair* v. *Birmingham, Bristol, & Thames Junction Ry.*, 1 Railw. Cas. 640; 9 L. J., Ch. 253.

The plaintiff in equity had obtained possession of a leasehold by purchase under an execution, but without obtaining any assignment from the sheriff, which he ought to have done. The defendant then brought ejectment at law, but was restrained from proceeding in the action by an injunction granted on his answer coming in; from which it appeared that the ground of his action at law was the want of actual assignment, though he also sued on equitable circumstances, which the court held raised no objection to the injunction, as being for the consideration of equity alone. *Jones* v. *Hughes*, 1 Hare, 383; 6 Jur. 316. And see *Doe* d. *Hughes* v. *Jones*, 1 Dowl. (N.S.) 382; 9 M. & W. 372; 11 L. J., Ex. 50; 12 *id.* 265.

Although a court of equity has no right to interfere with the attempt to enforce a legal title for an interest, however small, it is its duty to inquire whether such interest was being enforced bonâ fide, or for an equitable purpose; and if a legal title were used at law for a purpose inconsistent with good faith, and with the equitable rights of another party, then a court of equity would interfere. *Buckland* v. *Gibbins*, 32 L. J., Ch. 391; 9 Jur. (N.S.) 781; 8 L. T. 129; 11 W. R. 483.

Where proceedings were taken to enforce a legal right, consisting of the residue of a term of which three days only were unexpired, for the purpose of obtaining an improper advantage, the court restrained the proceedings by injunction. *Ib.*

The court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may, in some sense, be regarded as unconscientious if contrary to the dictates of prudence and reason, although the actor does the act without any malicious motive. *Turner* v. *Wright*, 6 Jur. (N.S.) 809; 2 L. T. 649; 8 W. R. 675.

Bonâ fide Exercise of Legal Power not Restrained.]—Defendants were lessees of mines with liberty, on giving notice, to make such railways over the surface as they should think necessary or convenient for carrying away the minerals. The plaintiffs, being lessees of other mines under the same lessor, took from him a lease of two closes of the same surface lands over which the defendants' power extended, in order to make a railroad for their minerals. The defendants thereupon gave notice that they required part of the surface lands for continuing a siding they already had communicating with a neighbouring railway, and proceeded to construct a siding on the same two closes which had been leased to the plaintiffs and (as required by their lease) to fence in the land, the effect being to exclude the plaintiffs from access across the closes to the railway. The plaintiffs brought an action to restrain the obstruction, alleging that the defendants' further lines were unnecessary, and that the defendants were exercising their power malâ fide and unreasonably:—Held, by analogy to the principle governing cases of purchase under compulsory powers, that, as the defendants were exercising a legal power, the onus of proving mala fides was on the plaintiffs, and that even if further accommodation was not at present necessary, the defendants were entitled to look forward to the time when it might become so. *James* v. *Lovel*, 56 L. T. 739; 35 W. R. 626.

6. Protection of Property Pending Litigation.

The plaintiff outlawed his debtor, and obtained an injunction, and was proceeding to obtain a custodiam, but, fearing lest the property should be carried off, he filed a bill for an injunction:—Held, that he was entitled to an injunction to preserve the property until he could obtain his custodiam. *Barry* v. *Donnellan*, 1 Hog. 339.

An injunction to restrain a defendant from parting with the property in question in the cause may be granted, notwithstanding a principal party interested is out of the jurisdiction. *Malcolm* v. *Scott*, 3 Hare, 39; 14 L. J., Ch. 57; 8 Jur. 1059.

In what cases the court will interfere to preserve property in litigation in statu quo. *Shrewsbury and Chester Ry.* v. *Shrewsbury and Birmingham Ry.*, 1 Sim. (N.S.) 410; 20 L. J. Ch. 574: 15 Jur. 548.

The court will in many cases interfere to preserve property in statu quo during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights; and, in order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the plaintiff. If therefore the bill states a substantial question between the parties, the title to the injunction may be good, and yet the title to the relief prayed may ultimately fail. *G. W. Ry.* v. *Birmingham & Oxford Junction Ry.*, 2 Ph. 597; 17 L. J., Ch. 243; 12 Jur. 106.

Statute giving Right, but no Remedy by Action.]—The owner of a ferry obtained an act enabling him to substitute a bridge, and providing that persons evading the tolls by conveying passengers, &c., across, otherwise than by the bridge, should be liable to penalties to be summarily enforced by a justice, under a distress warrant, and in default of distress by commitment of the offender. A railway company afterwards, having their terminus on the bank, established steamboats for the conveyance of their passengers across:—Held, that the act, giving no remedy by an action, as in a case where penalties might be recovered de die in diem, the court would protect by injunction an infringement of the right; and the court would not simply leave the complaining party to his remedy by distress, in order to try the legal right in replevin, but would direct an issue to try it, and not allow the defendant to object that the alleged wrong was done by a corporation; and would require an account to be kept pending an inquiry at law, without prejudice to the legal question, by granting the injunction in a case where the injury was not extreme or irreparable. *Cory* v. *Yarmouth & Norwich Ry.*, 3 Hare, 593; 3 Railw. Cas. 524.

Against Waste.]—Although an injunction ex parte will not be granted to stay waste, yet an interim order will be given, with leave to discharge it, where the object of the application is to preserve property during litigation. *Anwyl* v. *Owens*, 22 L. J., Ch. 995; 1 W. R. 207—L.JJ.

Advowson.]—On the principle of protecting property pending litigation, the court will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a defendant claiming to be a purchaser for valuable consideration without notice under it. *Greenslade* v. *Dare*, 17 Beav. 502.

Legal Estate.]—In an action by an equitable mortgagee for sale or foreclosure the court granted an interim injunction to restrain dealing with the legal estate till the next motion day, on an ex parte application by the plaintiff; there being ground for believing that the defendants intended to part with the legal estate pendente lite. *London and County Banking Co.* v. *Lewis*, 21 Ch. D. 490; 47 L. T. 501; 31 W. R. 233.

Pending Appeal to House of Lords.]—Where a bill has been dismissed and the decree has been inrolled, the court has exhausted its jurisdiction in that suit, and will not grant an injunction to preserve the property which was in question in the cause, pending an appeal to the House of Lords; and where the plaintiff is desirous of having the property thus temporarily protected, it is incumbent on him to see that the decree is framed so as to keep alive the jurisdiction pending the appeal. *Galloway* v. *London Corporation*, 11 Jur. (N S.) 537; 12 L. T. 623.

A decree was made in three suits for the administration of the personal estate of an intestate, directing the usual inquiry as to her next of kin. A certificate was made finding five persons of the name of F., who were resident abroad, to be the next of kin, and an order was made for distribution of the fund in court among them. S., who had not been a party to the proceedings, applied by motion to stay the distribution of the fund, alleging herself to be next of kin. The vice-chancellor suspended the giving out of the order, and directed his chief clerk to inquire whether S. had made out a primâ facie case, and the chief clerk finding that she had not, the vice-chancellor directed the order to be given out without prejudice to any independent proceeding by S. Four of the five shares were at once transferred to four of the persons found entitled; the fifth remained in court. Two of the shares which had been transferred were sold out, and the proceeds received by the vendors. S. then commenced an action, and obtained in it an order granting an injunction to restrain any dealing with the three shares which had not been sold, and directing an inquiry who were the next of kin, and this order was subsequently directed to be taken as made in the three suits as well as in the action. The chief clerk again found the F. family to be next of kin. The action and a summons to vary the certificate were heard before the vice-chancellor, who dismissed the summons and the action, but continued the injunction in the three causes until further order. S. appealed, and the court of appeal affirmed the decision of the vice-chancellor dismissing her bill, but S. being about to appeal to the House of Lords:—Held, that as, if S. ultimately succeeded in the House of Lords, her success would be useless unless the fund were protected in the meantime, the injunction ought to be continued pending the appeal. *Polini* v. *Gray*, *Sturla* v. *Freccia*, 49 L. J., Ch. 41; 12 Ch. D. 438; 40 L. T. 861.

And see APPEAL.

Alleged Right to Compensation for Abolition of Office in Custom House.]—*Tunstall* v. *Boothby*, 9 L. J., Ch. 294.

Specific Chattels.]—The jurisdiction to protect by injunction the possession, and to decree the delivery up, of specific chattels, is not confined to chattels, the loss or injury of which would not be adequately compensated by damages, but extends to all cases in which the party in possession of the chattels has acquired such possession through an alleged abuse of power on the part of one standing in a fiduciary relation to the plaintiff. *Wood* v. *Rowcliffe*, 2 Ph. 382; 17 L. J., Ch. 83; 11 Jur. 915.

Where a chattel, from being used in business or otherwise, has a peculiar value, the court will entertain a bill for an injunction to restrain its sale or detention. *North* v. *G. N. Ry.*, 2 Giff. 64; 29 L. J., Ch. 301; 6 Jur. (N.S.) 244; 1 L. T. 510.

Irreparable Damage to Seashore.]—See *Clowes* v. *Beck*, 13 Beav. 347; 20 L. J., Ch. 505 (ante, col. 1586).

Alleged Lien—Parting with Fund.]—Injunction refused to restrain defendants from parting with a fund on which plaintiffs claimed a lien, the claim being doubtful, and the defendants' liability, if the claim were valid, being admitted. *South Yorkshire Ry. and River Don Co.* v. *G. N. Ry.*, 1 W. R. 203—L.JJ.

Public Company—Illegal Association.]—The court will interfere by injunction to secure the property of an association from being appropriated by the trustee, who is also sole director, for the purpose of recouping himself the sums he has advanced, though questions are raised as to the legality of the association, and though relief might be refused at the hearing. *Sheppard* v. *Oxenford*, 3 W. R. 397—L.JJ.

Promissory Note.]—Injunction granted, on terms, to restrain defendant from negotiating a promissory note, and from further prosecuting an action at law upon it. *Simons* v. *Cridland*, 5 L. T. 523.

Adjacent Mines—Flow of Water.]—The barrier between two mines having been perforated, the defendant, owner of one of them, artificially caused his water to pass by the perforations into the plaintiff's mine, that being beneficial to him, but causing irreparable damage to the plaintiff. Interlocutory mandatory injunction granted to keep things until the hearing in the state in which they were ante litem motam:—Semble, it was immaterial whether or not the perforation was the wrongful act of the injured owner. *Westminster Brymbo Coal and Coke Co.* v. *Clayton*, 36 L. J., Ch. 476.

Plaintiff need not be in Occupation.]—A court of equity interferes by injunction to prevent an injury in respect of a legal right, simply on the ground of the damage it produces to pro-

perty; and the jurisdiction of the court is not confined to restraining injury to the enjoyment and comfort in the occupation. Therefore it is not necessary that a party filing a bill for an injunction to restrain such an injury should be in the actual occupation of the property. *Wilson* v. *Townend*, 1 Drew. & Sm. 324; 30 L. J., Ch. 25; 6 Jur. (N.S.) 1109; 3 L. T. 342; 9 W. R. 30. See also *Harman* v. *Jones*, Cr. & Ph. 299, ante, col. 1588, and *Strelley* v. *Pearson*, ante, col. 1560.

7. Restraining Publication.

Injunction granted to restrain the disclosure of secrets come to the defendant's knowledge in the course of a confidential employment. *Ecitt* v. *Price*, 1 Sim. 483.

Injunction to restrain the printing of an unpublished MS., a copy of which had been, by the representative of the author, given to a person under whom defendant claimed, but not with the intention that he should publish it. *Queensbury (Duke)* v. *Shebbeare*, 2 Eden, 329.

A plaintiff obtaining information from the production of documents in the defendant's possession, is not at liberty to make it public; and an injunction will, if necessary, be granted to restrain him. *Williams* v. *Prince of Wales Life Assurance Co.*, 23 Beav. 338; 3 Jur. (N.S.) 55.

Publication of facts contrary to agreement restrained, although occasioned by a very small difference in money arrangements. *Anon.*, 3 Jur. (N.S.) 685.

Proprietors of a newspaper dissolved partnership, and one of them agreed to purchase the whole. Before the completion and pending a suit for specific performance, the purchaser published statements as to the profits and loss of the paper, in order to establish a company to carry it on. A motion for an injunction to restrain him was refused. *Marshall* v. *Watson*, 25 Beav. 501.

A plaintiff prayed an injunction to restrain the defendant from falsely representing that the latter was carrying on business in succession to, or in connection with him; the bill averred general acts of misrepresentation, but one case only was made out in which the defendant had opened a letter addressed to the plaintiff, answered it in his own name, and endeavoured to obtain the custom which that letter offered to the plaintiff:—Held, that though this raised a grave suspicion against the defendant, it was not sufficient to entitle the plaintiff to an injunction. *Edgington* v. *Edgington*, 11 L. T. 299.

A. being indebted to T., an agreement was entered into, by which judgment for the debt was to be signed, but not entered up, against A. for securing payment by instalments, T. agreeing not to enter up judgment (so as to get into the Tradesman's Circular), nor publish it in any way. Shortly afterwards T. threatened to sell the judgment debt at a periodical sale, which would necessarily involve the publication, by advertisements, of A.'s indebtedness. The court, being of opinion that this threat was not bonâ fide for the purpose of sale, but for getting better terms from A., restrained such publication by injunction. A. having in the first place obtained an ex parte injunction, T. offered immediately, and before further expenses were incurred, to submit to a perpetual injunction, but refused to pay costs. A. thereupon brought the matter to a hearing:—Held, that he was entitled to the costs to the hearing. *Jamieson* v. *Teague*, 3 Jur. (N.S) 1206.

C. filed a bill to establish the validity of his security in priority to a voluntary settlement executed by his debtor H., who was subsequently in prison for debt, and discharged from custody under the acts for the relief of insolvent debtors. C. succeeded in establishing his claim, and, having been paid, he sent to the trustees of the settlement a notice announcing his intention to impeach the settlement, and warning them not to part with any of the funds in their hands. The trustees replied, that unless certain proceedings were instituted within one month they should disregard the notice. No proceedings were instituted within the time. Subsequently a bill was filed by the cestui que trust under the settlement, praying for an injunction to restrain C. from continuing the notice; the court ordered that the trustees should be at liberty to deal with the income of the funds until further order, according to the trusts of the settlement. *Lonergan* v. *Stourton*, 9 Jur. (N.S.) 1067; 11 W. R. 984.

A spinning company being obliged to re-adjust its rate of wages, and some of its workmen being members of a trade union, the company applied to such association on the subject; and the president, secretary, and two members went to the mill, and, after consultation, expressed themselves content with such re-adjustment. On the same day, however, the workmen who were members of the association gave a week's notice and left the mill. The association then posted a notice, which was in substance a warning to all workmen not to hire themselves to the company until the dispute was settled, and also advertised the notice in the local papers. The company remonstrated, posted a counter notice of warning, and filed a bill to restrain the publication and posting of such notices by the association, charging that workmen were by the threats and intimidation of the association prevented from hiring themselves to, or remaining in the employment of, the company; that the company was materially injured, their goodwill much lessened in value; and that they were losing 178*l.* per week; and praying an injunction:—Held, that the threatening or intimidating workmen from hiring themselves to or remaining in the employment of a tradesman or manufacturer is within the jurisdiction of a court of equity, because it is injurious to the trader's property. *Ib.*

Held, that this was a deterioration of the employer's business and property, and that a bill would lie to restrain the workmen from continuing such intimidation. *Ib.*

Proceedings of Court.]—Injunction until the hearing under the order of the house of lords for publishing Ld. Melville's trial and prohibiting any other publication of it. *Gurney* v. *Longman*, 13 Ves. 493.

Jurisdiction of the court to grant or dissolve an injunction, or commit for contempt in cases where the plaintiffs or defendants, or other persons, publish notices or advertisements with reference to the subject of a suit, calculated to prejudice the rights, or misrepresent the relative position or character, of any of the parties to the cause. *Mathews* v. *Smith*, 3 Hare, 331.

Although the court possesses the power of preventing the publication of its proceedings pending litigation, it will not undertake to

restrain every report published in the columns of a newspaper, which may appear to be unfair in any respect. *Brook* v. *Evans*, 29 L. J., Ch. 616; 3 L. T. 571—L.JJ.

To publish and circulate during the progress of an action a copy of the pleadings in the action with comments depreciating the case of one of the parties is a contempt of court, and calculated to prejudice the fair trial of the action, and such contempt, if threatened to be committed, will be restrained by injunction. *Kitcat* v. *Sharp*, 52 L. J., Ch. 134; 48 L. T. 64; 31 W. R. 227.

Garbled Statements of Legal Proceedings.]—Pending litigation, the court will restrain publication, by any of the parties, of ex parte garbled statements, calculated to prejudice the case of their opponents, of any of the proceedings in court or before the examiner. The fact that such publication is by way of defence, and in answer to similar publications by the other side, will not prevent the injunction being granted, but may excuse from payment of the costs of the motion. *Coleman* v. *West Hartlepool Ry.*, 8 W. R. 734.

See also COPYRIGHT—CONTEMPT OF COURT—TRADE.

Public Lecture—Notes taken by Shorthand Writer—Publication in Shorthand Characters.]—Where a lecture is delivered to an audience admitted by ticket without payment, there is an implied contract on their part not to publish such lecture for purposes of profit. *Nicols* v. *Pitman*, 53 L. J., Ch. 552; 26 Ch. D. 374; 50 L. T. 254; 32 W. R. 631.

The plaintiff delivered a lecture at a working men's college to an audience who were admitted gratuitously by tickets issued by the committee of the college. The plaintiff had committed the lecture to writing, but delivered it from memory. The defendant, a shorthand writer, attended the lecture, took it down nearly verbatim, and subsequently published his notes in shorthand characters in a periodical brought out and sold by him for the instruction of learners in the art of shorthand writing:—Held, that the plaintiff was entitled to an injunction to restrain the defendant from so publishing the lecture. *Ib.* See also *Caird* v. *Sime*, 57 L. J., P. C. 2; 12 App. Cas. 326; 57 L. T. 634; 36 W. R. 199—H. L. (Sc.).

Libel—Jurisdiction to Grant Interlocutory Injunction.]—The high court has jurisdiction to grant an interlocutory injunction restraining the publication of a libel. *Bonnard* v. *Perryman*, 60 L. J., Ch. 617; [1891] 2 Ch. 269; 65 L. T. 506; 39 W. R. 435—C. A.

An interlocutory injunction will not be granted to restrain the publication of a libel unless the court is of opinion that injury will be caused to the plaintiff's person or property by a continuance of the publication. Interlocutory injunction refused where the libel, though unjustifiable, was of such a character that no one would attach the slightest weight to it. *Salomons* v. *Knight*, 60 L. J., Ch. 743; [1891] 2 Ch. 294; 64 L. T. 589; 39 W. R. 506—C. A.

Pirated Book.]—Injunction granted to restrain publication of a book which appeared to contain pirated matter, until the trial of an action at law. *Sweet* v. *Shaw*, 8 L. J., Ch. 216.

Masters and Workmen—Trade Union—Intimidation—Malicious Injury.]—In consequence of a dispute with reference to an alleged preferential employment of non-union men by a building firm, a trade union published a poster headed "Trollope's Black List," containing the names of non-union men employed by the firm. Upon motion for an interlocutory injunction to restrain the publication, it was decided by Kekewich, J., that the publication was a purely malicious act, and that therefore an interlocutory injunction must be granted. The defendants appealed:—Held, that a primâ facie case had been established that the defendants were doing more than was in fact necessary for their own protection; and that therefore the order for an interlocutory injunction ought not to be interfered with. *Trollope* v. *London Building Trades' Federation*, 72 L. T. 342—C. A.

Circular Stating Defendant to be Plaintiff's Successor in Business.]—Injunction granted to restrain the defendants from issuing a trade circular representing to the public that they were the successors in business of the plaintiffs, or were carrying on the same business which the plaintiffs formerly and still carried on. *Harper* v. *Pearson*, 3 L. T. 547. See also *Scott* v. *Scott*, 16 L. T. 143.

Reputation—Advertisements Injurious to.]—There is jurisdiction to restrain by injunction the publication of advertisements injurious to a man's reputation or mercantile credit. *Dixon* v. *Holden*, L. R. 7 Eq. 488; 20 L. T. 357; 17 W. R. 482.

Libel—Injury to Trade—Placard—Circular.]—A motion was made by a firm of manufacturers for an interim injunction to restrain the secretary of a trade union committee and a printer from publishing false and injurious statements to the effect, inter alia, that the plaintiffs practised in their business a pernicious system of sweating. The respondents offered to treat the hearing of the motion as the trial of the action, but such offer was declined by the applicants. The court being of opinion that the statements constituted a trade libel, and that there was nothing reserved for the trial of the action, granted an interim injunction. *Bonnard* v. *Perryman* ([1891] 2 Ch. 269) distinguished. *Collard* v. *Marshall*, 61 L. J., Ch. 268; [1892] 1 Ch. 571; 66 L. T. 248; 40 W. R. 473.

With the exception of a case of trade libel, the court will not grant an injunction to restrain a libel before the case has been submitted to a jury. *Lee* v. *Gibbings*, 67 L. T. 263.

An action was brought by a business firm against a trade union, and the secretary, president, and vice-president, and treasurer of the union, for an injunction to restrain them from publishing a circular in which the plaintiffs were accused of boycotting some lightermen. The circular was signed by the secretary. It was admitted that the vice-president did not belong to the union, and was joined as defendant by mistake. The names of the president and treasurer were printed upon the paper upon which the circular was written, but they gave evidence that the circular was issued without their knowledge and authority, and that they disapproved of it. The plaintiffs in their statement of claim stated that the statements in the circular were untrue and "had been made maliciously and unjustifiably on the part of the

defendants." An interim injunction had been granted:—Held, that the injunction must be made perpetual against the society, the secretary, and other officers, servants or agents of the society, with costs. That the plaintiffs were justified in joining the president and treasurer as defendants; the court therefore gave them no costs. *Pink* v. *Federation of Trades Unions*, 67 L. T. 258.

Magazine which Defendant had agreed not to Publish—Forms of Order.]—On an interlocutory application to restrain the breach, by the publication of a certain named magazine or any other magazine prohibited by the agreement, of an agreement made between plaintiff and defendant, the publication of the named magazine only will be restrained; and the court will altogether suspend the publication until the hearing of the cause. *Ainsworth* v. *Bentley*, 14 W. R. 630.

Trade Circular—Misrepresentation.]—A firm of engineers issued a circular stating that they could sell goods of the same kind as their former employers, but better and cheaper; which statements were untrue:—Held, that the circular was a deceit upon the trade and the public, and that an injunction ought to be granted. *Stevens* v. *Paine*, 18 L. T. 600.

8. To Quiet Possession.

Injunction for plaintiff's possession as at time of filing bill, and three years before. *Sapcote* v. *Newport*, Cary 47.

Injunction for defendants in possession against plaintiff's entering. *Douche* v. *Perrot*, Cary 45.

Commission to put plaintiff into possession, injunction being dissolved or disobeyed. *Boles* v. *Walley*, Cary, 38.

Commission granted to put defendant in such possession of lands as he had at time of bill exhibited. *Hawkes* v. *Champion*, Cary 36, 45.

Against a writ of ayel, after forty-five years' possession, a perpetual injunction was granted. *Knight* v. *Adamson*, 2 Freem. 106.

It is usual in Ireland for a lessee, who has been three years in possession, and is disturbed, to file his bill in the court of chancery there, for an injunction to quiet him in possession, till evicted by due course of law; and this usage is founded upon the equity of the statutes made against forcible entries. But all bills of this kind must allege, and it must also be proved, that the sole and actual possession is in the plaintiff, and that no ownership or possession is in any other person. *Vernon* v. *Dublin City*, 4 Bro. P. C. 398.

An injunction was awarded to restore and quiet the plaintiff and his tenants in the possession of the premises in question, but it was at the same time ordered that he should appear to an ejectment to be brought by the defendant, in order to try the title. An ejectment was accordingly brought, and the defendant obtained a verdict, and was afterwards put into possession. But on an appeal by the plaintiff, it was ordered that he should be at liberty to bring an ejectment to recover possession of the premises, and that no mortgage should be set up in bar to his title. *Seymour* v. *Ryan*, 4 Bro. P. C. 390.

Bill to be quieted in possession of a right of common, and to prevent distresses. Defendants produced affidavits of fifty years' right of common and quiet possession; but the court would not interpose till after one or more verdicts at law. *Anon.*, Gilb. 183.

An injunction is awarded by a decree to put the plaintiff into possession of the premises in question; and at the same time the parties are directed to try the title at law. This decree is repugnant, and must be reversed as to the injunction. *Lanesborough* (*Lord*) v. *Elwood*, 4 4 Bro. P. C. 385.

Garden grounds used for trades as much protected by the Highway Acts, &c., as private property; plaintiff, therefore, quieted in possession by injunction against the commissioners. *Hughes* v. *Morden College Trustees*, 1 Ves. 188.

On a conviction before justices for a forcible entry, and a writ of restitution awarded by them, the record of the conviction was removed by certiorari into the king's bench. The lord chancellor, notwithstanding, granted an injunction to restore the plaintiff to his possession. *Stewart* v. *Stewart*, Wall. Lyn. 97.

The crown having obtained judgment in an information of intrusion, which was more than a year old, the court granted a conditional order for liberty to issue an injunction to put the crown in possession, serving the parties in possession of the lands. *Att.-Gen.* v. *Riggs*, 6 Ir. Eq. R. 17.

By a grant or patent, dated in 1801, the then Bishop of Ely, having, as the grant stated, "confidence in the probity, fidelity, care, and industry of P.," granted to P., who was a solicitor, "the office of receiver of all issues, profits, sum and sums of money, arising and issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies, to be approved of by the bishop and his successors, for his life. The office of receiver was an ancient office, and had been exercised before the restraining stat. of 1 Eliz. c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewal of leases, and prepared the leases of the see, and likewise attended all searches for records in the bishop's muniment room, of which he kept a key, for the performance of which acts he received fees and emoluments. It appeared also that his predecessor in office, who had held the office since 1785, had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favour, that he might be quieted in the possession of the office, and that the bishop might be restrained by injunction from obstructing the plaintiff in the exercise of such rights, and from doing acts in contravention of them:—Held, first, that the plaintiff's claim was not of such a nature as to induce the court to interfere to protect them, without being well satisfied (which the court was not) that his legal remedy was insufficient to do him complete justice; and, secondly, that the relief sought being analogous to the specific performance of an agreement, the bill must fail on the ground of want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this court against him, compelling their specific performance. *Pickering* v. *Ely* (*Bishop*), 2 Y. & Coll. C. C. 249; 12 L. J., Ch. 271; 7 Jur. 479.

Perpetual injunction granted to restrain the tenant of a farm in part of which was a pool

through which ran a stream from the mountains, depositing in its passage mineral substances, from taking and carrying away from and out of the bed and bottom of the pool or any part thereof, any soil, oxide of iron, ochre, shine, deposit, or other mineral substances, and from puddling, loosening, disturbing, and floating, and from causing to be puddled, loosened, disturbed, or floated off any soil, oxide of iron, shine, deposits, or mineral substances, already deposited upon the beds of the said pool, the right of the plaintiffs to the several mineral substances having been established by a verdict in an action at law, brought by them against the defendant, and not in an issue or action directed by the court. *Thomas* v. *Jones*, 1 Y. & Coll. C. C. 510.

Where party had been in possession fifty years, and that title was confirmed in chancery, other party was prohibited by injunction from disputing it again in court of law. *Clench* v. *Tomley*, Cary, 23. See also *Acherley* v. *Vernon*, 2 Barn. K. B. 212.

Where a defendant is in possession of an estate, and a plaintiff, claiming possession, seeks to restrain him from acts of spoliation, the court will not grant an injunction unless the acts are so flagrant as to justify it in departing from the general principle. *Lowndes* v. *Bettle*, 10 Jur. (N.S.) 226; 10 L. T. 55; 12 W. R. 309.

Where a plaintiff is in possession, the court will leave him to his remedy at law against a stranger committing such acts, unless they tend to the destruction of the inheritance. *Ib.*

But where a plaintiff in possession seeks to restrain the defendant claiming title, the tendency of the court will be to grant the injunction. *Ib.*

So where a plaintiff in possession filed a bill against a defendant claiming possession, and threatening to come upon the estate, and cut up sods, deal and other timber, the court granted a perpetual injunction to restrain him from so doing. *Ib.*

Where a managing body of a religious society appointed an agent at a salary, "with six months' notice of separation on either side," with liberty to occupy and carry on his trade in a house belonging to the society, and afterwards summarily dismissed him for alleged misconduct, and resumed the possession of the house, of which they were afterwards forcibly dispossessed by the agent, on a bill by the managing body the court granted an injunction to restrain such agent from disturbing the possession. *Spurgin* v. *White*, 2 Giff. 473; 7 Jur. (N.S.) 15; 3 L. T. 609; 9 W. R. 266.

Action for Quiet Possession—Injunction—Joinder.]—A claim for an injunction to restrain interference with quiet possession of real property is not such a separate cause of action as cannot, without the leave of the court, be joined with a claim for quiet possession. *Kendrick* v. *Roberts*, 46 L. T. 59; 30 W. R. 365.

C. PRACTICE RELATING TO.

1. How Obtained.

a. On Motion.

i. *In General.*

Application for injunction and appointment of receiver should be made the subject of two successive motions. *Lawson* v. *Morgan*, 1 Price, 303.

In a suit for an injunction the plaintiff is not bound to apply by motion for an injunction in the first instance. *Davies* v. *Marshall*, 7 Jur. (N.S.) 720; 4 L. T. 105; 9 W. R. 368.

A motion for an injunction upon notice, and before appearance, cannot be made, unless leave to give notice has been obtained, and the notice express that fact. *Cook* v. ——, 4 L. J. (O.S.) Ch. 141.

Where a motion for an injunction is ordered to stand over, with leave to the plaintiff to bring an action, the plaintiff is not bound to bring his action till the defendant applies to the court. *Bell* v. *Bell*, 14 Jur. 1129.

After the dismissal of a bill for the specific execution of an agreement, the plaintiff being unable to make a good title, an injunction to restrain him from proceeding on the agreement at law granted, on motion, the defendant undertaking forthwith to file a bill. *M'Namara* v. *Arthur*, 2 Ball & B. 349.

Perpetual.]—By consent, an injunction was made perpetual upon motion. *Morrell* v. *Pearson*, 12 Beav. 284.

Granting before Bill Filed.]—When, on account of the offices of the court being closed, the filing of a bill has been delayed, the court may grant an injunction before bill filed, and direct the bill and affidavit to be filed as on the day when the offices were closed. *Carr* v. *Morice*, 42 L. J., Ch. 787; L. R. 16 Eq. 125.

In a pressing case the court will grant an injunction before bill filed. *Thornloe* v. *Skoines*, 42 L. J., Ch. 788; L. R. 16 Eq. 126; 21 W. R. 880.

An injunction was granted before bill filed to restrain the defendant from levying execution. *Campana* v. *Webb*, 22 W. R. 622.

Motion by Defendant for, before Statement of Claim delivered—Cross-action by Defendant.]—A defendant who has appeared cannot, where no statement of claim has been delivered, move for an interlocutory injunction where the relief which he seeks is not incidental to or does not relate to or arise out of the relief sought by the plaintiff's action; but he must either wait till he can put in a counter claim or issue a writ in a cross-action. Relief against breach by the plaintiff of a covenant not to use the defendant's name in carrying on a business which had formed the subject of a partnership between the plaintiff and the defendant is not incidental to relief sought in an action by the plaintiff for breach by the defendant of a covenant not to carry on a like business within a certain radius, though both covenants are contained in the deed of dissolution of partnership. *Sargant* v. *Read* (1 Ch. D. 600) distinguished. *Carter* v. *Fey*, 63 L. J., Ch. 723; [1894] 2 Ch. 541; 7 R. 358; 70 L. T. 786—C. A.

ii. *Ex parte or on Notice.*

After Appearance.] — After service of subpœna, and the appearance of a defendant, a motion for an injunction cannot be made ex parte. *Langham* v. *G. N. Ry.*, 1 De G. & Sm. 486. And see *S. C.*, 16 L. J., Ch. 437; 11 Jur. 839.

Although, in cases in the nature of waste, an

injunction will sometimes be granted ex parte, even after appearance; yet, if in such a case an injunction has been obtained for default of appearance, and it turns out that appearance had in fact been entered at the time when the injunction was moved for, the order will be discharged. *Harrison* v. *Cockerell*, 3 Meriv. 1.

Plaintiff cannot move for injunction ex parte after he has served the defendant with a subpœna, and defendant has appeared. *Perry* v. *Weller*, 3 Russ. 519.

Appearance the day before motion would not suffice to prevent injunction ex parte in case of waste. *Allard* v. *Jones*, 15 Ves. 605.

Defendant having appeared, motion for injunction in matter of waste not immediate; without notice, refused. *Collard* v. *Cooper*, 6 Madd. 190.

Injunction not granted to prevent transfer of stock until defendants have appeared, or are in contempt, &c., upon notice. *Doolittle* v. *Walton*, Dick. 442.

An injunction may be granted ex parte, notwithstanding the defendant has appeared to the bill. *Bell* v. *Hull & Selby Ry.*, 1 Railw. Cas. 616.

An injunction to restrain the pulling down of houses granted on an ex parte motion, although the defendants had appeared. *Petley* v. *Eastern Counties Ry.*, 8 Sim. 483; 8 L. J., Ch. 209.

After appearance, no special injunction (such as against the navigating of a ship) without notice. *Marasco* v. *Boiton*, 2 Ves. 112.

An injunction allowed to be moved for ex parte, in a pressing case, after the defendants had entered an appearance. In this case, counsel having been instructed to oppose the motion, although no notice had been given, the court allowed them to be heard. *Acraman* v. *Bristol Dock Co.*, 1 Russ. & M. 321.

Notice required—Trading Concern.]—Jurisdiction by injunction, where the effect will be to stop a great trading concern, exercised with caution; not ex parte, but on notice, with the opportunity of opposing on affidavit. *Crowder* v. *Tinkler*, 19 Ves. 618; 13 R. R. 267.

Bill of Exchange.]—Injunction granted ex parte to restrain the negotiation of a bill of exchange, by a holder who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiffs, in the partnership's name. *Hood* v. *Aston*, 1 Russ. 412; 25 R. R. 93.

Motion of Course—Order Discharged.]—Court will discharge order for injunction obtained on motion of course, if it ought to have been moved for on notice. *Reed* v. *Bowyer*, 1 Price 101.

Defendant Served Personally, and not Appearing.]—Motion granted for an injunction for one partner against another, the defendant being in contempt, and served personally, and not appearing. *Read* v. *Bowers*, 4 Bro. C. C. 441.

Want of Answer.]—Where an injunction obtained for want of answer is dissolved on the merits, and the bill is afterwards amended, a motion for an injunction for want of an answer to the amended bill is a special application requiring notice, notwithstanding the defendant may be in contempt. *Chimelli* v. *Chauvet*, Younge, 560.

Answer by one of three Defendants—Injunction Irregular.]—Injunction to stay proceedings at law, dissolved for irregularity, plaintiff having obtained the injunction as of course, for want of anwer of two defendants who resided abroad, without notice to the other defendant, who was sole plaintiff at law, and had put in his answer in time. *Cooper* v. *Flindt*, Wightw. 409.

Action for Accounts.]—If a bill for an injunction prays for an account and answer from any of the defendants, all the defendants must be served before moving on the bill. *Newenham* v. *O'Sullivan*, 1 Ir. Eq. R. 68.

Policy of Insurance.]—A. being sued at law on policy of insurance which he had made as agent for B., on motion for injunction, on affidavit of B.'s residing abroad, A. must have notice. *Beachcroft* v. *Gordon*, 3 Anstr. 686.

Notice should be given.]—Notice of an application for an injunction should be given to a defendant where that can conveniently be done without producing any mischief to the plaintiff, and although a subpœna may have been served to appear and answer the bill. *Home* v. *Thompson*, Sau. & Sc. 615.

Pulling down Houses.]—An injunction to restrain pulling down houses granted ex parte, after appearance. *Petley* v. *Eastern Counties Ry.*, 8 Sim. 483; 8 L. J., Ch. 209.

Transfer of Stock.]—When a transfer of stock is about to be made to wrong persons, the court will not grant an ex parte injunction to restrain the transfer, unless the plaintiff swears that he believes the defendant will avail himself of the transfer and will refuse to retransfer. *Arkwright* v. *Gryles*, 13 L. J., Ch. 303.

Parting with Legal Estate.]—In an action by an equitable mortgagee for sale or foreclosure, the court granted an interim injunction to restrain dealing with the legal estate till the next motion day, on an ex parte application by the plaintiff; there being ground for believing that the defendants intended to part with the legal estate pendente lite. *London and County Banking Co.* v. *Lewis*, 21 Ch. D. 490; 47 L. T. 501; 31 W. R. 233—C. A.

After Notice of Motion.]—Notice of motion for an injunction was given, but owing to press of business in the court it stood over from time to time, and at last stood over without the undertaking as to damages being continued. On a threat by C. and F. to do the act sought to be restrained, G. obtained an interim injunction ex parte:—Held, that notice of motion having been given, the ex parte injunction ought not to have been granted. *Graham* v. *Campbell*, 47 L. J., Ch. 593; 7 Ch. D. 490; 38 L. T. 195; 26 W. R. 336—C. A.

To Restrain Execution—Payment into Court.]—Where an unsuccessful plaintiff at law files his bill to restrain the defendant at law from issuing execution against him for the costs, the court will not grant an injunction ex parte unless the plaintiff brings the amount of the taxed costs into court. *Fisher* v. *Baldwin*, 1 W. R. 484—L.JJ.

To Restrain Breach of Conditional Agreement, where Condition not Perfectly Performed.]—Injunction granted ex parte to restrain acts agreed not to be done if a certain sum of money were paid, though the plaintiff was not prepared to pay the whole of the agreed sum. *Anon.*, 3 Jur. (N.S.) 685.

Bill of Exchange.]—Injunction granted ex parte to stay negotiation of bills of exchange. —— v. *Bozon*, 3 L. J. (O.S.) Ch. 57.

To Restrain Proceedings at Law.]—Injunction granted ex parte to stay proceedings at law where the action was commenced so late that the plaintiff in equity could not obtain the common injunction in time to serve any useful purpose. *Jones* v. *Bassett*, 2 Russ. 205.

iii. *Service of Notice of.*

Permission for personal service of notice of motion for an injunction granted under special circumstances. *Mills* v. *Pearson*, 4 Y. & Coll. 468.

An injunction may be obtained before appearance upon personal service of the notice of motion, but a receiver cannot, except leave be given to serve the notice personally. *Ramsbottom* v. *Freeman*, 4 Beav. 145; 10 L. J., Ch. 362.

Such leave will not be granted unless it appears that the plaintiff has used due diligence to compel appearance. *Ib.*

Held, that, under the circumstances, notice of motion for an injunction ought to have been served on the assignees of the bankrupts. *Crawford* v. *Scott*, 6 Jur. 163.

On Housekeeper, Insufficient.]—Service of notice of motion for an injunction to restrain execution on a judgment obtained in an action at law, on the housekeeper to the persons who were the defendants' attorneys in that action, is insufficient. Where the order obtained on such motion stated that it was made on notice to the defendants, they should move to discharge such order, and not to dissolve the injunction. *Angier* v. *May*, 3 Eq. R. 488; 3 W. R. 330.

iv. *Affidavit.*

To Prove Allegation in Bill.]—Affidavit in support of injunction admitted after answer to prove an allegation in the bill as to acts of the parties, neither admitted nor denied by the answer; but such affidavit not to be allowed in contradiction to the answer. *Morgan* v. *Goode*, 3 Mer. 10.

To Contradict Answer.]—On a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer. *Sommerville* v. *Buckler*, 3 Anstr. 658.

In an injunction cause, affidavits admitted on motion against the answer not on the title, but on questions of fact, as in the instance of waste, &c., and the original affidavit, where the defendant, having obtained time to file affidavits, instead of that puts in an answer. *Morphett* v. *Jones*, 19 Ves. 350.

Affidavit of Merits—Foreign Defendant.]—Where injunction is moved in exchequer, you may move to try the cause for staying execution till the merits of injunction be determined; but injunction will not be granted against a foreigner unless on affidavits of merits. *Anon.*, Lofft, 545.

Verifying Letters.]—Letters set forth by the bill, and not admitted by the answer, allowed to be verified by affidavit in support of an injunction. *Taggart* v. *Hewlett*, 1 Mer. 499.

In Action to Restrain Publication.]—Injunction, until answer or further order, to restrain the publication of a work as the plaintiff's, upon affidavit, by the plaintiff's agents (the plaintiff himself being abroad), of circumstances making it highly probable that it was not the plaintiff's work; and the defendant refusing to swear as to his belief that it was so. *Byron (Lord)* v. *Johnston*, 2 Mer. 29; 16 R. R. 135.

Affidavit by Plaintiff after Answer.]—Court will not, in aid of motion to prevent partner receiving or creating debts, and for appointing receiver, permit plaintiff to use affidavit made and filed after coming in of answer; though in a case analogous with irreparable waste such affidavit made, &c., before answer might be used. *Lawson* v. *Morgan*, 1 Price, 303.

In injunction cases, no affidavit as to the title after answer. *Platt* v. *Button*, 19 Ves. 447.

As to Plaintiff's Knowledge and Belief.]—If material fact be charged in injunction bill, and deposed to in affidavit in support of it, not positively, but as plaintiff has reason to know, and that he believes it to be true, and fact is one which if true lies only within knowledge of the defendant, who may deny it, if not true, the court will grant injunction if not denied by him. *Scott* v. *Becher*, 4 Price, 346; 18 R. R. 722.

Partnership.]—Affidavits admitted on motion after answer, for an injunction and receiver, in the case of partnership, by analogy to waste. *Peacock* v. *Peacock*, 16 Ves. 49; 10 R. R. 138.

Against Executor.]—Injunction granted to restrain an executor claiming under a will, and also by gift from testatrix, in lifetime, from selling, upon affidavit of undue influence. *Edmunds* v. *Bird*, 1 Ves. & B. 542.

Answer put in before Motion.]—A special injunction was moved for before answer without notice, the proper affidavits being filed, and the court on such motion directed notice to be given, but the answer was put in before the motion came on after notice:—Held, that the affidavits might be read. *Atkinson* v. *Kemble*, 7 Sim. 638.

On motion for injunction, affidavits filed before answer may be read, where plaintiff, by saving notice of motion till future day, enabled defendant to file answer before motion read. *Glassington* v. *Thwaites*, 1 Sim. & S. 134; 1 L. J. (O.S.) Ch. 113; 24 R. R. 153.

On an application for a special injunction, the answer of the defendant and the affidavits in support of the application were filed the same day:—Held, that the affidavits were admissible in support of the motion. *Nicholson* v. *Knapp*, 9 Sim. 326; 7 L. J., Ch. 219.

Misnomer of Party.]—An order, obtained on affidavit of service, discharged with costs, on the ground of a misnomer of a party in the affidavit. *Salomon* v. *Stalman*, 4 Beav. 243; 10 L. J., Ch. 327.

Interpleader.]—Upon motion for an injunction in an interpleader suit to restrain an action, there is no necessity for an affidavit of merits. *Sedgwick* v. *Clegg*, 4 Jur. 742.

Allegations not Noticed in Answer.]—In moving for an injunction after answer, affidavits filed after the answer may be read in support of allegations in the bill, which are not noticed by the answer. *Jefferys* v. *Smith*, 1 Jac. & Walk. 298; 21 R. R. 175.

Affidavits Filed before Bill.]—Interim injunction granted ex parte where the affidavits had by mistake been filed before the bill. *Fennall* v. *Brown*, 18 Jur. 1051. See also *Bowen* v. *Bowen*, 7 Ir. R. Eq. 251.

After Answer.]—Affidavits filed after the answer cannot be read on a motion for a special injunction, in support of which no affidavits had been filed before the answer; and the rule is the same whether notice of the motion was given before the answer was put in or afterwards. *Manser* v. *Jenner*, 2 Hare, 599.

Where an answer is filed after notice of motion for a special injunction, affidavits subsequently filed cannot be used to contradict the answer. *Lloyd* v. *Jenkins*, 4 Beav. 230; 5 Jur. 697. S. P., *Beatty* v. *Beatty*, 2 Moll. 541.

A motion for an injunction and receiver being brought on, stood over at the request of the defendant, who filed his answer the next day:—Held, that the plaintiff might use affidavits subsequently filed, in contradiction to the answer, which, under these circumstances, must be treated as an affidavit. *Gibson* v. *Nicol*, 6 Beav. 422.

On a motion after the answer for an injunction to stay waste, affidavits filed subsequently to the answer cannot be read. *Smythe* v. *Smythe*, 1 Swan. 252.

A plaintiff in a bill for an injunction to stay waste, cannot read a supplemental affidavit in support of a conditional order for the injunction. The proceedings under such a bill are peculiar to Ireland. *Joley* v. *Stockley*, 1 Hog. 247.

Answer, when treated as Affidavit.]—An answer to a bill for an injunction, which has been filed after the service of notice of a motion for an injunction, is no bar to the motion, and can only be used as an affidavit. *Atkinson* v. *Collins*, 1 Hog. 110.

After answer, the original bill was amended, and the defendant obtained time to answer it; the plaintiff then gave notice of motion for a special injunction, and filed affidavits in support of it. The motion coming on, the defendant obtained time to answer the affidavits, and then filed both her answer and affidavits in opposition:—Held, that the second answer must be treated as an affidavit, and that the affidavits in support of the motion might be used to qualify the second, but not the first answer. *Maden* v. *Veevers*, 5 Beav. 503; 12 L. J., Ch. 38.

Affidavits were filed in support of an application for an injunction to restrain the master and part owner of a ship from taking possession of goods claimed by him as his private property, and by the other partners as partnership property, after which the defendant put in his answer, and several affidavits were subsequently filed on both sides:—Held, under such circumstances, and on such an application, that the answer could only be treated as an affidavit. *Gardner* v. *M'Cutcheon*, 4 Beav. 534.

The plaintiff claimed to be a partner with the defendant, and sought, by his bill, accounts and an injunction and receiver. Before the answer was put in he gave notice of motion for an injunction and receiver, and filed affidavits in support of the motion. The answer came in on the day for which the notice of motion was given, and before the motion was made, and it denied the existence of any partnership:—Held, that the affidavits could not be read on the motion, which, therefore, failed; but no costs were given. *Rock* v. *Mathews*, 2 De G. & Sm. 227; 12 Jur. 643.

Ex parte Application.]—The affidavits, upon which an ex parte application for an injunction is made, must show, either that notice to the defendant would be mischievous, or that the mischief is so urgent that it would be done, if notice were served upon the defendant, before the injunction could be obtained. When the affidavits fall short of this point, the motion must be directed to stand over, and notice of it to be served on the defendant. *Anon.*, 1 L. J. (o.s.) Ch. 3.

Affidavit not mentioned in Notice of Motion.]—That the notice of motion for an injunction contained no notice of an affidavit in support of the injunction previously filed, is not an objection that can be taken by a defendant who has actually searched for and obtained a copy of the affidavit. Semble, otherwise, when the defendant has not searched further back than the date of the notice of motion. *Bent* v. *Reynolds*, 2 Jur. 201.

Neglect to obtain Office Copies.]—A special injunction was dissolved with costs, office copies of the affidavits in support of it not having been obtained, when it was moved for. *Jackson* v. *Cassidy*, 10 Sim. 326; 10 L. J., Ch. 356.

An ex parte injunction obtained on an affidavit, of which no office copy was in court at the time of making the motion, dissolved with costs. *Elsey* v. *Adams*, 4 Giff. 398.

By Solicitor.]—Motion to extend the common injunction refused, because it was supported by the affidavit of the solicitor only, and no satisfactory explanation was given why the plaintiff himself had not made the usual affidavit. *Spalding* v. *Reiley*, 4 L. J., Ch. 169. See also *Scotson* v. *Gaury*, 1 Hare, 99; 11 L. J., Ch. 98.

v. *Full Disclosure of Material Facts (Ex parte Injunction).*

When a plaintiff comes for an *ex parte* injunction he must state his case in the first instance fully and fairly. *Hemphill* v. *M'Kenna*, 2 Dr. & War. 183; 2 Con. & L. 76; 5 Ir. Eq. R. 57.

In cases of injunction, the court exercises discretion; so that, where the effect of continuing an injunction would have been to exclude a question on a doubtful statute from ever being discussed, and no apparent danger to the property was shown, the court dissolved the injunction. *Att.-Gen.* v. *Aspinall*, 2 Myl. & C. 613; 7 L. J., Ch. 51; 1 Jur. 812. And see *S. C.*, 1 Keen, 513.

It is an established rule, that where a party obtains an ex parte injunction by misrepresent-

ing the facts of the case, he shall not afterwards be permitted to support the injunction, by showing another state of circumstances in which he would be entitled to it. *Ib.*

Injunction order in a possessory suit set aside upon the ground that the plaintiff had not fully and fairly stated his case in the first instance. *Dease* v. *Plunkett*, Dr. 255.

Before a party makes an application to this court for its interposition by injunction, he ought to make the strictest investigation into the accuracy of the circumstances stated by him. *Vandergucht* v. *De Blaquiere*, 8 Sim. 315; 7 L. J., Ch. 270; 2 Jur. 738.

Upon obtaining an interim order, in the nature of an injunction ex parte, the plaintiff must bring all material facts to the knowledge of the court, at the peril of having his injunction refused. *Fuller* v. *Taylor*, 32 L. J., Ch. 376; 9 Jur. (N.S.) 743; 8 L. T. 69; 11 W. R. 532.

Where the fact that the defendant's solicitors denied the plaintiff's right had not been stated to the judge, the court, on the motion for injunction, made no order, except that the costs of the defendant be costs in the cause. *Ib.*

On an application for an ex parte injunction, a plaintiff omitted to state a material fact. A motion being made to dissolve it, the plaintiff swore that he had forgotten the circumstance:—Held, that it was no excuse for the suppression. *Clifton* v. *Robinson*, 16 Beav. 355.

A plaintiff applying for an injunction should fairly state his case, both where the application is ex parte, and where, on notice, the opponent does not appear; but the court does not hold him so strictly to the rule in the latter case as in the former. *Maclaren* v. *Stainton*, 16 Beav. 279; 22 L. J., Ch. 274; 1 W. R. 70.

Parties coming for an injunction ex parte ought to state their case fully and fairly to the court. If they do not, they will be made to pay costs, even though successful. *Holden* v. *Waterlow*, 15 W. R. 139.

When a plaintiff applies ex parte for a special injunction, he is bound to state in his bill every material fact, and set out every material document bearing upon the subject-matter of the litigation. *Harbottle* v. *Pooley*, 20 L. T. 436.

When therefore a plaintiff omitted a material letter written by the defendant, and the attention of the court was not pointedly called to such letter on the application for the ex parte injunction, the court immediately discharged the order for the injunction, and directed restitution of possession of certain premises, which were in question in the suit. *Ib.*

b. By Action.

i. *Claim.*

Proper injunction cannot be granted unless expressly prayed by the bill. *Savory* v. *Dyer*, Ambl. 70.

The general prayer for relief will not extend to an injunction, which will not be granted unless expressly prayed for. *Davile* v. *Peacock*, Barnard. 27. And see *Jesus College* v. *Bloom*, 3 Atk. 262.

Though that part of bill, preliminary to prayer for subpœna, asks for injunction, yet if the prayer of process omits it, it is a sufficient ground for refusing injunction. *Anon.* Urged by Mr. Knight, K.C., 6th Nov. 1829, and acquiesced in by Vice-Chancellor (MSS.). And see cases, Ambl. 70, n.

Excepted case in which an injunction was granted though not prayed for by the bill. *Blomfield* v. *Eyre*, 8 Beav. 250; 14 L. J., Ch. 260; 9 Jur. 717.

Whether at the hearing an injunction can be granted, which the bill or information did not seek, quære. *Att.-Gen.* v. *Birmingham & Oxford Junction Ry.*, 4 De G. & Sm. 490; 15 Jur. 1024.

An injunction granted upon an interlocutory application cannot exceed that prayed by the bill. *Munro* v. *Wivenhoe & Brightlingsea Ry.*, 4 De G. J. & S. 723; 13 W. R. 880.

Although the prayer of process is no longer part of a bill, the rule of the court still continues, that an injunction granted on motion must be such an injunction as is prayed by the bill. On a motion to dissolve an ex parte injunction, granted in the terms of the prayer of the bill, it is not competent to the court to grant a new injunction in terms not prayed by the bill. *Burdett* v. *Hay*, 33 L. J., Ch. 41; 9 Jur. (N.S.) 1260; 9 L. T. 429; 12 W. R. 61.

Where a plaintiff alleges and proves, in a case for an injunction, a peculiar and specific injury, the order which he obtains gives him an extended right, in general terms, to restrain any injury of the same kind; but where the peculiar and specific injury is distinctly stated upon the pleadings, and where the words used describe another peculiar and specific injury proposed to be proved, the plaintiff is not entitled to relief. *Hertz* v. *Union Bank of London*, 1 Jur. (N.S.) 127; 3 W. R. 49.

Where a bill states that an injury by the defendant will, by a certain mode of operation, be inflicted upon the plaintiff, and then, after giving notice of motion for an injunction, that mode of operation is changed and another adopted, the wholesome arrangement is to amend the bill. *Ib.*

General words in a motion for an injunction are only justified by establishing a specific case of injury. *Ib.*

Multifariousness—Want of Parties.]—It is no objection to a motion for an injunction and a receiver that the bill is multifarious or deficient for want of parties, if it is sought to protect funds which are really in danger. *Evans* v. *Coventry*, 3 Eq. R. 545; 3 W. R. 149.

ii. *Leave to Amend without Prejudice.*

Amendment of bill allowed without prejudice to an injunction obtained on merits. *King* v. *Turner*, 6 Madd. 255.

Leave given to amend a bill without prejudice to an injunction obtained on affidavit of merits. *Pickering* v. *Hanson*, 2 Sim. 488.

After an injunction granted against one of two defendants who afterwards put in their answers, leave was given on application, supported by affidavit, to amend bill without prejudice to injunction. Answer of defendant against whom injunction was not granted, stating facts which were a surprise on plaintiff, and which made amendments necessary. *Vesey* v. *Wilks*, 3 Madd. 475.

Plaintiff, in a bill for an injunction, must state at once the whole case within his knowledge; but the court, though very jealous of amendment, permits even reamendment, ascer-

taining precisely its nature, without prejudice to an injunction, on clear and positive affidavit that the facts, which must be stated, came to the plaintiff's knowledge since the bill filed, and on payment of costs. *Sharp* v. *Ashton*, 3 Ves. & B. 145.

After answer not excepted to, liberty to amend the bill without prejudice to the injunction staying proceedings at law, being the common injunction, not upon the merits, refused with costs. *Turner* v. *Bazely*, 2 Ves. & B. 330.

Upon an application for the plaintiff to amend his bill without prejudice to an injunction, previously obtained on merits, the particular amendments must be specified. *Bell* v. *Brockbank*, 2 Y. & J. 181.

Motion to amend bill of discovery after answer without prejudice to injunction, by adding prayer for relief, or otherwise, as plaintiff should be advised, refused. *Jackson* v. *Strong*, M'Clel. 245; 13 Price, 494.

Where injunction has been obtained on merits, motion to amend without prejudice to injunction is motion of course; but where it has issued on account of delay, notice of motion must be given and proposed amendment stated. *Pratt* v. *Archer*, 1 Sim. & S. 433. This case is, however, mis-stated. See 2 Sim. 488, n.

After an injunction had been continued on the merits, the plaintiff moved to amend without prejudice to the injunction:—Held, that in such a case the amendment could not prejudice the injunction, and therefore the motion was a simple application to amend, and ought to have been made before the master. *Woodroffe* v. *Daniel*, 9 Sim. 410; 8 L. J., Ch. 16.

Injunction obtained ex parte. The answer was put in; whereupon motion was made to amend bill, without prejudice to injunction, and the proposed amendments were stated, but motion refused. *Penfold* v. *Stoveld*, 3 Madd. 471.

In an injunction cause, if an injunction has been raised, and exceptions taken to the answer are allowed, the plaintiff may move for liberty to amend the bill, without prejudice to the injunction, and that the defendant should answer the amendment and exceptions together, without giving notice of the motion. *Creighton* v. *Talbot*, 1 Hog. 334.

Motion for liberty to amend injunction bill must be on notice, and founded on affidavit, stating what new matter is, and that it came to plaintiff's knowledge after bill was filed; or else on exceptions to defendant's answer, overruled or allowed by notice. *Donegal* v. *Berry*, 1 Hog. 46.

Semble, the order to amend before answer, after a common injunction, without prejudice to the injunction, is an order of course. Where the common injunction had issued against one of two defendants for want of answer, such an order could not be objected to by the defendant against whom no injunction had issued. *Ferrand* v. *Hamer*, 4 Myl. & C. 143; 8 L. J., Ch. 96; 3 Jur. 236.

The plaintiff obtained a special injunction, and the defendants subsequently filed a general demurrer, after which, and before the demurrer had been set down, the plaintiff obtained an order of course to amend "without prejudice to the injunction":—Held, irregular. *Warburton* v. *London and Blackwall Ry.*, 2 Beav. 253.

After a demurrer the plaintiff may before it has been argued, obtain an order of course to amend; the only question is what costs he is to pay, and that depends upon whether the demurrer has been set down or not. *Ib.*

The plaintiff, having obtained the common injunction upon the allowance of exceptions for insufficiency, procured an order to amend without prejudice to the injunction, undertaking to amend within a week, and that the defendant might answer the exceptions and amendments together. The amendments having been made accordingly, the court extended the common injunction to stay trial. *Archer* v. *Hudson*, 6 Beav. 474; 12 L. J., Ch. 483.

Where injunction obtained on filing the bill has, upon the coming in of the defendant's answer, been continued till the hearing, and the plaintiff, for the first time, seeks to amend his bill without prejudice to the injunction, the court will grant a motion to that effect if the proposed amendments be not inconsistent with the case previously made by the bill for the injunction. To sustain such a motion there is not any necessity for an affidavit stating when the matter of the proposed amendment came to the knowledge of the plaintiff. *Donegal* v. *Berry* (1 Hog. 46) and *Hamilton* v. *Patten* (Cr. & Dix. Ab. Ca. 203) observed upon. *O'Beirne* v. *O'Beirne*, 1 Ir. Ch. R. 158. Reversing *id.* 152.

iii. *Reference for Scandal.*

Where bill found scandalous by master, injunction not granted till matter expunged. *Davenport* v. *Davenport*, 6 Madd. 251. And see *Neale* v. *Wadeson*, 1 Cox, 104; 1 Bro. C. C. 574.

iv. *Other Matters.*

Injunction against waste not prevented by appearance gratis the day before the motion. *Allard* v. *Jones*, 15 Ves. 605.

Where a suit was abated, and defendant would not appear to revivor, an injunction was granted, notwithstanding the cause was not revived. *Hamilton (Duke)* v. *Macclesfield (Earl)*, 1 Eq. Abr. 285.

In an action for an injunction to restrain the defendants from using certain premises as a small-pox hospital, application was made under (Jud. Act) Ord. XVI. r. 13, by the plaintiff, to join another person, with his consent, who was an inhabitant of the neighbourhood, on the ground that since the action was brought the original plaintiff had given up business, and was going abroad. The application was refused on the ground that the cause of action was injury to the plaintiff's own property only, and it was not "necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action" that any other person should be added as plaintiff within Ord. XVI. r. 13. *Dalton* v. *St. Mary Abbots, Kensington*, 47 L. T. 349.

2. Irregularity in Obtaining, when Waived.

Where injunction was held irregular:—Held, defendant had not waived objection to the irregularity, by asking for time to answer. *Travers* v. *Stafford*, Ambl. 105; 2 Ves. 19.

If the defendant puts in his answer, and then moves to dissolve the injunction, this waives an irregularity in obtaining it. *Davile* v. *Peacock*, Barnard. 27.

3. Appeal.

An appeal, after the lapse of a month, from the refusal of a motion for an injunction to restrain a public company from proceeding with their works, ordered to stand over till the hearing, as being brought too late. *Williams* v. *St. George's Harbour Ry.*, 2 De G. & J. 547.

Delay from October to March in appealing from the refusal of a motion for an injunction held fatal to the appeal. *Burgess* v. *Burgess*, 3 De G. M. & G. 896; 22 L. J., Ch. 675; 17 Jur. 292.

4. Dissolution.

a. Proceedings for.

i. *Evidence in Support.*

In supporting motion to dissolve injunction, the plaintiff cannot use any allegations in the bill, unless confessed by answer. *Maxwell* v. *Ward*, 11 Price, 3.

Upon motion to dissolve an ex parte injunction, the defendant cannot read affidavits filed after his answer. *Barwell* v. *Brookes*, 12 L. J., Ch. 457; 7 Jur. 364.

ii. *Time.*

The common injunction may be dissolved in the long vacation. *Lane* v. *Barton*, 1 Ph. 363; 13 L. J., Ch. 25.

When an interim injunction is granted over the next motion day or until further order, it signifies that the injunction may be dissolved, before the day fixed, but cannot be extended beyond that period except with the leave of the court. *Bolton* v. *London School Board*, 47 L. J., Ch. 461; 7 Ch. D. 766; 26 W. R. 549.

The court refused to hear a motion to dissolve an injunction, pending a motion, of which the plaintiff had given notice, for production of documents mentioned in a schedule to the answer, no unnecessary delay having taken place in giving notice of the latter motion. *Storer* v. *Jackson*, 12 Sim. 503.

iii. *Other Matters.*

An injunction is not dissolved in exchequer court, as a consequence of course, on allowing a demurrer to the bill on the equity of which it was obtained: it must be moved that the injunction be dissolved on that ground. *Barclay* v. *Curtis*, 9 Price, 661.

An injunction being obtained ex parte to restrain the publication of a work by a defendant, the defendant, who claimed a property in, and a right to proceed with the publication, subsequently became bankrupt:—Held, that a motion to dissolve the injunction might be made on behalf of the defendant, without his assignees being made parties. *M'Beath* v. *Ravenscroft*, 8 L. J., Ch. 208.

A defendant may move to dissolve injunction for insufficient service of subpœna, although he has not appeared. *Menzies* v. *Rodrigues*, 1 Price, 92.

Cross-motions—Right to Begin.]—Where an interim order has been obtained, and simultaneous applications are made, on the part of the plaintiffs for an injunction in terms of the order, and on the part of the defendants to discharge the order, the plaintiffs have the right to begin. *Fraser* v. *Whalley*, 2 Hem. & M. 10.

Injunction till Answer.]—Replying to answer, and serving subpœna to rejoin, will not prevent defendant from moving to dissolve, unless cause, an injunction granted till answer. *Molineux* v. *Luard*, Dick. 684.

Plaintiff Neglecting to Speed Cause.]—Injunction granted on merits; plaintiff ordered to speed cause; he replied, but proceeded no further:—Held, that defendant could not move to dissolve injunction, as he might proceed with suit. *Flower* v. *Herbert*, Dick. 349.

Plaintiff consenting to Dissolution, but afterwards Objecting.]—If plaintiff in injunction bill, filed to restrain defendant from proceeding in action at law, gives a cognovit, and undertakes in writing to dismiss his bill, and consents to a dissolution of injunction, but afterwards refuses to do so, the court, on motion by defendant, and notice to plaintiff, will dissolve it, but not dismiss the bill. *Norway* v. *Eade*, 6 Price. 156.

Standing Over—Plaintiff ordered to Speed.]—Injunction cause stood over at hearing for want of parties; injunction not dissolved nor receiver appointed on motion, without special case of waste, but plaintiff compelled to speed the cause. *Price* v. *Williams*, 1 Ves. J. 401.

Motion to Dissolve—Granting New Injunction.]—It is irregular for the court upon a defendant's motion to dissolve an injunction obtained against him ex parte, to grant any new injunction, and especially so if the new injunction is not granted in the terms of the prayer of the bill. *Burdett* v. *Hay*, 4 De G. J. & S. 41; 33 L. J., Ch. 41; 9 Jur. (N.S.) 1260; 9 L. T. 429; 12 W. R. 61.

Ex parte Motion to dissolve ex parte Injunction.]—The court declined to hear ex parte a motion to dissolve an ex parte injunction. *Spanish General Agency Corporation* v. *Spanish Corporation*, 63 L. T. 161.

b. Grounds.

i. *In General.*

Discretion.]—The court exercises a wide discretion as to keeping up or dissolving injunctions; and where plaintiff, who had obtained an injunction, became an insolvent, and delay occurred in appointing an assignee, and the suit was thereby retarded, on an application by the defendant, the injunction was ordered to stand dissolved, unless a supplemental bill in a week; and a supplemental bill having been filed and answered, the plaintiff, on a second application by defendant, was ordered to set down the cause forthwith, or the injunction stand dissolved; Lord Chancellor, disregarding the objection, that, by the course of the court, the plaintiff in the supplemental suit was entitled to time to bring the cause regularly to hearing. *Caird* v. *Campbell*, 1 Moll. 484.

Practice.]—Court will set aside injunction.

granted after trial and verdict, and obtained on ground that one of the defendants (a plaintiff at law), in whom the interest was averred to be, was in contempt for not having answered, and that his answer was most material to the defence at law of the plaintiffs (in equity) to the action, as it might show that property was not in truth in him, notwithstanding strong affidavit of merits, and a new trial being granted nisi on same merits. *Whitmore* v. *Thornton*, 3 Price, 241.

Injunction dissolved, plaintiff's legal title being doubtful, and the continuance of the injunction being unnecessary for the protection of plaintiffs, and injurious to the defendants. *Shrewsbury & Birmingham Ry.* v. *L. & N. W. Ry.*, 3 Macn. & G. 70; 20 L. J., Ch. 90; 14 Jur. 1125.

Defendants at law having three grounds of defence to action, of which two were legal and one equitable, the injunction which the Master of the Rolls had continued to the hearing was dissolved on appeal; because if the legal grounds were good, the aid of the court was not wanted; if bad, the court would have the verdict as to damages as a measure of amount to be paid into court. *Barnard* v. *Wallis*, Cr. & Ph. 85; 2 Railw. Cas. 162; 5 Jur. 813.

An application for an injunction to restrain an alleged breach of covenant had been once ordered to stand over until the decision of two legal questions raised by the defendant. On those questions being decided in the plaintiff's favour, and the motion coming on again, the defendant raised a third legal objection, and the court below, at his request, directed a case to be stated for the opinion of a court of law upon it, but on the ground of the delay in bringing it forward granted an injunction in the meantime. On appeal, however, the Lord Chancellor dissolved the injunction, notwithstanding that circumstance, on the ground of the much greater facility of indemnifying the plaintiff than the defendant, according as the one or the other might succeed at law. *Rigby* v. *G. W. Ry.*, 2 Ph. 44; 1 Coop. C. C. 7; 10 Jur. 531.

On a motion to dissolve an injunction, there being no answer, the court will not dissolve the injunction upon the sole ground that the plaintiff's equity is denied by the defendant's affidavit where the affidavit did not traverse all the facts on which the plaintiff's equity rested. *Pyecroft* v. *Pyecroft*, 2 Sm. & G. 326.

Injunction for want of an answer dissolved because not served for several months after answer came in. *Morice* v. *Bank of England*, Kel. 43.

Where plaintiff obtained injunction for want of answer, but suffered defendant in equity to go to trial, and obtain verdict, and did not serve injunction till defendant in equity sued out fi. fa. on judgment, court dissolved the injunction. *Anon.*, 2 Eq. Abr. 525.

Special injunction dissolved with costs, office copies of affidavits in support of it not having been obtained when it was moved for. *Jackson* v. *Cassidy*, 10 Sim. 326; 10 L. J., Ch. 356.

Where an injunction was obtained ex parte, there being at the time no office copy in court of the affidavit which was filed in support of the motion, the court, on the application of the defendant, dissolved the injunction, with costs. *Elsey* v. *Adams*, 32 L. J., Ch. 616; 9 Jur. (N.S.) 788; 8 L. T. 451; 2 N. R. 263.

When plea is allowed, injunction dissolved absolutely. *Philips* v. *Langhorn*, Dick. 148.

Injunction nisi not dissolved by putting in answer, until costs of contempt be paid. *Hall* v. *Darney*, Dick. 289.

Injunction nisi for want of answer; answer put in, but costs of contempt not paid; order nisi to dissolve injunction. Plaintiff should move to discharge order for irregularity. *Ib.*

Variance between affidavit in support of motion for injunction and bill, in date of bill of exchange, on which defendant had commenced proceedings at law, is a sufficient ground for dissolving the injunction obtained. *Wattleworth* v. *Pitcher*, 2 Price, 189.

A plaintiff resident abroad having made default in giving security for costs, the court ordered that he should give the security within four days, or that an injunction which he had obtained ex parte should be dissolved, but it refused to order the bill to be dismissed. *Fort* v. *Bank of England*, 10 Sim. 616.

A., in consideration of B. engaging him as his assistant in the business of an apothecary at a stated salary, agreed in writing with B. not to practise as an apothecary within seven miles of the town of M., under a penalty of 500*l.* A., having been discharged by B. from his service, proceeded to practise as an apothecary in the town of M.; whereupon, B. moved for an injunction to restrain A. from so practising; but the motion was ordered by the court to stand over, with liberty for B. to bring an action. In the action, B. recovered 500*l.* damages and the costs against A., and entered up judgment for the same, and afterwards proved under a fiat in bankruptcy issued against A. for the amount of the costs, but not for the damages:—Held, that an injunction granted against A., on a renewed motion, could not be maintained; and that B. was not entitled to any equitable right arising out of the legal contract entered into between the parties:—Held, also, that the court had no power to set off the costs recovered at law by B. in the action against the costs given to A. on the renewed motion for the injunction. *Sainter* v. *Ferguson*, 1 H. & Tw. 383; 1 Macn. & G. 286; 19 L. J., Ch. 170; 14 Jur. 255. And see *S. C.* at law, 18 L. J., C. P. 217.

Injunction granted pending notice of motion for a dedimus, is dissolved of course, on the dedimus being granted. *M'Mahon* v. *O'Brien*, 1 Sch. & Lef. 237.

On a motion to dissolve an injunction, the defendant may rely on an objection, although it would have been a ground for demurring to the bill. *Hudson* v. *Maddison*, 12 Sim. 416; 11 L. J., Ch. 55; 5 Jur. 1194.

A conditional consent to proceed at law waives an injunction. *Grant* v. *Priddell*, 1 Anstr, 62.

Undertaking to amend Writ — Non-Performance.]—An ex parte injunction was obtained by the plaintiffs shortly before two o'clock on a Saturday afternoon on condition that a party should be added as plaintiff for the purpose of his counsel giving on his behalf the usual undertaking as to damages. The writ was not amended until the following Tuesday morning, whilst a motion was being made to dissolve the injunction. The court dissolved the injunction without deciding the merits, on the ground that the plaintiffs had not fulfilled the terms on which the injunction was granted, and had thereby left the defendant without the protection of the undertaking as to damages.

Spanish General Agency Corporation v. *Spanish Corporation*, 63 L. T. 161.

Alleged Death of Defendant.]—Common injunction will not be dissolved on doubtful evidence that the defendant is dead. *Janson* v. *Sclarte*, 2 Y. & C. 127 ; 6 L. J., Ex. Eq. 75.

ii. *Suppression of Facts, on Ex parte Application.*

If a plaintiff, applying ex parte for an injunction, suppress a material fact, it will be a ground for dissolving the injunction with costs. *Hemphill* v. *M'Kenna*, 3 Dr. & War. 183 ; 2 Con. & L. 76 ; 6 Ir. Eq. R. 57. See also *Hatch* v. *Borsley*, 4 L. J., Ch. 160.

Injunction order in possessory suit, set aside on the ground that plaintiff had not fairly stated his case. *Dease* v. *Plunkett*, Dr. 255.

An injunction having been obtained ex parte, with constructive notice of its being untenable, the court, after answer filed, dissolved the injunction, and gave costs on the ground of such notice. *Greenwood* v. *Bairstow*, 5 L. J., Ch. 179.

An ex parte injunction had been obtained, to stay an ejectment to which the plaintiffs in equity stated, in their bill, they had no defence at law ; and there was not sufficient time for the defendants to move to dissolve it before the day of trial. It appeared afterwards, that the injunction had improperly issued, but without any misrepresentations as to the facts in the plaintiff's affidavits. The injunction was dissolved, with costs ; but held, reversing an order of the court below, that the court had no power, on motion by the defendant, to order the plaintiffs to give judgment in the ejectment. *Brown* v. *Newall*, 2 Myl. & C. 558 ; 6 L. J., Ch. 348 ; 1 Jur. 422.

An order for an ex parte injunction, made after the appearance of the defendant, without that fact being represented to the court, will be discharged. *Randall* v. *Commercial Ry.*, 8 L. J., Ch. 252.

Where a plaintiff, upon an application for an ex parte injunction, suppresses material facts, the injunction will be dissolved on that ground alone, and the plaintiff will not be allowed on a motion to dissolve to maintain it on the merits then disclosed. *Hilton* v. *Granville* (*Lord*), 4 Beav. 130 ; Cr. & Ph. 283 ; 10 L. J., Ch. 398.

A party is entitled to move to dissolve an injunction if, from ambiguity in its terms, he may under any construction of the order be prejudicially affected. *Dalglish* v. *Jarvie*, 2 Macn. & G. 231 ; 2 H. & Tw. 437 ; 20 L. J., Ch. 475 ; 14 Jur. 945.

It is the duty of a party asking for an injunction to bring under the notice of the court all facts material to the determination of his right to that injunction ; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward. *Ib.*

Thus, where a plaintiff obtained an ex parte injunction on the facts stated in the bill, but other facts came out in the defendant's answer raising a question of law on which the right of the plaintiff to the injunction depended :—Held, that the omission of the plaintiff to bring these facts under the notice of the court was of itself a sufficient ground for dissolving the injunction. *Ib.*

Injunction about to Expire.]—A motion to discharge an ex parte injunction on the ground of its having been obtained by misrepresentation is proper, though the injunction is about to expire. *Wimbledon Local Board* v. *Croydon Sanitary Authority*, 32 Ch. D. 421.

Defendant must apply Promptly.]—Although an injunction ex parte upon a statement, in which material facts are concealed or misrepresented, would, on a speedy application, be dissolved with costs, yet that is not a sufficient ground for a motion to dissolve that injunction, after a period of several months has elapsed before notice of such motion is given ; nor will the question, whether there has been such concealment or misrepresentation, be taken into consideration, on appeal from an order made by the court in which the injunction was granted, and by which order the injunction was continued and the costs reserved. *Bell* v. *Hull and Selby Ry.*, 1 Railw. Cas. 616.

Interim Order—Ex parte—Motion to Discharge Order, whether necessary.]—Upon a motion by the plaintiffs for an injunction, or in the alternative to continue an interim order already obtained ex parte, no cross notice of motion to discharge the interim order was given by the defendant. The interim order was irregularly obtained on suppression of material facts : —Held, that the court may discharge an ex parte order without a formal notice of motion to discharge being given by the defendant. *Boyce* v. *Gill*, 64 L. T. 824.

c. Without Special Order.

i. *By Amendment of Bill.*

Injunction falls by amending bill, unless expressly saved. *Bliss* v. *Boscowen*, 2 Ves. & B. 102.

Injunction does not drop of course on plaintiff amending bill. *Mason* v. *Murray*, Dick. 536.

Amendment of bill after exceptions allowed and not answered does not prejudice an injunction previously obtained. Therefore it is a motion of course for leave to amend, and that defendant may answer amendments and exceptions together. *Dipper* v. *Durant*, 3 Mer. 465.

Amendment of bill after exceptions to answer allowed does not prejudice injunction previously obtained. *Adney* v. *Flood*, 1 Madd. 449.

Amendments made to bill after injunction cannot be used in support of injunction. *Vere* v. *Glynn*, Dick. 441.

Therefore, if injunction is obtained on original bill, and defendant answers, and plaintiff amends, proceedings to get rid of injunction are on original bill and answer to it. *Ib.*

Semble, the order to amend before answer, after a common injunction, without prejudice to the injunction, is an order of course : where the common injunction had issued against one of two defendants for want of answer, such an order could not be objected to by the defendant against whom no injunction had issued. *Ferrand* v. *Hamer*, 4 Myl. & C. 143 ; 8 L. J., Ch. 96 ; 3 Jur. 236.

After an injunction has been granted, or continued upon the merits, the amendment of the bill does not prejudice the injunction ; and a special motion to the court for leave to amend

in such a case is unnecessary and improper. *Woodroffe* v. *Daniel*, 9 Sim. 410; 8 L. J., Ch. 16.

Although irregular to file an amended bill without leave, after an order to continue an injunction on the terms of speeding the cause, yet the amendment being material and such as the court would have allowed, and the plaintiff offering terms which tended to prevent delay, the injunction was continued, plaintiff paying the costs of defendant's motion to dissolve it. *Welsh* v. *Hannan*, 2 Sch. & Lef. 516.

An injunction having been obtained, the bill was amended by adding a plaintiff:—Held, that the injunction had thereby ceased to exist. *Att.-Gen.* v. *Marsh*, 16 Sim. 572; 18 L. J., Ch. 272; 13 Jur. 317.

The common injunction is not dissolved by the plaintiff obtaining an order to amend without saving the injunction, unless the record is altered. *Davis* v. *Davis*, 2 Sim. 515.

The mere fact of amending a bill does not of itself dissolve or discharge the common injunction, though it may furnish a ground for dissolving or discharging it on an application for that purpose. *Brooks* v. *Purton*, 1 Y. & Coll. C. C. 271; 11 L. J., Ch. 122; 6 Jur. 94.

A new issue, which has been raised by amendments to the bill after an arrangement and undertaking given on an application for an injunction, vitiates the undertaking; from which the defendant who has given it will be discharged. *Clarke* v. *Clarke*, 11 L. T. 366; 13 W. R. 133.

An injunction, if granted upon merits, is not dissolved by amendment of the bill, though the amendment be without saving the injunction. *Harvey* v. *Hall*, L. R. 11 Eq. 31; 23 L. T. 391.

ii. *By Dismissal of Bill.*

Bill being dismissed, an injunction falls with it without special order. *Willis* v. *Yates*, Coop. t. Brougham, 498.

On dismissing a bill it is unnecessary to dissolve an injunction, as it falls of course. *Green* v. *Pulsford*, 2 Beav. 70.

On the dismissal of a bill of interpleader, the plaintiff is entitled to be paid back the money which he lodged in court for the purpose of obtaining an injunction; and the injunction falls without an order for the purpose, though it is the general practice to apply for an order to dissolve it. *Blennerhasset* v. *Scanlan*, 1 Hog. 363.

d. Evidence.

An indictment for perjury in defendant's answer, and a true bill proved thereon by grand jury, not sufficient ground for refusing to dissolve common injunction. *Forster* v. *Seward*, 5 Jur. 1031.

A plaintiff who has obtained the common injunction cannot sustain it on grounds contained in the answer, but not stated in his bill. *Cresy* v. *Beavan*, 13 Sim. 99.

Semble, on showing cause against dissolving the common injunction affidavits are admissible to prove facts alleged by the bill, but which are neither admitted nor denied by the answer. *Ord* v. *White*, 3 Beav. 357.

On showing cause against dissolving an injunction, the plaintiff cannot read affidavits to prove allegations in the bill of matters of fact, which the answer neither denies nor admits. *Castellain* v. *Blumenthal*, 12 Sim. 47; 10 L. J., Ch. 223; 5 Jur. 501.

Where the obligor in a bond has obtained the common injunction to restrain the obligee from proceeding in an action which has been commenced in his name by an assignee of the bond, the answer of the obligee cannot be read in opposition to a motion to dissolve the injunction made by the assignee. *Montague* v. *Hill*, 4 Russ. 128.

Plaintiff obtained an ex parte injunction; defendant filed his answer, and served a notice of motion to dissolve the injunction. Exceptions were taken to the answer, to which the defendant submitted, and then filed a further answer. Between the filing of the exceptions and the putting in of the further answer, the plaintiff filed affidavits in support of the injunction. The defendant then moved to dissolve on the notice served prior to putting in his further answer:—Held, that the affidavits so filed by the plaintiff might be read on the hearing of the motion. *Smith* v. *Cleasby*, 10 Sim. 91; 10 L. J., Ch. 163; 5 Jur. 383.

Defendant moved, on affidavits, to dissolve an ex parte injunction. The motion stood over at the plaintiff's request. The defendant then filed his answer, after which the plaintiff filed several affidavits. On the motion being resumed, those affidavits were held to be inadmissible. *Woodin* v. *Field*, 15 Sim. 307.

Not necessary for plaintiff, who claims an estate as tenant in tail under settlement of parents, to prove by affidavit their marriage, before he shows cause against dissolving an injunction, to restrain an ejectment brought against him to recover the estate. *Hodgson* v. *Dean*, 2 Sim. & S. 221; 3 L. J. (o.s.) Ch. 95; 25 R. R. 188.

On a motion to dissolve an injunction to stay proceedings at law, the plaintiff in equity has no right, under s. 40 of the stat. 15 & 16 Vict. c. 86, to require that the motion shall stand over, in order that he may examine orally witnesses who had made an affidavit for the defendant. *Normanville* v. *Stanning*, 10 Hare, App. xxvi.

Upon a motion to dissolve an injunction it is not the proper time to object to the form of the plaintiff's affidavit denying collusion; but any such objection should be taken on demurrer, when the court might grant leave to amend the affidavit. *Hamilton* v. *Marks*, 5 De G. & Sm. 638.

Where a special injunction has been obtained on affidavits, and on the answer coming in, the defendant moves to dissolve, such affidavits may be used against the answer. *Custance* v. *Cunningham*, 13 Beav. 363.

e. Payment of Money out of Court.

The plaintiff, in equity, having been taken in execution, and discharged by a judge of the court of law, on payment into the hands of the master of that court of the amount of the sum indorsed on the writ, with sheriff's poundage; and the common injunction having afterwards been issued; on motion to dissolve the injunction, it was ordered that the plaintiff might apply to the court of law for payment to him and to the defendants of the sum paid into the hands of the master, that sum, when received, to be paid into the bank to abide the event of

the cause. *Hawkshaw* v. *Parkins*, 2 Swan. 539; 19 R. R. 125.

B., the holder of certain bills accepted by F., attached by proceedings in the lord mayor's court, in the hands of C., a large sum of money belonging to F.; F. filed a bill to restrain the action; a special injunction was granted, and the money was paid into court by the garnishee. B., by his answer, denied the whole of the equity suggested by the bill:—Held, that though the injunction must be dissolved, the money in court would not be paid out to B. before he has obtained judgment in this action. *Furnival* v. *Bogle*, 4 Russ. 142; 6 L. J. (O.S.) Ch. 91; 28 R. R. 34.

On the dismissal of a bill of interpleader, the plaintiff is entitled to be paid back the money which he lodged in court for the purpose of obtaining an injunction. *Blennerhasset* v. *Scanlan*, 1 Hog. 363.

See also INTERPLEADER.

f. Delay and Acquiescence, Effect of.

An injunction was obtained before answer. The defendant filed his answer, but delayed moving to dissolve until several months after replication, and at a period when the evidence would have been published but for the defendant having obtained an enlargement of the publication. The motion was, on that ground, refused. *Feistel* v. *King's College, Cambridge*, 10 Beav. 491; 16 L. J., Ch. 339; 11 Jur. 506.

The court possesses, and will exercise, jurisdiction over a bottomry bond in a case of fraud; and will, for that purpose, restrain proceedings upon the bond in the admiralty court by injunction. It is not necessary for the purpose of supporting an interlocutory injunction of that kind, that the court should find a case which would entitle the plaintiff to relief at all events; it is sufficient if the court finds, upon the evidence then before it, a case which makes the transaction a proper subject of investigation in a court of equity. After long acquiescence under such an order, the court will not readily entertain an application for dissolving it. *Glascott* v. *Lang*, 8 Sim. 358; 3 Myl. & C. 451; 2 Jur. 909.

By three acts of parliament of the same session a railway company was empowered to make three distinct lines, forming a cluster and not a continuous line. In the next session an act was passed declaring the company to have lines and to be only one company, and authorising and requiring them to grant a lease of the lines to another company. They completed only one of the lines, which was worked by the other company under the provisions of the last act. Some months after it was obvious that the other two lines could not be completed within the time prescribed by the acts. A shareholder in the company filed a bill seeking to restrain it from applying its funds otherwise than for the purpose of constructing all three of the lines, but he did not make the company who were lessees parties to the suit:—Held, that more inconvenience would arise from the court interfering than from its abstaining to do so; and on this account, as well as on the grounds of acquiescence and want of parties, an injunction granted by the court below was dissolved. *Hodgson* v. *Powis (Earl)*, 1 De G. M. & G. 6; 21 L. J., Ch. 17; 15 Jur. 1022. Reversing 12 Beav. 392, 529; 19 L. J., Ch. 356, 418; 14 Jur. 906, 965.

Where an injunction is obtained for want of answer, and answer is afterwards filed, but defendant does not move to dissolve until two terms after, and when bill has been amended, yet injunction may be dissolved by motion of course. *Patton* v. *Panton*, 3 Anstr. 651.

By a decree made thirty years ago, an account had been directed of a testator's personal estate, and of his debts and testamentary expenses, and an injunction had been granted to restrain the bank from permitting the transfer of a small sum of stock belonging to the testator's estate, but no further proceedings had been had in the suit. The court, upon the petition of the only party interested, dissolved the injunction, so that an immediate transfer of stock might be made to the petitioners, without carrying the suit any further. *De Beaufort* v. *Archdeacon*, 1 Y. & Coll. 549; 5 L. J., Ex. Eq. 72.

Injunction obtained two years back, on granting commission to examine in India, not yet returned, dissolved. *Penney* v. *Edgar*, 1 Anstr. 276.

Bill for injunction and commission to examine, and both parties at liberty to examine and cross-examine; defendant examined witnesses, and plaintiff cross-examined them, but plaintiff takes out no commission; injunction dissolved, and publication ordered. *Emmet* v. *Ayliffe*, Dick. 239.

5. SUSPENDING.

Account of Profits.]—Where, upon motion for an injunction in a matter involving the making of profits, the granting the injunction is suspended, it is the usual practice to direct the defendant to keep an account of profits in the meantime. *Swallow* v. *Wallingford*, 12 Jur. 403.

In Interpleader.]—Where the court sees that the continuance of the injunction in an interpleading suit, in full force, may have the effect of enabling a stranger to deprive the parties to the suit of the legal rights which they have already acquired, the injunction will be suspended so far as to allow proceedings at law to go on to judgment. *Siereking* v. *Behrens*, 2 Myl. & C. 581. And see *S. C.*, 1 Jur. 50.

Where Plaintiff's Right doubtful.]—Where a plaintiff asks for an injunction, and has not, in the opinion of the court, completely established his case, the court may direct an issue, and will let the motion for the injunction stand over in the meantime. *Freeman* v. *Tottenham & Hampstead Ry.*, 11 Jur. (N.S.) 254; 13 W. R. 1004—L.JJ.

Injunction granted by C. A.—Application to Suspend.]—Where the court of appeal has granted an injunction that had been refused in the court below, an application to suspend its operation is properly made to the court below. *Shelfer* v. *City of London Electric Lighting Co.* 64 L. J., Ch. 736; [1895] 2 Ch. 388; 12 R. 441; 73 L. T. 42; 44 W. R. 198—C. A.

6. CONTINUING.

Common injunction which had been obtained under the old practice extended under the new on the application of the plaintiff. *Holme* v. *Brown*, 9 Hare, App. xxix.; 1 W. R. 5.

Where Important Question Raised.]—A point which materially concerns merchants in general, will induce the court to continue an injunction. *Green* v. *Suasso*, 2 Atk. 229.

Bill by the Universities—Sale of Bibles.]—Upon the answer to a bill by the universities, the king's printer not joining, but being made defendant, an injunction restraining the sale, in England, of bibles, prayer-books, &c., printed by the king's printer in Scotland, was continued to the hearing. *Oxford and Cambridge Universities* v. *Richardson*, 6 Ves. 689.

To Protect Property.]—Injunction continued against the lord, to protect the property until the determination of the right. *Grand Junction Canal Co.* v. *Dimes*, 2 Jur. 1077.

Landlord and Tenant—Breach of Covenant.]—A lessee covenants not to dig up a particular part of the demised premises for raising sand, gravel, &c., under the penalty of 100*l.* per acre. He breaks this covenant, and thereupon the lessor files a bill for an injunction; on affidavit of the waste committed, the injunction is granted till answer, and further order. After the answer put in, a motion is made to dissolve the injunction, and upon showing cause the defendant consents to appear and plead to an action of debt or trover, and to take short notice of trial; thereupon, the injunction is dissolved. But, on an appeal, this order was discharged, and an injunction granted to continue till the hearing of the cause. *London City* v. *Pugh*, 4 Bro. P. C. 395.

Till Trial at Law.]—Injunction continued on terms till it could be ascertained by trial at law whether a forfeiture had been incurred. *Algar* v. *Murrell*, 6 Jur. 775.

Ex parte Injunction.]—The infringement of a strict legal right will not necessarily induce the court to continue an injunction which has been granted ex parte. *Att.-Gen.* v. *Eastern Counties Ry.*, 7 Jur. 806.

Doubtful Question of Law.]—Doubts in matters of law are always sufficient ground for continuing an injunction once granted. *Maxwell* v. *Ward*, 11 Price, 3.

Answer referred for Scandal or Impertinence.]—The answer being referred for impertinence is a good ground to continue an injunction. *Hurst* v. *Thomas*, 2 Anstr. 591.

Reference of answer for scandal and impertinence is not cause for continuing injunction. *Milner* v. *Golding*, Dick. 672.

Revival of Suit.]—Injunction after revival of suit continues without order. *Kennedy* v. *Lloyd*, 8 Ir. Eq. R. 581.

To Stay Execution.]—Injunction granted last term to stay execution; ordered that injunction shall stand in force. *Burtet* v. *Redman*, Cary, 47.

On Plaintiff Giving Security.]—An injunction obtained on the filing of the bill continued to the hearing (the plaintiff giving security and undertaking to speed his cause), it appearing that there was a serious question for the hearing, which, if decided in the plaintiff's favour, would entitle him to the relief sought. *Donnell* v. *Church*, 4 Ir. Eq. R. 630.

Plaintiff with Defeasible Right.]—It is not necessary for a party who seeks to continue an injunction to the hearing to show an indefeasible right to the decree prayed by bill; where, therefore, assignees of a bankrupt sought a specific performance of an agreement for a lease against a party, who was herself a lessee and restrained from assigning without the consent of the lessor in writing thereto obtained, the court continued the injunction to restrain proceedings at law, there being a probability of obtaining the consent of the lessor to the assignment. *Powell* v. *Lloyd*, 1 Y. & J. 427; 31 R. R. 662.

Bill Irregularly Amended.]—Although irregular to file an amended bill without leave, after an order to continue an injunction on the terms of speeding the cause, yet the amendment being material and such as the court would have allowed, and the plaintiff offering terms which tended to prevent delay, the injunction was continued, plaintiff paying the costs of defendant's motion to dissolve it. *Welsh* v. *Hannan*, 2 Sch. & Lef. 516.

On Terms.]—An injunction, though not to be continued with a view to specific performance of an agreement to grant a lease, if under a clause for re-entry the lease, when granted, would be at an end by the tenant's acts, was maintained upon undertaking to give possession, when required by the court, and paying the rent due, by waiver of the forfeiture, if incurred, viz., distraining for subsequent rent. *Gourlay* v. *Somerset (Duke)*, 1 Ves. & B. 68; 13 R. R. 234. See also *Solby* v. *Moore*, 8 Price, 631; *Attwood* v. *Barham*, 2 Russ. 186.

Laches of Plaintiffs.]—Injunction not continued where the plaintiffs had neglected to make use of the powers they possessed. *Ellison* v. *Bignold*, 2 J. & W. 503.

Farm Agreement—Restraining Ejectment.]—Bill for specific performance of parol agreement to grant farm lease, with usual covenants of neighbourhood, and injunction to prevent ejectment, plaintiff having taken possession. Upon answer, stating insolvency of plaintiff, and various breaches of agreement during five years' possession, the injunction was continued, on undertaking to give judgment in ejectment, go to commission, and set down cause for next term, paying rent into court. Defendant also insisted on covenant not to assign; that is subject of inquiry as to custom of neighbourhood. *Boardman* v. *Mostyn*, 6 Ves. 467.

Restraining Publication—Evidence.]—A bill filed by A. against C. stated that A. and B. had together made various etchings for their own amusement, and without any view to publication, and that C. had improperly and surreptitiously obtained impressions of those etchings, and had printed and advertised for sale a catalogue of the etchings. Upon affidavits in support of the bill, an injunction was granted to restrain C. from publishing the catalogue. C. put in an answer, in which he stated that he believed that the impressions had not been improperly obtained, but did not suggest any mode in which

they could have been properly obtained. Upon a motion by C., after answer, for dissolving the injunction, it was ordered that the injunction should be continued. *Prince Albert* v. *Strange*, 1 Macn. & G. 25; 1 H. & Tw. 1; 18 L. J., Ch. 120; 13 Jur. 109.

On Amended Bill.]—An injunction was granted to stay an action until answer. The defendant having put in a full answer gave notice of motion to dissolve, after which the plaintiff amended his bill. The answer showing a mere legal question:—Held, that the injunction must be dissolved, and that the plaintiff was not, on this occasion, entitled to have it continued on the case alleged by the amendments. *Mollett* v. *Enequist*, 26 Beav. 466.

Injunction over certain Day or until further Order.]—Semble, that where an interim injunction is granted over a certain day, "or until further order," the injunction is not continued after the day named "until further order," but may be stayed before the day named by order of the court. *Bolton* v. *London School Board*, 47 L. J., Ch. 461; 7 Ch. D. 766; 26 W. R. 549.

Not ex parte.]—Ex parte motion to continue refused, until two defendants in contempt should have appeared and answered. *Highham* v. *Antwis*, 11 Price, 759.

7. Reviving.

a. In General.

Injunction dissolved on the answer, not revived of course, without special motion on amendments verified by affidavit. *James* v. *Downes*, 18 Ves. 522; 11 R. R. 247.

That an indictment for perjury upon the answer has been found by the grand jury is not a ground for reviving an injunction. *Clapham* v. *White*, 8 Ves. 35.

The common injunction having been dissolved upon the coming in of the answer, and the bill being subsequently amended, the injunction was revived upon special application, supported by affidavit of the facts stated by way of amendment, the defendant being in default (though not in contempt) for not answering the amended bill. *Vipan* v. *Mortlock*, 2 Mer. 476.

The inspection of documents set forth in the schedule to the answer in an injunction cause may be obtained before the dissolution of the injunction, and used to oppose the motion to dissolve it. Hence, when the injunction has been dissolved, and the plaintiff afterwards, by inspecting the documents referred to by the answer, discovers new matter, he cannot move to revive the injunction upon an amended bill containing the new matter, and verified by affidavit. *Powell* v. *Lassalette*, Jac. 549.

Upon a motion to revive the common injunction, the court will hear the defendant on the merits. *Blake* v. *White*, 1 Y. & Coll. 420; 4 L. J., Ex. Eq. 48.

b. On Death of Party.

Not necessary to revive perpetual injunction on death of party. *Askew* v. *Townshend*, Dick. 471.

Where injunction abates by death of defendant, defendant's representatives should move that plaintiff revive in a reasonable time, or injunction be dissolved. *Stuart* v. *Ancell*, 1 Cox, 411.

Where a defendant dies pending an injunction against him to restrain proceedings in an ejectment, the heir-at-law may move that the plaintiff in equity may revive within a week, or that the injunction be dissolved. *Hill* v. *Horre*, 2 Cox, 50.

See also *Browne* v. *Warner*, 3 Beav. 296; *Jones* v. *Massey*, 3 Beav. 295; and *Turner* v. *Cole*, *ib.*

8. Form.

Injunction with clause, si ita sit. *Christopherus* v. *Chomeley*, Cary, 37.

Form of the common injunction restraining proceedings at law touching the matters in question in the cause. *Land* v. *Blanshard*, 4 Hare, 31.

A writ of injunction issued after execution is in the same form with the common writ before execution. *Hawkshaw* v. *Parkins*, 2 Swan. 539; 19 R. R. 125.

If the order for an injunction on payment of costs of the action is in the usual form of injunctions after decree for administration, it will be improper if the parties entitled to injunction, having to pay costs as a preliminary, might, from the situation of the estate, be enabled to obtain it in time. *Drewery* v. *Thacker*, 3 Swan. 541; 19 R. R. 274.

The right to an injunction is founded on the fact, that injury is accruing to the plaintiff, and it is, therefore, necessary that that fact should be inserted in the order granting the injunction. *Lingwood* v. *Stowmarket Papermaking Co.*, 13 L. T. 540.

Where the matter in dispute is distinctly raised by the motion for an injunction, and is ready for decision, the right should be declared by the injunction founded thereon, that the order may inform the defendant what is the opinion of the court as to the limits of such right. *Cother* v. *Midland Ry.*, 2 Ph. 469; 17 L. J., Ch. 235; 5 Railw. Cas. 187.

In an action for the imprisonment under a commitment for contempt, the order is pleaded, and the plaintiff demurs:—Held, that an injunction ought not to issue limiting the plaintiff as to the particulars in respect of which he might on such demurrer question the validity of the order. *Van Sandau, Ex parte, Martin, In re*, 1 De G. 55; 1 Ph. 455; 14 L. J., Bk. 9; 9 Jur. 193.

When the court grants an injunction, the order ought not merely to direct that an action shall forthwith be brought, with liberty to the parties to apply in case of delay, but to give such directions of its own, in the first instance, as will insure the speedy trial of the action. An injunction granted pending an action to be brought by the plaintiff, for the speedy trial of which special directions were given, was dissolved on the ground of the plaintiff not having duly complied with those directions. *Stevens* v. *Keating*, 2 Ph. 333.

In an injunction, the words pro defectu placiti are intended of an issuable plea; and the words judicium intrare are intended of a final judgment; therefore, if the defendant be in execution, and pleads plene administravit, and the plaintiff at law enters judgment de bonis testatoris cum acciderint, he may proceed to a scire facias to inquire of assets, and enter judgment thereupon;

for the meaning of the injunction is, that the defendant may proceed so far as that nothing shall remain but to take out execution after the injunction is dissolved. *Morrice* v. *Hankey*, 3 P. W. 146. And see 2 Eq. Abr. 528.

By the common order for an injunction, in an interpleading suit, the injunction is directed to issue upon bringing the fund in question into court; and if, without the special direction of the court, the order is so drawn up that it does not make the bringing of the fund into court a condition precedent to the issuing of the injunction, the order will be discharged for irregularity. *Sieveking* v. *Behrens*, 2 Myl. & C. 581; 1 Jur. 50.

Semble, if there is not time to bring the fund into court, a special order will be made to provide for the emergency. *Ib.*

Restraining Publication.]—Where an injunction is granted, restraining the publication and sale of a work, pending a trial at law, to determine the question of alleged piracy, it is not necessary that the order should specify the particular articles alleged to have been pirated, although the plaintiffs do not claim a copyright in the whole of the articles contained in their publication; it being admitted, that some of the articles in the two works had been derived from a source common both to the plaintiffs and defendants. *Sweet* v. *Maugham*, 11 Sim. 51; 9 L. J., Ch. 323; 4 Jur. 479.

When all Defendants have resigned Office.]—A bill having been filed against a local board of health alleging that it was committing a nuisance, and praying for an injunction to restrain it, all the members of the board resigned. There being no defence to the suit, the injunction was granted in the terms of the first paragraph of the prayer of the bill. *Hardinge* v. *Southborough Local Board*, 32 L. T. 250.

9. Service.

Original need not be Delivered.]—Injunction served, and copy delivered; the party serving is not bound to deliver the injunction itself to be compared. *Woodward* v. *King*, 2 Ch. Ca. 203.

Notice to Defendant Sufficient.]—Exception to the rule requiring personal service of an order of injunction, where the party was present when the order was made, established by Lord Hardwicke; further extended since to notice by information. *Kimpton* v. *Eve*, 2 Ves. & B. 350; 13 R. R. 116. S. P., *Anon.*, 3 Atk. 567; *Powel* v. *Follet*, Dick. 116.

Where to be Served.]—Service of injunction at defendant's house, good. *Holgate* v. *Grantham*, Cary, 58.

At last Place of Abode.]—Injunction upon affidavit of an intended marriage with a male infant aged eighteen, restraining communication with him until further order; and that service of the order at the house which appeared to be the last place of abode, though apparently shut up, should be good service. *Pearce* v. *Crutchfield*, 14 Ves. 206.

Substituted Service.]—Substituted service of an injunction ordered. *Kirkman* v. *Honnor*, 6 Beav. 400; 12 L. J., Ch. 336.

Notice to Defendant's Clerk.]—A defendant's clerk in court was held not to be his agent for the purpose of receiving notice of an injunction granted in the cause. *Gooseman* v. *Dann*, 10 Sim. 517.

To Agent.]—Quære, whether service of notice of injunction on an agent, when the principal is out of the jurisdiction, can be good service, especially when that agent is merely an agent for sale of the goods of the principal. *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416.

Corporation.]—Service of notice of injunction on one member of a corporation is sufficient. *Ib.*

Before Order Passed and Entered.]—Plaintiff, who has obtained an order for injunction, is not entitled in point of practice to serve it with the writ of execution before it be passed and entered, although usual to do so; and if he should so serve it, and there should be an error in drawing up the order, to the prejudice of the defendant, it will be considered contempt, and so treated by the court on application to punish the plaintiff for so doing; nor will plaintiff be suffered to avail himself of the excuse of its being a mistake, and all the costs incurred by defendant, arising from such an irregularity, will be ordered to be paid by plaintiff. *Scott* v. *Becher*, 4 Price, 346; 18 R. R. 722.

Defendant Present in Court.] — Defendant being in court when order for injunction is made is bound by it from that time, and not from formal service thereof only. *Ib.*

On Defendant's Solicitors—At Address given by Defendant.]—Injunction granted ex parte restraining the receipt of a pension, and order made that service of the bill, the interrogatories, and the injunction on the solicitors, who were in communication with the defendant, or had means of being so, and also service at an address previously given by him, should be good service. *Heald* v. *Hay*, 9 W. R. 369.

10. Proceedings for Breach of.

a. Breach, what amounts to.

Injunction against Hindering Navigation of Canal—Action against Canal Company.]—Where an injunction had been granted restraining the stopping of vessels, and the hindering the navigation of a canal:—Held, that bringing actions against the canal company, and warning their servants that they were trespassers, was not a breach. *Grand Junction Canal Co.* v. *Dimes*, 17 Sim. 38; 18 L. J., Ch. 419; 13 Jur. 779.

But bringing actions against the company in respect of such barges having passed was contrary to the tenor of the decree, and in that respect an injunction was granted to restrain the actions. *Ib.*

Plaintiff's Solicitor.]—An annuity was granted to A., in consideration of certain services performed by him. A. assigned the annuity for a valuable consideration to B., the deed of assignment containing the usual power of attorney to sue and give discharges, which power was declared to be irrevocable. A., shortly after the assignment quitted England. B., having brought an

action in the name of A. for arrears of the annuity, the grantors filed their bill against A. and B. to restrain the proceedings at law, alleging that the annuity had been obtained through fraud and misrepresentation, and that it had been assigned to B. colourably and without consideration. B., by his answer, denied all knowledge of the alleged fraud or misrepresentation, and claimed to be a purchaser for a full consideration. No answer being put in by A., who continued abroad, an injunction, obtained by the plaintiffs against A. and B., was dissolved as to B., who proceeded to trial in the action at law commenced by him in the name of A. (the plaintiffs in equity appearing on such trial), and recovered a verdict. The plaintiffs subsequently moved for an attachment against the solicitor of B., for a breach of the injunction, but the court refused the application. *Imperial Gas Light Co.* v. *Clarke*, Younge, 580.

Injunction against Proceedings at Law—Taking Money out of Court.]—Taking money out of court of law, paid in there by rule of court, is breach of common injunction against proceedings at law. A motion for that purpose was refused. *Parke* v. *Shrewsbury* (*Earl*), M'Clel. 103; 13 Price, 289.

—— **Showing Cause.**]—Showing cause against a rule nisi for a new trial is not a breach of an injunction. *Whitmore* v. *Thornton*, 3 Price, 241.

—— **Delivery of Declaration.**]—Delivery of declaration is a breach of the common injunction to stay proceedings at law. Effect of plaintiff's acquiescence. *Mills* v. *Cobby*, 1 Mer. 3.

—— **Giving Notice of Trial.**]—Giving notice of trial is a breach of injunction to stay trial. *Bird* v. *Brancker*, 2 Sim. & S. 186; 3 L. J. (o.s.) Ch. 84.

—— **Obtaining Order to Change Venue.**]—It is a breach of an injunction to stay trial to obtain an order to change the venue in the action. *Pariente* v. *Bensusan*, 13 Sim. 522; 7 Jur. 618.

—— **Proclamations by Sheriff.**] — Plaintiff obtained the common injunction after four proclamations had been made under an exigent issued in an action commenced against him by defendant:—Held, that it was a breach of the injunction for defendant to sue out a writ to compel the sheriff to make a fifth proclamation. *Marsack* v. *Baillie*, 2 Sim. & S. 576. *S. C.* sub nom. *Marack* v. *Bailey*, 4 L. J. (o.s.) Ch. 205.

After a plaintiff at law had obtained a writ exigi facias, and the first of the five necessary proclamations had been made, the defendant served him with an injunction to restrain him from taking further proceedings at law. After such service, in consequence of the plaintiff refusing to give any instructions to the sheriff, three of the further proclamations were made:—Held, that this amounted to a contempt by the plaintiff at law, and that he should not have the benefit of any proclamations made since the injunction had been served. *Woodley* v. *Boddington*, 9 Sim. 214; 7 L. J., Ch. 196; 2 Jur. 513.

—— **Obtaining Rule to Show Cause why Money should not be Paid Out.**]—In an action at law, the defendant paid into the court of law the sum demanded in the action, and filed his bill in equity to restrain the action, and obtained the common injunction restraining the plaintiff at law from proceeding to execution. The plaintiff at law having tried the action, and obtained a verdict, applied for and obtained a rule nisi to show cause why the money paid into the court of law should not be paid out to him:—Held, that this proceeding was a step towards execution, and was a breach of the injunction. *Brooks* v. *Purton*, 1 Y. & Coll. C. C. 271; 11 L. J., Ch. 122; 6 Jur. 94.

—— **Second Civil Bill in Continuation of Civil Bill Dismissed without Prejudice.**]—A landlord obtained a civil bill decree in an ejectment against an overholding tenant, who appealed, and filed a bill for specific performance of an agreement to grant a lease, and for an injunction. The common injunction was obtained, and, on the appeal, the civil bill was dismissed without prejudice, and the landlord brought a second civil bill, and obtained a decree. An attachment for breach of injunction was refused, as second civil bill was only continuation of first. *M'Girr* v. *Jervis*, Hay. & J. 501.

—— **Obtaining Rule to Show Cause against Attachment.**]—An injunction for want of an answer had been obtained to restrain the defendant from all proceedings at law against the plaintiff, on an award of payment of money. The award having been made a rule of the court of king's bench, the defendant applied to that court for an attachment for non-performance of the award, and obtained a rule to show cause; this is not of itself any breach of the injunction. *Franco* v. *Franco*, 2 Cox, 420.

—— **Plaintiff should get Leave to Sue on Bail Bond.**]—Where defendant has been arrested on attachment for contempt in not appearing to subpœna ad resp., and he has given a bail bond to sheriff, and there is an injunction restraining further proceedings in the action, plaintiff should apply for leave to be permitted to sue on the bail bond, notwithstanding the injunction, where the defendant has not complied with condition by appearing. *Birdwood* v. *Hart*, 6 Price, 32.

Breach of injunction by proceeding against bail. —— v. *Hancock*, 17 Ves. 385.

—— **Injunction after Execution—Sheriff Paying over Money.**] — Where an injunction is obtained, even after execution executed, it is a breach of the injunction to call on the sheriff to pay over the money; but if the sheriff had voluntarily paid the money, it seems that would be no breach of the injunction. Sed quære. *Franklyn* v. *Thomas*, 3 Mer. 234.

If an injunction is obtained on bill filed after execution executed, the goods not yet being out of the hands of the sheriff, and the sheriff proceeds to sell without process, he will be ordered to pay the money into court. *Ib.*

Attaching and receiving money levied by sheriff, though levied before bill was filed, is breach of injunction. *Axe* v. *Clarke*, Dick. 549.

Technical Breach Provoked by Plaintiff.] —Where plaintiff misrepresents to the public what has been done by the court, and defendant, to correct that misstatement, does what in strictness is a breach of the injunction, the court will not entertain any complaint by plaintiff. *Bar-*

field v. *Nicholson*, 2 L. J. (O.S.) Ch. 90; 25 R. R. 144.

Where Injunction Dissolved as to Two of Three Plaintiffs.]—Where the common injunction is dissolved with respect to two out of three plaintiffs at law, it is a contempt of court for three afterwards to go on with the action. *Money* v. *Jordan*, 13 Beav. 229; 20 L. J., Ch. 174; 15 Jur. 49.

An order nisi, to dissolve the common injunction, was obtained by two out of three co-plaintiffs at law, and made absolute generally and not as to the two only:—Held, that they were not guilty of a contempt by afterwards proceeding in the names of the three; but the order was afterwards varied, and the plaintiff, who had been arrested in the meanwhile, was set at liberty on undertaking to confess judgment, in order that he might not afterwards say that the judgment had been satisfied by the execution. *Ib.*

Execution.]—Effect of an injunction in the court of chancery before action commenced, staying all proceedings at law after action commenced, permitting the defendant to call for a plea and proceed to judgment at law, if in a condition to do so, or if not to do only what is necessary to enable him to sue, restraining execution. Therefore, after bail excepted to, ruling the sheriff to bring in the body, is a breach of the injunction. *Bullen* v. *Ovey*, 16 Ves. 141.

—— **On Joint Judgment, where Injunction obtained by One of Two Defendants.**]—Injunction obtained by one co-obligor, the other not being made party, is no breach of injunction to sue out execution on a joint judgment, with notice to sheriff of injunction, and directions not to take plaintiff in equity. *Chaplain* v. *Cooper*, 1 Ves. & B. 16.

After injunction obtained by principal, proceeding against bail is a breach. *Ib.*

Recovering Costs.]—Solicitor may proceed to tax his costs after a verdict at law, with a view to commence an action in his own name for the amount, after a final settlement between the parties by arbitration without his concurrence, notwithstanding an injunction to stay execution. *Brooks* v. *Bourne*, 1 Price, 72.

Where, previous to injunction to stay proceedings after verdict in ejectment, plaintiff at law had taxed costs at law, and obtained writ of possession, it is a breach of injunction to sue out attachment for costs; but injunction being improperly obtained, Lord Chancellor would not commit for contempt. *Partington* v. *Booth*, 3 Mer. 148; 17 R. R. 48. *Woodward* v. *King*, 2 Ch. Ca. 203.

Injunction obtained by Shareholders suing on behalf, &c.—Action against other Shareholders.]—A suit by some partners in a joint-stock banking company, on behalf of themselves and the other shareholders, to restrain a creditor of the company from suing the shareholders for a debt alleged to have been equitably created. The common injunction restrained the defendants from proceeding at law against the plaintiffs touching the matters in question:—Held, that the common injunction in terms only protected the plaintiffs named on the record, and that therefore a proceeding by the defendants against the other shareholders, not individually named, was no breach of the injunction. *Lund* v. *Blanshard*, 4 Hare, 290; 14 L. J., Ch. 332.

Waste—Planting Potatoes in Ploughed Land.]—Planting potatoes in land previously ploughed is not such a breach of an injunction to stay waste as will be punished by attachment. *Brophy* v. *Quarry*, Hayes, 449.

Injunction against Pulling Down House—Forcible Entry by Breaking Window.]—Parties claiming to be equitable mortgagees in possession of certain freehold houses commenced pulling down the wall of one of them. The party claiming to have the legal estate thereupon filed his bill against the equitable mortgagees, and obtained, ex parte, an injunction to restrain them from pulling down, destroying, or damaging the houses or buildings, and from removing or carrying away the bricks or materials thereof, and from doing or committing any waste, injury, or spoil to, in, or upon the premises, or any part thereof. The plaintiff afterwards put workmen into the houses, who excluded the defendants by shutting the doors and windows. The defendants thereupon obtained an entry by breaking a window in one of the houses, broke the lock of one of the doors, and ejected the plaintiff's workmen:—Held, that, under the circumstances, no breach of the injunction had been committed. *Loder* v. *Arnold*, 15 Jur. 117.

Injunction Against Permitting Certain Effect from Certain Cause—Effect Happening—Dispute as to Cause.]—After an injunction had been granted, restraining a defendant from permitting a certain injurious effect to be produced by a given cause (but not otherwise restraining any definite act), the apprehended injury took place; but the defendants denied, to the best of their belief, that it arose from the alleged cause. The court, in such circumstances, refused to treat the defendants as contumacious, until it should have been conclusively determined, by a verdict at law, that the injury complained of was produced by the cause assigned. *Dawson* v. *Paver*, 5 Hare, 424; 4 Railw. Cas. 81; 16 L. J., Ch. 274; 11 Jur. 766.

The verdict of a jury having found that the forbidden cause would produce the effect, but, a new trial being directed, the court declined to proceed as for a breach of the injunction till after the second trial. *Ib.*

The rule that an individual must so use his own property as not to injure his neighbours, applies to persons acting under inclosure and other acts of parliament of a similar nature. *Ib.*

Exercise of Right by Stranger.]—One, not party to injunction, exercising an antecedent right, cannot commit a breach of it. *Booth* v. *Stanley*, 2 Eq. Abr. 528.

Alleged Breach by Agent of Person Restrained.]—By the terms of an injunction A. B. was restrained, but it did not extend to "his servants and agents." A motion to commit his agent, C. D., for breach of the injunction held irregular; but semble, that he might be proceeded against for "a contempt," if he knowingly aided and assisted A. B. in breach of the injunction. *Wellesley* (*Lord*) v. *Mornington* (*Earl*), 11 Beav. 180; 12 Jur. 367.

Person Restrained Aiding and Abetting Breach.]—If a party, who together with others has been restrained by injunction from doing a particular act, is afterwards present, aiding and abetting, when that is done which the injunction has prohibited, he is guilty of a breach of the injunction. *St. John's College* v. *Carter*, 4 Myl. & C. 497; 8 L. J., Ch. 218; 3 Jur. 18.

Alleged Breach of Undertaking not to Publish Statement.]—An action having been brought to restrain the defendant from publishing an advertisement termed a "caution," as injurious to the plaintiffs, the defendant, on a motion for injunction, undertook not to publish the caution till the trial. A newspaper published an inaccurate account of the proceedings, and the defendant then published an advertisement giving an accurate account, in which he stated that he had undertaken not to repeat the caution till the trial, but he did not set out the terms of the caution. A motion was made to commit the defendant for contempt and for breach of the undertaking:—Held, that the motion must be refused without costs. *Buenos Ayres Gas Co.* v. *Wilde*, 29 W. R. 43.

Allowing Sewage to Flow.]—A local board of health was restrained by a decree of the court, at the suit of an individual, from allowing sewage to flow into a river after a certain date. The board did not stop the sewage, but tried, and failed, to render it inoffensive:—Held, that the board had committed a contempt of court, and was not excused by the fact that the board was acting in the matter on behalf of the public, and carrying out duties imposed on it by act of parliament. *Spokes* v. *Banbury Local Board*, 11 Jur. (N.S.) 1010; 13 L. T. 453; 14 W. R. 169—L. JJ. Affirming 35 L. J., Ch. 105; L. R. 1 Eq. 42.

Public Body—Sequestration.]—An order for sequestration for contempt granted against a public body having property vested in it for various public purposes, it appearing to the court that there was property on which the sequestration would operate. *Ib.*

Trustees Restrained, and their Successors, Agreeing to Commit Breach.]—An injunction was granted against certain trustees of a friendly society by name, restraining them from dividing 2,000*l.*, part of the society's funds, among its members. These trustees shortly afterwards retired, and others were appointed in their place. A fresh resolution was then passed by the society for dividing the 2,000*l.*, and this was carried out by the new trustees. One of the former trustees was present when the resolution was passed, and assisted in distributing the money. All received their shares of the money, but had repaid them. On motion to commit all the trustees, old and new, for contempt:—Held, on the evidence, that the new trustees had notice of the order; that they and the old trustees, who actively assisted in dividing the money, must be committed to prison, and the costs of the motion must be paid by all. *Avory* v. *Andrews*, 51 L. J., Ch. 414; 46 L. T. 279; 30 W. R. 564.

Disobedience by Third Parties—Attachment.]—The plaintiff having obtained an injunction whereby the defendants were restrained from interfering with or disturbing his markets and fairs, or doing any acts whereby he should be deprived of the tolls and customs to which he was, by the judgment, declared entitled:—Held, that the plaintiff was entitled to an order that writs of attachment should issue against persons, not defendants in the action, who had knowingly acted in contravention of the injunction. *Smith-Barry* v. *Dawson*, 27 L. R., Ir. 558.

Person not Enjoined knowingly "Aiding and Assisting" in Breach—Committal.]—A person who knowingly aids and assists in the doing of acts which have been expressly prohibited by injunction (although he is not a party to the litigation nor named in the order granting the injunction) may be committed for contempt of court. *Wellesley* (*Lord*) v. *Mornington* (*Earl*) (11 Beav. 180, 181) followed. *Seaward* v. *Paterson*, 66 L. J., Ch. 267; [1897] 1 Ch. 545; 76 L. T. 215; 45 W. R. 610—C. A. Affirming 61 J. P. 281.

Act Contrary to the Spirit, not the Letter, of Injunction.]—The court will interfere to restrain an action at law, the bringing of which is against the spirit, though not within the letter, of a former injunction. A solicitor assisting his client in bringing such an action may be called upon by the court to answer the matters of the affidavits. *Brenan* v. *Preston*, 1 W. R. 173—L.JJ.

b. Notice of Injunction, What is Sufficient.

Personal Service Necessary.]—*Gooch* v. *Marshall*, 8 W. R. 410.

Order not Served.]—Breach of injunction after notice of the order, without personal service of the injunction or order. *Kimpton* v. *Eve*, 2 Ves. & B. 349; 13 R. R. 116.

Defendant committed for breach of an injunction after notice of its having been obtained, although the order for the injunction had not been served. *Vansandau* v. *Rose*, 2 Jac. & Walk. 264; 22 R. R. 114.

A party who has notice of an order of the court is bound by it from the time the order is pronounced; and if the order be an injunction, and the party, after notice, be guilty of a breach of it, he may be committed for the contempt without the production of the writ of injunction, and although the writ have not actually issued. *M'Neil* v. *Garratt*, Cr. & Ph. 98; 10 L. J., Ch. 297; 5 Jur. 826.

Party having knowledge of injunctions being granted proceeds at law; he is guilty of contempt, though not sealed. *Powel* v. *Follet*, Dick. 116.

It does not excuse a party proceeding at law, after injunction, that it was not sealed; for where a party, or his solicitor, has been present on an order for an injunction, they will be bound, although it be not sealed. *Anon.*, 3 Atk. 567.

It is not the rule on applications for commital for contempt by disregarding an order of the court, that the court will only commit where, there having been time to draw up, enter, and serve the order, such order has been actually served on the offending party. On the contrary, even where the order is ten or eleven months old, and has never been so served, the party disregarding it will be committed if it appears that he really knew of its existence and purport, and

wilfully disobeyed it. *United Telephone Co.* v. *Dale*, 53 L. J., Ch. 295; 25 Ch. D. 778; 50 L. T. 85; 32 W. R. 428. See also *Robinson* v. *Elton*, 4 L. J., Ch. 197.

An attachment may be issued for breach of an injunction, although no writ of injunction has been actually issued, when the defendant, after being served with the decree or order for injunction, has disobeyed it. *Mining Co. of Ireland* v. *Delany*, 21 L. R., Ir. 8.

Notice after taking in Execution.]—Where a party is taken after he has obtained an injunction, but before notice given of it, the detaining him after notice is no contempt. *Willis* v. *Daniel*, 1 Anstr. 36.

Defendant in Court—Delay—Order not Drawn up.]—Contempt by breach of injunction by defendant, present in court during the motion, though retiring before the order pronounced; but motion to commit after a considerable lapse of time, and the order not drawn up, refused with costs. *James* v. *Downes*, 18 Ves. 522; 11 R. R. 247. See *Scott* v. *Becher*, 4 Price, 346; 18 R. R. 722.

Defendant in Court, Leaving before Judgment.]—Contempt by breach of injunction by persons who were present in court during the motion, though absent when the order was pronounced. *Hearn* v. *Tennant*, 14 Ves. 136; 9 R. R. 253.

Drawing up Order.]—In November, 1847, an order was made for an injunction, but was not drawn up. Upon an ex parte application in April, 1849, to have it drawn up:—Held, that notice of the application must be given to the defendant. *Bateman* v. *Wiatt*, 11 Beav. 587.

Defendant's Counsel in Court without Instructions.]—The presence of a defendant's counsel in court without instructions, when an interim injunction is continued against him in the absence of and without notice to his solicitor, does not constitute such notice to the defendant as will justify committal for contempt for a subsequent breach of the order. *Carrow* v. *Ferrior*, 37 L. J., Ch. 569; L. R. 3 Ch. 175.

Notice of Injunction—Proper Mode of Giving.]—A London solicitor who obtains an order from the court of bankruptcy in London restraining a sale under an execution in the country ought, instead of telegraphing the order to the sheriff's officer, to telegraph it to a solicitor at the place, as his agent, asking him to give notice of it to the persons affected. *Langley, Ex parte, Bishop, In re*, 49 L. J., Bk. 1; 13 Ch. D. 110; 43 L. T. 181; 28 W. R. 174—C. A.

Notice by Telegram.]—Sufficient notice of the granting of an injunction may be given by telegram; but, if it is sought to commit for contempt a person who, after receiving such a notice, disregards it, the court must decide upon the particular facts whether he had in fact notice of the injunction, and it is the duty of those who ask for the committal to prove this beyond reasonable doubt. *Ib.*

A sheriff's officer and an auctioneer proceeded with the sale of the property of a trader seized under a fi. fa. after they had received notice by a letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the court of bankruptcy had made an order restraining further proceedings under the writ:—Held, that the sheriff's officer and the auctioneer had been guilty of contempt of court, and that they must pay the costs of a motion to commit them. *Bryant, In re*, 4 Ch. D. 98; 35 L. T. 489; 25 W. R. 230.

Semble, that it is equally a contempt of court, if he had received notice of an act of bankruptcy. *Ib.*

c. Motion for Committal or Attachment.

i. *In General.*

Interfering with Pastor of Dissenting Church—Parties.]—The consistoire, or governing body of the French Protestant church of London, was, in 1860, restrained by injunction from interfering with the plaintiff, a pastor of the church, in the discharge of his duties as pastor. In 1866, M., a defendant in the suit, and also a pastor of the church, was present at a meeting of the consistoire, when they resolved to suspend the plaintiff from the discharge of his duties. M., as agent of the consistoire, took an active part in enforcing, though he did not in passing, that resolution. The plaintiff then moved for an order to commit M. for contempt of court, on the ground of the alleged infraction by him of the injunction granted in 1860. The members of the consistoire were not served with, and did not appear upon, the motion:—Held, that the court would not, in their absence, decide upon the validity or invalidity of the act of suspension, and that, upon the whole case stated in support of the motion, it must be refused; the only order to be made being, that the plaintiff must pay the costs of it. *Dangars* v. *Rivaz*, 14 L. T. 348. Affirmed, 15 L. T. 196—L.JJ.

Acquiescence.]—The court will not assist a plaintiff in enforcing attachment if he has not exercised due vigilance in maintaining his right secured by injunction. *Rodgers* v. *Nowill*, 1 W. R. 122.

Acquiescence by the plaintiff in the defendant's breach of the injunction must be of the distinctest and clearest kind, almost enough to support a claim founded on such acquiescence, or the defendant will be liable to be committed. *Rodgers* v. *Nowill*, 1 W. R. 205—L.JJ.

Defendant not Contumacious.]—Where defendant, after breach, had taken some steps to put himself in the right, motion ordered to stand over till the following term, defendant paying the costs of the application. *Cornish* v. *Upton*, 4 L. T. 862.

Form of Order.]—An order to commit for breach of an injunction which omitted to state the affidavit of service of the order for the injunction, or the notice to commit, or that the defendant had appeared by counsel on the motion, held irregular, and discharged, but without costs. *Stephens* v. *Workman*, 8 L. T. 232; 11 W. R. 503.

ii. *Notice of.*

Personal Service necessary.]—Personal service of a notice of motion to commit for breach of an injunction is necessary, and cannot be dispensed with, though counsel undertake to

appear for the party. *Ellerton* v. *Thirsk*, 1 Jac. & Walk. 376.

A notice of motion to commit the defendant for breach of an injunction, need not be served on his clerk in court, as well as on himself personally. *Bowdler* v. *Bowdler*, 9 L. J., Ch. 394; 4 Jur. 626.

An order that a defendant in contempt for breach of an injunction shall stand committed, unless cause be shown on a stated day, is not irregular if it be personally served. *Durant* v. *Moore*, 2 Russ. & M. 33; 9 L. J. (o.s.) Ch. 12.

Upon breach of injunction to restrain an act, the proper course is personal service of notice of motion that defendant shall stand committed. It is not the practice to move that he show cause why he shall not stand committed. *Angerstein* v. *Hunt*, 6 Ves. 488.

Where it is to do anything, the course is to move that he shall do it on a particular day, or stand committed. *Ib.*

Affidavit must be Specific—Service of Order.]—An attachment will not be awarded for breach of an injunction, unless the charging affidavit contains a specification of the time and place when and where the act complained of was committed; or if the party could have been, but was not, served with the injunction. *Morris* v. *Morris*, 1 Hog, 238.

Husband and Wife.]—After a decree and an injunction against husband and wife restraining proceedings abroad:—Held, that a motion to commit the husband for his wife's breach of the injunction could not be sustained; that where a wife is living separate from her husband, and abroad, though she has appeared jointly with him by the same solicitor in all the proceedings in the cause, a notice of motion to commit for contempt must be served upon her personally, and that substituted service ought not to be ordered; and that either the plaintiff or the husband may obtain an order for the wife's separate appearance; and therefore the court refused the motion, with liberty to the plaintiff and the husband to make such application as they respectively might be advised to obtain the separate appearance of the wife. *Hope* v. *Carnegie*, L. R. 7 Eq. 254.

II. Costs.

a. Of Motion for Injunction.

The costs of an injunction order await the event of the cause, and are taxed with the costs of the cause. They are never given in the first instance. *Anon.*, 2 Moll. 327.

An action on a post obit, as contrary to the principles of this court, was restrained, and subsequent motion to set injunction aside was refused with costs, such case being an exception to general rule, that costs of motion for injunction, or to dissolve injunction, refused are costs in cause. *Marsack* v. *Reeves*, 6 Madd. 108.

The course of the court provides for the costs of motions for injunctions in a way most just, by leaving the party moving, if his suit fails, to pay the costs; and if his suit succeeds, providing for his costs effectually. *G. W. Ry.* v. *Oxford, Worcester, and Wolverhampton Ry.*, 5 De G. & Sm. 437; 16 Jur. 443.

The application for an injunction having partly failed and partly succeeded, no costs were given on either side. *Rochdale Canal Co.* v. *King*, 22 L. J., Ch. 604; 17 Jur. 1001; 1 W. R. 278.

An application was made after answer, for an injunction to stay proceedings at law, and was refused. The plaintiff was ordered to pay the costs. *Barwell* v. *Barwell*, 5 Beav. 373; 12 L. J., Ch. 9; 7 Jur. 272.

Successful Application—Case not fairly stated.]—If parties applying for an injunction ex parte do not state their case fully and fairly they will have to pay the costs even if successful. *Holden* v. *Waterlow*, 15 W. R. 139.

Set-off of Costs.]—As to set-off of costs of motion for injunction against costs of a trial at law for the same breach of covenant. *Sainter* v. *Ferguson*, 1 H. & Tw. 333; 1 Macn. & G. 286; 19 L. J., Ch. 170; 14 Jur. 255.

Where no Order as to Costs.]—When a motion for an injunction involving the merits of the cause was ordered to stand over to the hearing, and afterwards the bill was changed into an information and bill, and at the hearing a decree for a perpetual injunction was made with costs, the plaintiff's costs of the motion, though not specifically mentioned, are costs in the cause, and will be allowed him on taxation. *Att.-Gen.* v. *Lonsdale (Lord)*, 40 L. J., Ch. 198; L. R. 6 Ch. 141; 23 L. T. 794; 19 W. R. 235.

Injunction with Costs—Interim Injunction.]—An order made on notice and continuing an injunction with costs will, in the absence of special directions to the contrary, include the costs of an interim injunction previously obtained on an ex parte application. *Blakey* v. *Hall*, 56 L. J., Ch. 568; 56 L. T. 400; 35 W. R. 592.

b. Of Cause.

Plaintiff proceeding, after Interlocutory Injunction, for Costs only.]—On an interlocutory application, an injunction was granted, which determined the principal subject of dispute between the parties. The court held, that the plaintiff was not justified in afterwards proceeding in the cause for the costs only, and gave him no costs subsequent to that time. *Taylor* v. *Davis*, 7 L. J., Ch. 179.

A. being indebted to T., an agreement is entered into by which judgment for the debt is to be signed, but not entered up, against A. for securing payment by instalments, T. agreeing not to enter up judgment (so as to get into the "Tradesman's Circular"), nor publish it in any way. Shortly afterwards T. threatened to sell the judgment debt at a periodical sale, which would necessarily involve the publication, by advertisements, of A.'s indebtedness. The court, being of opinion that this threat was not bonâ fide for the purpose of sale, but for getting better terms from A., restrained such publication by injunction. A. having in the first place obtained an ex parte injunction, T. offered immediately, and before further expenses were incurred, to submit to a perpetual injunction, but refused to pay costs. A. thereupon brought the matter to a hearing:—Held, that he was entitled to the costs to the hearing. *Jamieson* v. *Teague*, 3 Jur. (N.S.) 1206.

Interim Injunction—Perpetual Injunction.]—Where the general merits of a plaintiff's bill,

praying an injunction to restrain an infringement of the plaintiff's copyright, have not been displaced by the defence, the plaintiff will be entitled to his costs for bringing such cause to a hearing to obtain a perpetual injunction after an interim injunction has been obtained in such cause. *Mayhew* v. *Maxwell*, 3 L. T. 847.

Trademark—Imitation—Injunction refused.]—If a trader imitates another person's label or trademark, and sails so near the wind as just to avoid an injunction, the court, on refusing the injunction, will not willingly give him any costs of the proceedings. *Bass* v. *Dawber*, 19 L. T. 626.

Perpetual Injunction.]—Where the plaintiff is entitled to have the injunction made perpetual, the defendant will have to pay the costs of the suit, however trivial the subject-matter may be, unless, after the interlocutory injunction was granted, he tendered the costs up to that time. *Fradella* v. *Weller*, 2 Russ. & M. 247.

c. Of Motion for Committal or Attachment.

Unintentional Breach.]—A party guilty of a breach of an injunction through mistake will not be committed, but will have to pay the costs of the application bringing that breach under the notice of the court. *Newman* v. *Ring*, 10 Jur. 463. And see *S. C.*, 15 L. J., Ch. 365.

Breach by Defendant's Servant.]—A defendant, whose servant has committed a breach of an injunction of the court, but to whom personally no blame attaches, is liable to pay the costs of a motion for committal. *Rantzen* v. *Rothschild*, 13 L. T. 399; 14 W. R. 96.

d. Of Inquiry as to Damages.

Where in an action to restrain the defendant from polluting a stream, and for damages, judgment was given for the plaintiff with costs, and an inquiry as to damages ordered, the costs of such inquiry were reserved in order that the court might exercise control over the manner in which the inquiry was conducted, and prevent the costs being unduly increased by the plaintiff. It is the usual practice to send such an inquiry to the chief clerk and not to a referee. *Slack* v. *Midland Ry.*, 50 L. J., Ch. 196; 16 Ch. D. 81; 43 L. T. 434; 29 W. R. 302.

R. C. M.

INLAND REVENUE.

See REVENUE.

INNKEEPER.

1. *Duties and Liabilities*, 1638.
2. *Lien*, 1645.
3. *Application for Licence.*—*See* INTOXICATING LIQUORS.
4. *Restrictive Covenants in Leases respecting.*—*See* LANDLORD AND TENANT — VENDOR AND PURCHASER.

1. DUTIES AND LIABILITIES.

Duty to Admit.]—A person who keeps an inn is bound to admit all persons who apply peaceably to be admitted as guests. *Hawthorn* v. *Hammond*, 1 Car. & K. 404.

An indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time; and it is not necessary for the guest to tender the price of his entertainment, if his objection is not on that ground. And it is no defence for the innkeeper that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused to tell his name and abode, as the innkeeper has no right to insist upon knowing those particulars; but if the guest comes to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him. *Rex* v. *Ivens*, 7 Car. & P. 213.

—— **Not to Particular Apartments.**]—Although a traveller is entitled to reasonable accommodation in an inn, he is not entitled to select a particular apartment, or to insist on occupying a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose. *Fell* v. *Knight*, 8 M. & W. 269; 10 L. J., Ex. 277; 5 Jur. 554.

A landlord of an inn may, after a request to withdraw, remove a guest from a particular room in an inn where he has misconducted himself, but he may not remove him from the house. A guest has no right to select his own accommodation, but it is the duty of the landlord to find such accommodation for the guest as he may choose. *Scrivenor* v. *Reed*, 6 W. R. 603.

Duty to Continue to Lodge Guest.]—A traveller who goes to a common inn is not necessarily entitled to accommodation therein as long as he chooses to remain on payment of the inn charges and conducting himself properly, and if he forms an intention of staying in the inn and has no intention of going on to any other place, he ceases to be a traveller, and the innkeeper is entitled to terminate the relation of host and guest by reasonable notice. The question whether a traveller staying in a common inn has ceased to be a traveller is a question of fact, in determining which the length of his stay in point of time must be taken into consideration, but is not of itself conclusive. *Lamond* v. *Richard*, 66 L. J., Q. B. 315; [1897] 1 Q. B. 541; 76 L. T. 141; 45 W. R. 289; 61 J. P. 260—C. A.

Duty to Supply Refreshments.]—Attached to an hotel and under the same roof and licence, but entered by a separate door from the street, was a refreshment bar, at which persons casually passing by obtained refreshments at the counter. A householder living within twelve hundred yards had been in the habit of coming to the bar with several large dogs, which had been found an annoyance to other guests; and letters had passed in which the innkeeper had objected to the dogs being brought into the bar, and the visitor had asserted his right to bring them. The visitor subsequently, while taking a walk for pleasure, went with one large dog to the bar and claimed to be served with refreshment, which was refused. On an indictment charging the

proprietor of the bar, as an innkeeper, with refusing refreshment to the prosecutor:—Held, that he could not be convicted: first, because the refreshment bar was not an inn; secondly, because the prosecutor was not a traveller; and thirdly, because, had it been otherwise, the innkeeper had reasonable ground for his refusal. *Reg.* v. *Rymer*, 46 L. J., M. C. 108; 2 Q. B. D. 136; 35 L. T. 774; 25 W. R. 415; 13 Cox C. C. 378.

As to Post-Horses.]—An innkeeper, though licensed to let post-horses, is not liable to an action for refusing to supply them for a guest. *Dicas* v. *Hides*, 1 Stark. 247.

For Loss of Goods—Who are Liable.]—It seems that an hotel-keeper is subject to the same liabilities as an innkeeper. *Jones* v. *Osborn*, 2 Chit. 484.

—— **Salaried Manager.**] — The salaried manager of an hotel belonging to a company is not an innkeeper so as to be by law responsible for the goods and property of the guests, although the usual licence under 1 Geo. 4, c. 61, has been granted to him personally. *Dixon* v. *Birch*, 42 L. J., Ex. 135; L. R. 8 Ex. 135; 28 L. T. 360; 21 W. R. 443.

—— **Who are Guests.**]—The plaintiff on arriving at the platform of a station handed his goods to the defendant's porter, who was awaiting the arrival of the train. He proceeded to the hotel, whither his goods were subsequently conveyed, intending to stay the night. On receipt of a telegram he gave up his intention of remaining, but ordered refreshments. He was directed to the railway refreshment-room, which was not actually part of the hotel, but connected with it by a passage in which the hotel lock-up room, where the plaintiff's goods were placed, was situated. After lunching and paying for his lunch in the refreshment-room, he found that certain of his goods were missing:—Held, that the plaintiff was not a guest. *Strauss* v. *County Hotel and Wine Co.*, 53 L. J., Q. B. 25: 12 Q. B. D. 27; 49 L. T. 601; 32 W. R. 170; 48 J. P. 69.

M. went to an hotel early in the morning and asked for a bedroom. He was told that he could not have a bedroom, but that he could use a room, engaged by persons expected to arrive during the day, for the purpose of dressing, and he was shown up and his luggage was taken to this room. He then dressed and went down to breakfast, leaving the room unlocked and the stand of his dressing-bag outside the bag and exposed upon the dressing-table. After breakfasting he paid for his breakfast and went out, and did not return till late at night. In the meantime the persons who had engaged the room arrived, and one of the hotel servants removed M.'s luggage into the corridor as it was, leaving the dressing-stand out of the bag. On his return M. asked for his room and was told he had none, but one being subsequently found, his luggage was brought to it. M. then found that jewellery had been stolen from a drawer in the dressing-stand, and sued the hotel company for 140*l.* for the loss thereof. A notice pursuant to 26 & 27 Vict. c. 41, s. 3, was exhibited in the hall of the hotel:—Held (Fry, L.J., diss.), that M. occupied the room as a guest until the arrival of the persons who had engaged the room, and that as, in the ordinary course, the relationship of innkeeper and guest continues until the guest's property is brought and redelivered to him on his departure, the hotel company were negligent in placing M.'s goods as they did in the corridor. By so doing they debarred themselves from proving that the loss was contributed to by M.'s negligence in leaving his goods exposed in the room, and M. was therefore entitled to recover to the extent of 30*l.*, the limit prescribed by 26 & 27 Vict. c. 41, s. 1. As, however, M.'s negligence debarred him from proving that the loss occurred wholly by the "wilful act, default, or neglect" of the hotel company, he was not entitled to recover beyond that amount. *Medawar* v. *Grand Hotel Co.*, 60 L. J., Q. B. 209; [1891] 2 Q. B. 11; 64 L. T. 851; 55 J. P. 614—C. A.

—— **Liability for.**]—An innkeeper, though guilty of no negligence, but even diligent, is liable for the loss or injury of the goods of his guest not arising from the negligence of the guest, the act of God, or the queen's enemies. *Morgan* v. *Ravey*, infra.

—— **Loss Occasioned by Negligence of Guest—Evidence.**]—A guest at an inn went to bed, leaving a bag containing about 27*l.* in his trousers pocket. He left his trousers on the ground at the side of his bed farthest from the door. There was a key in the lock of the door, but he only shut the door and did not lock it. He had previously pulled the bag containing the money out of his pocket in the commercial room for the purpose of paying somebody some money. In the course of the night somebody entered his bedroom through the door and stole the bag of money:—Held, that there was evidence of negligence on his part, which occasioned the loss in such a way that it would not have happened had he used the care that a prudent man might reasonably be expected to have taken under the circumstances. *Oppenheim* v. *White Lion Hotel Co.*, 40 L. J., C. P. 231; L. R. 6 C. P. 515; 25 L. T. 93.

When a guest at an inn has an opportunity given him of securing valuables in his possession, by giving them over to the custody of the innkeeper or otherwise, and neglects such opportunity:—Held, that his conduct amounts to such negligence as to deprive him of his right to recover against the innkeeper, in case of such valuables being lost or stolen. *Jones* v. *Jackson*, 29 L. T. 399.

—— **Display of Wares by Guest.**]—If there has been negligence on the part of the guest, the innkeeper will not be liable. *Burgess* v. *Clements*, 4 M. & S. 306; Holt, 211, n.; 1 Stark. 251, n.; 16 R. R. 473.

An innkeeper is not answerable for the goods of his guest, which are lost through the negligence of the guest, out of a private room in the inn chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper, who at the same time told the guest that there was a key, and that he might lock the door, which he neglected to do. *Ib.*

If a guest at an inn deposits his goods in a room which he uses as a warehouse, and of which he has the exclusive possession, the innkeeper is not liable for the loss. *Farnworth* v. *Packwood*, 1 Stark. 249; Holt, 209.

—— **Not Locking Door—What is Sufficient Evidence of Negligence to leave to the Jury.**]—The plaintiff brought an action against the defendant to recover the value of property, consisting of jewellery worth 19*l.* 10*s.*, which was stolen during the night from a table in the plaintiff's bedroom while he and his wife were staying as guests at the defendant's hotel. There was a bolt inside the door of the plaintiff's bedroom and a key on the outside, and a wardrobe with drawers in the room. The plaintiff left the key on the outside of the door, but he swore positively that he bolted the door on the inside when he went to bed, at the same time admitting that he had said, in reply to an observation that the door could not be unbolted from the outside, "If that is so I must have made a mistake." The plaintiff's wife had been wearing valuable jewellery in the hotel during the evening:—Held, that there was sufficient evidence of negligence on the part of the plaintiff to be left to the jury. That, even if leaving the door unbolted was not in itself sufficient evidence, there were other circumstances which, coupled with it, would be sufficient. That it cannot be laid down as a proposition of law that leaving the door unbolted is not evidence of negligence; but that each case must depend upon its own circumstances. *Herbert* v. *Markwell*, 45 L. T. 649; 46 J. P. 358. Affirmed in C. A., W. N. 1882, 112.

There is no obligation on the part of the guest at an inn to lock or fasten the door of the room in which he sleeps; and the omission to do so does not discharge the innkeeper from his liability to answer for goods of the guest stolen from the room in which he slept. *Mitchell* v. *Woods*, 16 L. T. 676.

An innkeeper is liable for the value of property of his guest lost while in his house, unless caused by the negligence of the guest. *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131; 3 L. T. 784; 9 W. R. 376. *S. C.*, at nisi prius, 2 F. & F. 283.

The omission of a guest to leave valuable articles with an innkeeper, or to fasten his door on retiring to rest, is not necessarily such negligence as disentitles him to recover. *Ib.*

An action is maintainable against the executors of the innkeeper, if brought within the time limited by 3 & 4 Will. 4, c. 42, s. 2. *Ib.*

When property has been stolen from a guest in an inn, the innkeeper is liable unless the guest has contributed by his own negligence to the loss; but not locking his door is not such negligence. *Filipowski* v. *Merryweather*, 2 F. & F. 285.

—— **Direction to Jury.**]—If the jury finds that the guest was guilty of gross negligence, the innkeeper is relieved from his liability. *Armistead* v. *Wilde* or *White*, 17 Q. B. 261; 20 L. J., Q. B. 524; 15 Jur. 1010.

Where a guest had, on the evening of the night in which the theft was committed, and on several previous occasions, opened his driving-box, and counted the bank notes kept in it, in the presence of persons in the commercial room, and the box was so insecurely fastened that it might be opened without a key:—Held, that the jury was warranted in finding the guest guilty of gross negligence; though it was the custom of travellers to leave their driving-boxes in the commercial room during the night. *Ib.*

Where the goods of a guest at an inn are lost the innkeeper is liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. *Cashill* v. *Wright*, 6 El. & Bl. 891; 2 Jur. (N.S.) 1072; 4 W. R. 709.

Where there is such negligence the innkeeper is not responsible. *Ib.*

Therefore where an innkeeper set up such negligence in answer to an action by the owner for the loss of goods, and the judge told the jury that the innkeeper was responsible, unless there had been gross negligence on the part of the owner, but did not explain what would constitute gross negligence:—Held, a misdirection, inasmuch as the jury might have understood that the owner was entitled to recover unless there had been an absence on his part of even the loosest degree of care. *Ib.*

—— **Goods, where placed.**]—An innkeeper is liable for the loss of a parcel left in the lobby or hall of the inn. *Candy* v. *Spencer*, 3 F. & F. 306.

An admission by an innkeeper that he left money entrusted to him for the purpose of taking up a bill in his cash-box in his tap-room, where it was lost, together with a much larger sum of his own, is evidence of gross negligence to go to a jury. *Doorman* v. *Jenkins*, 4 N. & M. 170; 2 A. & E. 256; 4 L. J., K. B. 29.

If a guest at an inn directs valuable goods to be placed in the public room, and if the innkeeper does not require them to be removed to a safer place, he is liable as an insurer, in the event of the goods being stolen. *Richmond* v. *Smith*, 2 M. & Ry. 235; 8 B. & C. 9; 6 L. J., (o s.) K. B. 279.

—— **Refusal to take charge of.**]—If an innkeeper refuses to take charge of goods till a future day, because his house is full of parcels, still he is liable to make good the loss if the owner stops as a guest and the goods are stolen during his stay. *Bennett* v. *Mellor*, 5 Term Rep. 273; 2 R. R. 593.

—— **Evidence of Landlord's Negligence.**]—The plaintiff while a guest at the defendants' hotel had certain jewellery stolen:—Held, that the fact that the defendants' servants did not cause the premises to be searched upon the discovery of a poker and a knife on the bed in the plaintiff's room from which the jewellery was stolen was no evidence of negligence on the part of the defendants' servants. *Huntly* (*Marchioness*) v. *Bedford Hotel Co.*, 56 J. P. 53—C. A.

Notice limiting Liability—Contents of.]—In the plaintiff's room was a notice that "articles of value, if not kept under lock, should be deposited with the manager, who will give a responsible receipt for the same." The jewellery was kept in a locked jewel-box inside a basket-trunk, that was also locked, in the plaintiff's room:—Held, that this notice did not constitute a special bargain with the plaintiff that the defendants would be responsible if jewels were kept under lock. *Ib.*

A mere verbal error in a copy of s. 1 of the Innkeepers Liability Act, 1860, exhibited for the purpose of limiting an innkeeper's liability,

will not vitiate the notice so as to make it ineffectual, provided the notice states correctly the provisions of the act; but the omission of a material portion of the statute will render the notice ineffectual to protect the innkeeper. *Spice* v. *Bacon*, 46 L. J., Ex. 713; 2 Ex. D. 463; 36 L. T. 896; 25 W. R. 840—C. A.

In an hotel a notice was exhibited containing a copy of the first section of the act, correct in every particular, only that in the exception the word "act" was accidentally omitted:—Held, that this was a material omission, and that the notice was insufficient to protect the innkeeper. *Ib.*

A guest at the inn had stolen from his bedroom at night property amounting to the value of 119*l.*:—Held, that the notice contained no statement which admitted the continuance of the common law liability for the goods or property stolen, lost or injured through the wilful act of the innkeeper or his servant, and therefore did not protect him. *Ib.*

—— **Meaning of "Wilful."**]—The word "wilful," in s. 1 of the Innkeepers Liability Act, 1860, applies only to the following word "act," and not to the next following words, "default or neglect." *Squire* v. *Wheeler*, 16 L. T. 93.

Restaurant—Customer's Overcoat—Delivery to Waiter.]—The plaintiff went into the defendant's restaurant for the purpose of dining. His overcoat was received by the waiter at the table, and, without any directions, hung up on a peg in the room. The coat was stolen:—Held, that the jury were justified in finding that there was a bailment and such negligence as rendered the defendant liable. *Ultzen* v. *Nicol*, 63 L. J., Q. B. 289; [1894] 1 Q. B. 92; 10 R. 13; 70 L. T. 140; 42 W. R. 58; 58 J. P. 103.

Liability for Money.]—An innkeeper is responsible for money belonging to his guest. *Kent* v. *Shuckard*, 2 B. & Ad. 803; 1 L. J., K. B. 1.

Loss of Carriage.]—A., on a fair-day, coming to an inn kept by B. with a horse and gig ordered the horse to be put into the stable, but giving no special direction as to the gig. The horse was put into the stable, and the gig was placed with other carriages in the public highway, near the house, where it was the practice of B. to put carriages on fair-days. The gig was stolen:—Held, that B. was answerable for the loss. *Jones* v. *Tyler*, 3 N. & M. 576; 1 A. & E. 522; 3 L. J., K. B. 166.

When a guest arrives at an inn with a horse and gig, and gives direction to the ostler to take his horse in, but says nothing about the gig, a promise to take the gig into the inn may be implied. *Ib.*

Injury to Horse—Evidence of Negligence.]—The horse of a guest, at an inn, was stabled with another horse, and kicked and injured by it:—Held, that though these facts raised a presumption of negligence against the innkeeper, he might defend himself by showing that due care had been used, for that he was not liable without negligence. *Dawson* v. *Chamney* or *Cholmley*, D. & M. 348; 5 Q. B. 164; 13 L. J., Q. B. 33; 7 Jur. 1037.

—— **Relationship of Innkeeper and Guest.**]—By an arrangement between an innkeeper and her ostler, he had the profit of the stables, paying no rent, but providing hay, corn, &c., and supplying not only the guests in the inn, but residents in the town, whose horses he was allowed to take care of. D., who had no knowledge of this arrangement, arrived at the inn with his horse and gig, which were taken to the stable, and he became a guest. He subsequently left, saying that he should not be back till the following Monday, and requested that his horse should be attended to. He did not return for a fortnight, and in the meantime the ostler (for the purpose, as he said, of exercising the horse) drove it out, when it took fright at a locomotive steam-engine and was injured:—Held, that the relation of innkeeper and guest subsisted between the parties, and consequently the former was liable for the injury done to the horse. *Day* v. *Bather*, 2 H. & C. 14; 32 L. J., Ex. 171; 9 Jur. (N.S.) 440; 8 L. T. 205; 11 W. R. 575.

A person who takes in horses to agist does not, like an innkeeper, insure their safety; he is answerable only in case of negligence. *Broadwater* v. *Blot*, Holt, 547.

Liability for Injury to Person of Guest.]—The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house at all hours of night or day, but must be limited to those places into which guests may be reasonably supposed to be likely to go, in a reasonable belief that they are entitled or invited to do so. *Walker* v. *Midland Ry.*, 55 L. T. 489; 51 J. P. 116—H. L. (E.)

It is the duty of an hotel-keeper to take reasonable care of the persons of his guests, so that they are not injured by reason of a want of such care on his part whilst they are in the hotel as his guests. *Sandys* v. *Florence*, 47 L. J., C. P. 598.

A statement of claim alleged that, while the plaintiff was using an hotel, of which the defendant was proprietor, as a guest for reward to the defendant, by his negligence the ceiling of the room in which the plaintiff then was, fell upon and injured him:—Held, that such statement sufficiently showed a cause of action. *Ib.*

Injuries caused by a Dog.]—An innkeeper is, by reason of s. 2 of the Dogs Act, 1865, deemed to be the owner of a dog living in his hotel, and is liable for injuries to cattle caused by it, notwithstanding the dog was at the time of the injuries complained of under the control of a person staying at the hotel, to whose care it had been committed by the real owner. *Gardner* v. *Hart*, 44 W. R. 527.

Liability for Expense of Dinner.]—Where a party of several persons dine together at a tavern, they are jointly liable for the whole expense, and not merely each for his own share. *Forster* v. *Taylor*, 3 Camp. 49; 13 R. R. 748.

Account for Spirits—Legality.]—The 24 Geo. 2, c. 40, s. 12, which prevents a person from recovering for spirits supplied to a smaller amount than 20*s.* at a time, does not apply to spirits supplied by an hotel-keeper to a guest who is resident in his hotel. *Proctor* v. *Nicholson*, 7 Car & P. 67.

Washing Linen of Guests.]—The master of an hotel is not liable to pay for the washing of the linen of the guests at his house. *Callard* v. *White*, 1 Stark. 171.

2. LIEN.

What is an Inn.]—A person keeping a house of public entertainment in London, where provisions and beds are furnished for all persons applying for and paying for the same, but which was merely termed a tavern and coffee-house, and not frequented by stage-coaches or waggons, and had no stables attached to it, is to be considered an innkeeper, subject to the privileges and liabilities of such persons; and therefore he has a lien on the goods of his guests for the payment of his bill. *Thompson* v. *Lacy*, 3 B. & Ald. 283; 22 R. R. 385.

No Lien on Person.]—An innkeeper, although he has a lien on the goods, has none on the person of his guest, and cannot therefore detain him for any reckoning due; still less has he any right to take any of his clothes off his person as a security for the same. *Turnbolf* v. *Alford*, 3 M. & W. 248; 1 H. & H. 13; 7 L. J., Ex. 60; 2 Jur. 110.

Not limited to Things which he is bound to Receive.]—An innkeeper's lien extends to all the goods which he has actually received with a guest whether the property of the guest or not, and is not limited to such things as he was bound to receive with the guest. *Threfall* v. *Borwick*, 44 L. J., Q. B. 87; L. R. 10 Q. B. 210; 32 L. T. 32; 23 W. R. 312—Ex. Ch.

—— **Piano.**]—A person went to an inn and stayed there with his family for some time; he took with him to the inn a piano, as his own, which he had hired. A. having left the inn in debt to the innkeeper, he claimed as against the owner of the piano to detain the piano by virtue of his lien as innkeeper:—Held, that, whether he as innkeeper was bound to take in the piano or not, having done so he had a lien upon it. *Ib.*

But where B. lent a pianoforte to a professional pianist whilst staying as a guest at an inn, the innkeeper well knowing that the pianoforte was the property of B.:—Held, that the innkeeper had no lien on the pianoforte for a bill due from his guest. *Broadwood* v. *Granara*, 10 Ex. 417; 24 L. J., Ex. 1; 1 Jur. (N.S.) 19; 3 W. R. 25; 3 C. L. R. 177.

On Property of Third Persons.] — Goods brought by a guest to an inn are subject to the innkeeper's lien, though they may turn out to be the property of a third party, provided they are such as a person might ordinarily travel with. *Snead* v. *Watkins*, 1 C. B. (N.S.) 267; 26 L. J., C. P. 57.

A., who had formerly been clerk to the plaintiff, an attorney, was subpœnaed as a witness in an action brought by his employer to recover the amount of a bill of costs. A. put up at a public house of entertainment at Westminster, kept by the defendant, bringing with him a bag containing, amongst other things, a letter-book belonging to the plaintiff. Whilst at the defendant's house he became indebted to the defendant for lodging and refreshments, and quitted without paying his bill, leaving behind him the bag with the letter-book, which the defendant refused to deliver up to the plaintiff on demand, claiming a lien for his bill against A.:—Held, that the claim of lien was valid. *Ib.*

The plaintiffs' traveller, in the course of his business, stayed at the defendant's inn. The plaintiffs forwarded goods to the traveller at the inn for sale to customers in the neighbourhood. The defendant knew that the goods were the property of the plaintiffs. The traveller having failed to pay the defendant a bill he had incurred for board and lodging:—Held, that the defendant was entitled to a lien upon the goods for the debt. *Robins* v. *Gray*, 65 L. J., Q. B. 44; [1895] 2 Q. B. 501; 14 R. 671; 73 L. T. 252; 44 W. R. 1; 59 J. P. 741—C. A.

—— **Credit given to Husband—Separate Property of Wife.**]—The defendants, husband and wife, stayed at the plaintiffs' hotel; the wife had with her a quantity of luggage, which was her separate property; credit was given to the husband, who made payments on account. The balance of the plaintiffs' bill not being paid, the plaintiffs detained the wife's luggage in the alleged exercise of their right of lien:—Held, that the plaintiffs were entitled to a lien upon the goods, notwithstanding that they were the separate property of the wife. *Gordon* v. *Silber*, 59 L. J., Q. B. 507; 25 Q. B. D. 491; 63 L. T. 283; 39 W. R. 111; 55 J. P. 134.

On Horses and Carriages.]—An innkeeper has no lien on a horse placed in his stable for the amount of its keep, unless placed there by a guest. *Binns* v. *Pigot*, 9 Car. & P. 208.

Where an innkeeper receives horses and a carriage to stand at livery, the circumstance of the owner, at a subsequent period, taking occasional refreshment at the inn, or sending a friend to be lodged there at his charge, will not entitle the innkeeper to a lien in respect of any part of his demand. *Smith* v. *Dearlove*, 6 C. B. 132; 17 L. J., C. P. 219; 12 Jur. 377.

An innkeeper has a lien on a horse for his keep, although wrongfully seized under colour of a legal proceeding, unless he knew that the party making the seizure was a wrongdoer at the time it was made. *Johnson* v. *Hill*, 3 Stark. 172; 23 R. R. 764.

An innkeeper has a lien on a carriage, brought to the inn by a guest, for its standing room, though the carriage does not belong to the guest himself. *Turrill* v. *Crawley*, 13 Q. B. 197; 18 L. J., Q. B. 155; 13 Jur. 878.

A man went to an inn, with two racehorses and a groom, in the character of a guest, and remained there for several months, taking the horses out every day for exercise and training, and being occasionally absent for several days together, at races in different parts of the country, but always with the intention of returning to the inn:—Held, that, in the absence of evidence of any alteration in the relation of the parties, that of innkeeper and guest must be presumed to continue; and that the occasional absences did not destroy the innkeeper's lien upon the horses for his bill. *Allen* v. *Smith*, 12 C. B. (N.S.) 638; 31 L. J., C. P. 306; 9 Jur. (N.S.) 230; 6 L. T. 459; 10 W. R. 646. Affirmed, 9 Jur. (N.S.) 1284; 11 W. R. 440—Ex. Ch.

Held, also, that the fact of the innkeeper's having claimed a lien for the whole time, when in truth he was entitled for a part of it only, was

not such an excess of claim as to dispense with a tender of that which was really due. *Ib.*

For Money Lent.]—The landlord of an inn has a lien for money lent to his guest, if it was agreed between them at the time of the loans that the guest's goods should be a security for the sums lent. *Proctor* v. *Nicholson*, 7 Car. & P. 67.

Execution—Goods subject to Lien.]—The landlord of an inn has a lien on the goods of a guest for board and lodging, and wine supplied to such guest's order, whatever may be the amount, provided the guest is possessed of his reason, and not an infant. Therefore the sheriff, under a fi. fa. against the guest, can only take the guest's goods, subject to the lien of the landlord for such his bill, and not merely subject to a lien for a reasonable quantity of wines, &c., only. *Ib.*

Extends to all Goods, &c., of Guest.]—The lien of an innkeeper is general, and extends to all goods and chattels belonging to his guest; and therefore a chattel, although deposited with the innkeeper and placed by him apart from the personal goods of the guest, may be detained by him on account of money owing to him for the lodging, food, and entertainment of the guest. *Mulliner* v. *Florence*, 47 L. J., Q. B. 700; 3 Q. B. D. 484; 38 L. T. 167; 26 W. R. 385—C. A.

Waiver.]—The lien of an innkeeper over a chattel belonging to a guest is waived, if in order to reimburse himself he sells it, unless under the Innkeepers Act, 1878, and this rule holds good even although the retention of the chattel is attended with expense. *Ib.*

An innkeeper who accepts security from his guest for the payment of hotel charges does not waive his lien at common law upon the goods of the guest for the amount of such charges unless there is something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the existence or continuance of the lien and therefore destructive of it. *Angus* v. *McLachlan*, 52 L. J., Ch. 587; 23 Ch. D. 330; 48 L. T. 863; 31 W. R. 641.

What Care Necessary.]—An innkeeper retaining the goods of his guest by virtue of such lien is not bound to use greater care as to their custody than he uses as to his own goods of a similar description. Observations on *Cowell* v. *Simpson* (16 Ves. 275; 10 R. R. 181). *Ib.*

Termination of.]—Semble, the innkeeper's lien upon the traveller's goods for his charges terminates at the same time as the right of the traveller to be lodged in the inn as a traveller (per Lord Esher, M.R.). *Lamond* v. *Richard*, 66 L. J., Q. B. 315; [1897] 1 Q. B. 541; 76 L. T. 141; 45 W. R. 289; 61 J. P. 260—C. A.

Other points relating to.]—*See* LIEN.

J. M.

INNS OF COURT.

See BARRISTER.

INNUENDO.

See DEFAMATION.

INQUEST.

See CORONER.

INQUIRY (WRIT OF).

See Order XXXVI. rr. 56, 57, 58.

By Court.]—On an interlocutory judgment, the court may assess damages with the assent of the plaintiff, without the intervention of a jury. *Gould* v. *Hammersley*, 4 Taunt. 148.

By Master.]—Before the provision contained in 15 & 16 Vict. c. 76, s. 92, which abolished rules to compute, the court refused to refer it to the master to compute principal and interest on a covenant to pay over to the plaintiff the first-fruits or proceeds which should be realised, and be at the disposition of defendant, under a writ of sequestrari facias. *Smith* v. *Nesbitt*, 2 C. B. 288; 3 D. & L. 420; 15 L. J., C. P. 31.

A defendant having suffered judgment by default in an action on a foreign judgment, the court would not refer it to the master to see what was due, and give the plaintiff leave to enter up final judgment for such sum without executing a writ of inquiry. *Messin* v. *Massareene* (*Lord*), 4 Term Rep. 493.

In an action upon a deed, whereby the plaintiffs covenanted to indemnify the bank of England against advances to L. and B. on bills of exchange to the amount of 100,000*l.*, and the defendant and others agreed to sub-indemnify the plaintiffs to the same amount in certain aliquot proportions, of which the defendant's proportion was 5,000*l.*; and the plaintiffs alleged that they had been obliged to pay the whole 100,000*l.* to the bank, and demanded of the defendant his proportion of 5,000*l.*; in which action the plaintiffs had judgment upon demurrer; the court refused to refer it to the master to compute the principal and interest due on the deed; considering that it was not a mere question of computation of principal and interest, but that it was open to the defendant, before the sheriff's jury, to enter into questions of collateral satisfaction of the plaintiffs' demand from securities and effects of L. and B., the principals, in their hands. *Denison* v. *Mair*, 14 East, 622.

A reference to the master was made to compute what was due in an action on a covenant for non-payment of rent. *Byron* v. *Johnson*, 8 Term Rep. 410. S. P., *Hoard* v. *Hunt*, 3 Jur. 24.

But in an action upon an indenture of lease, the breaches assigned being the non-payment of rent and of land-tax, the court refused a rule to compute. *Morris* v. *Thompson*, 4 Scott, 295; 1 Jur. 71.

The court referred it to the master to compute what was due for principal and interest on a mortgage. *Berthen* v. *Street*, 8 Term Rep. 326.

The amount due on a judgment, deducting payments made and proved at the trial, or the amount due for costs on a contract to pay costs of suing, is a matter of calculation, which may be referred to the master, under the 15 & 16 Vict. c. 76, s. 94. *National Assurance Association* v. *Best*, 27 L. J., Ex. 19.

—— **Interfering with Finding of Master.**]—Where the parties agree to withdraw the case from the jury, and to submit it to the master under a judge's order, the master sits as an arbitrator appointed by the parties, and the court will not interfere with his finding as to the facts. *Fisher* v. *Pyne*, 1 Man. & G. 265.

Writ.]—A writ of inquiry may be tested in vacation. *Collett* v. *Curling*, 5 D. & L. 605; 12 Jur. 854.

The teste of a writ of inquiry may be amended by the award on the roll. *Johnson* v. *Toulmin*, 4 East, 173.

Service of Notice.]—It is not sufficient to serve a notice of inquiry on the defendant personally; it should be upon his attorney. *Brookes* v. *Till*, 2 Y. & J. 276.

Notice of a writ of inquiry was allowed to be served by sticking it up in the office, and leaving it at the defendant's last place of abode, though neither the process nor notice of declaration had been personally served. *Watson* v. *Delcroix*, 2 C. & M. 425; 2 D. P. C. 396; 4 Tyr. 266; 3 L. J., Ex. 94.

In an action by a public officer of a banking company for the balance of an account, the court allowed notice of executing a writ of inquiry to be served at the last place of abode of the defendant, and by sticking up in the master's office, in Michaelmas term, 1841, interlocutory judgment for want of a plea having been signed on the 11th January, 1839, and it being sworn that the defendant had gone to South Australia, in March, 1839, to evade payment of his debts. *Probin* v. *Locock*, 1 D. (N.S.) 197.

Irregular Notice.]—A defendant, to whom an irregular notice of inquiry is given, ought to return it forthwith, and state what objection he has to it. *Stevens* v. *Pell*, 2 C. & M. 421; 2 D. P. C. 355; 4 Tyr. 6; 3 L. J., Ex. 83.

Length of Notice.]—Where a defendant is under terms to take short notice of trial, he is not bound to take short notice of inquiry. *Ib.*

Notice of Continuance.]—If notice of a writ of inquiry, to be executed at a particular hour and place, is continued, the notice of continuance need not express any hour or place. *Jones* v. *Chune*, 1 Bos. & P. 363.

Time for Inquiry.]—On notice to execute a writ of inquiry at a certain hour, the party is not tied down to the exact time fixed by the notice. *Williams* v. *Frith*, 1 Doug. 198; Lofft, 193.

Notice of executing a writ of inquiry on "Tuesday, the 14th of January instant," when the 14th of January fell on a Thursday, and on which day the writ of inquiry was executed; the court refused to set aside the execution of the writ of inquiry for this irregularity, but rejected "Tuesday" as surplusage, it appearing that the defendant was not misled thereby. *Batten* v. *Harrison*, 3 Bos. & P. 1. S. P., *Eldon* v. *Haig*, 1 Chit. 11.

Before whom taken.]—An inquisition taken before two under-sheriffs extraordinary was set aside, because the high sheriff can appoint no more than one under-sheriff extraordinary. *Denny* v. *Trapwell*, 2 Wils. 378.

In an action on an administration bond, judgment by default having been suffered, and breaches assigned, under 8 & 9 Will. 3, c. 11, s. 8, the court allowed a writ of inquiry to be executed before the chief justice, notwithstanding 3 & 4 Will. 4, c. 44, s. 16, but only granted a rule nisi in the first instance. *Canterbury (Archbishop)* v. *Burlington*, 1 D. (N.S.) 285.

Trial.]—A cause coming down for trial on writ of inquiry may be tried, though it has not been entered. *Crisp* v. *Cordery*, 2 F. & F. 864.

Irregular Notice Cured.]—An irregular notice of executing a writ of inquiry is cured by the defendant's lying by, and allowing the writ of inquiry to be completed. *Viner* v. *Clarke*, 1 Anstr. 175.

Special Jury.]—Where it appears that a common jury is improper to assess damages on a writ of inquiry before the sheriff, the court will direct the sheriff to summon a jury to be taken from the special jury book. *Price* v. *Williams*, 5 D. P. C. 160.

Counsel.]—It is sufficient notice of a plaintiff's intention to appear before the sheriff on the execution of a writ of inquiry by counsel, that the plaintiff's attorney informs the attorney for the defendant of such intention. *Elliot* v. *Nicklin*, 5 Price, 641.

Where no intimation has been given of an intention on the part of a plaintiff to appear by counsel on an inquisition of damages, the defendant should apply to the sheriff to put off the execution of the writ of inquiry. *Ib.*

Oath—By Whom Administered.]—In executing an inquiry, the under-sheriff, and not his deputy, should administer the oath to the jury. *Rex* v. *Ferrand*, 3 B. & Ald. 260; 1 Chit. 745; 22 R. R. 373.

Evidence—Judgment by Default.]—A judgment by default admits the facts stated on the record. *Green* v. *Hearne*, 3 Term Rep. 301.

Where in an action for slander the defendant suffered judgment by default, and on the execution of the writ of inquiry the plaintiff produced no evidence, and the jury assessed the damages at 40*l.*:—Held, first, that the plaintiff was not bound to produce any evidence; and, secondly, that the jury was not bound to give nominal damages only. *Tripp* v. *Thomas*, 5 D. & R. 276; 3 B. & C. 427; 1 Car. & P. 477; 3 L. J. (O.S.) K. B. 42.

At the execution of a writ of inquiry after judgment on demurrer, it is not competent to the defendant to controvert anything but the amount of the sum in demand. *De Gaillon* v. *L'Aigle*, 1 Bos. & P. 368.

In an action on a special agreement by the defendant, for certain considerations to pay the plaintiff a particular sum of money, a judgment by default admits the sum alleged to be due, and the plaintiff is entitled to a verdict for that

amount without any evidence of damage. *King* v. *Beak*, 8 D. P. C. 735 ; 4 Jur. 633.

Where a defendant suffers judgment by default in an inferior court, and removes the proceedings into a superior court, in which he pleads to issue, the judgment by default is not even primâ facie evidence of the right of action. *Bottings* v. *Firby*, 4 M. & Ry. 567 ; 9 B. & C. 762 ; 7 L. J. (O.S.) K. B. 329.

In an action on a bond for the performance of covenants in a lease, judgment and suggestion of damages to be assessed on the writ of inquiry, the lease need not be proved. *Collins* v. *Rybot*, 1 Esp. 157.

In an action on a policy on a foreign ship, where there is a stipulation that the policy shall be sufficient proof of interest ; if there is judgment by default, the plaintiff on the writ of inquiry need only prove the defendant's subscription to the policy, without giving any evidence of interest. *Thellusson* v. *Fletcher*, 1 Dougl. 315 ; 1 Esp. 73.

In an action for work and labour, the defendant, on a judgment by default, is at liberty to cross-examine the plaintiff's witnesses, who are called to prove the work done, as to whether the work was done on the defendant's retainer or not. *Williams* v. *Cooper*, 3 D. P. C. 204.

Upon a judgment by default or on demurrer, the contract or contracts are admitted as stated in the declaration, and evidence to contradict them ought not to be admitted. *Stephens* v. *Pell*, 2 D. P. C. 629.

Where a plaintiff in an action upon a bill of exchange has obtained judgment on demurrer to a plea, he may, on execution of a writ of inquiry, recover the amount of the bill without producing it in court. *Lane* v. *Mullins*, 2 Q. B. 254 ; 1 G. & D. 712 ; 1 D. (N.S.) 562 ; 11 L. J., Q. B. 51 ; 5 Jur. 1084. S. P., *Watson* v. *Glover*, 12 L. J., C. P. 184 ; 7 Jur. 68.

Adjournment.]—Where a writ of trial issues to a sheriff, under the 3 & 4 Will. 4, c. 42, he has the same power as a judge at nisi prius to adjourn the trial, or the plaintiff may withdraw the writ. *Shaw* v. *Owen*, 17 C. B. 524 ; 25 L. J., C. P. 103.

Amendment.]—The teste of the writ may be amended. *Johnson* v. *Toulmin*, 4 East, 173.

The return may also be amended by the award, even after the inquisition of damages has been taken, and consequently a defect in the return does not vitiate the proceedings or affect the jurisdiction of the sheriff. *Pippet* v. *Hearn*, 1 D. & R. 266 ; 5 B. & Ald. 634.

Where in an action for treble value of tithes, the declaration contained a count for treble value, and counts for tithes bargained and sold, and on an account stated ; and the defendant suffered judgment by default ; and the jury, on a writ of inquiry, assessed the damages at 17*l.* 4*s.* 9*d.* on the first count for the treble value, and 9*l.* for the single value on the other counts, but omitted to find costs : the court ordered the return of the inquisition to be amended by the insertion of nominal damages as to the last counts, on which costs de incremento might be added. *Bale* v. *Hodgetts*, 7 Moore, 602 ; 1 Bing. 182 ; 1 L. J. (O.S.) C. P. 34.

If two sued in trespass suffer judgment by default, and the plaintiff executes writs of inquiry against them separately, and takes several damages against them, it is irregular ; and if the plaintiff enters up final judgment with those several damages against them, it is erroneous ; but the court will permit the plaintiff to amend his own proceedings before final judgment, on payment of costs. *Mitchell* v. *Milbank*, 6 Term Rep. 199.

Staying Execution.]—The court will not, at the instance of the sheriff, stay the execution of a writ of inquiry, on a judgment by default in an action for a libel, on the ground that the house of commons has voted the libel to be a privileged publication, and that all persons concerned in bringing any action in respect of such publication are guilty of a breach of the privileges of that house. *Stockdale* v. *Hansard*, 8 D. P. C. 148.

Setting aside.]—It is not necessary that a rule to set aside a writ of inquiry should be drawn up on reading the under-sheriff's notes. *Stephens* v. *Pell*, 2 C. & M. 710 ; 2 D. P. C. 629 ; 4 Tyr. 267 ; 3 L. J., Ex. 214.

No affidavit of merits is required where the execution of a writ of inquiry is set aside on the ground of irregularity in not giving notice of the inquiry. *Williams* v. *Williams*, 4 Tyr. 368.

Where, on the execution of a writ of inquiry in an action for slander, the jury is incorrectly informed by the under-sheriff, that any amount of damages will carry costs, and they find for less than 40*s.*, that is no ground for a new writ of inquiry, or for increasing the amount of the verdict. *Grater* v. *Collard*, 7 D. P. C. 503 ; 1 W. W. & H. 294 ; 2 Jur. 568.

A new trial will not be granted where the sum sought to be recovered is under 5*l.*, merely because it is of importance to the plaintiff. *Lee* v. *Evans*, 12 C. B. (N.S.) 368.

The court will not grant a rule for setting aside an inquisition after judgment by default, on the ground that the under-sheriff directed the jury to consider the poverty of the defendant, in mitigation of damages. *Kingston* v. *Haychurch*, 1 Chit. 644.

The court set aside an inquisition taken on a writ of inquiry, because some of the jury were debtors in prison, and taken out of custody for the purpose of attending. *Staunton* v. *Beadle*, 4 Term Rep. 473.

A judgment upon a writ of inquiry was set aside because the jury was returned by the attorney for the plaintiff. *Baylis* v. *Lucas*, Cowp. 112.

More Damages than Claimed.]—Though the jury on a writ of inquiry assesses more damages than are laid in the declaration, yet if judgment is entered accordingly, it is error. *Cheveley* v. *Morris*, 2 W. Bl. 1300.

Excessive Damages.]—The court refused to quash a writ of inquiry on account of excessive damages, though the court acknowledged them to be so, from the peculiar circumstances of the case. *Benson* v. *Frederick*, 3 Burr. 1845.

A motion to set aside an inquisition for excessive damages must be made on affidavits. *William* v. *Reeves*, 2 Chit. 218.

After judgment by default and writ of inquiry executed, the court ordered a new inquiry, on the ground that, as to part of the damages found, there was no evidence to warrant the finding of the jury ; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand :—Held, notwithstanding, that he was not bound to pay the

plaintiff the costs of the inquiry. *Porter* v. *Cooper*, 2 C., M. & R. 232; 3 D. P. C. 662; 4 L. J., Ex. 192.

On motion to set aside an inquisition taken on a writ of inquiry before the under-sheriff for excessive damages, the court will not admit minutes of what passed before the under-sheriff to be read, unless verified by affidavit. *Lathbury* v. *Brown*, 10 Moore, 106; 3 L. J. (O.S.) C. P. 81.

Where, in an action against custom-house officers for entering plaintiff's house and searching for run goods, where they found none, the jury assessed 100*l.* damages on a writ of inquiry against them, though they did little or no damage: the court refused to set aside the inquisition. *Bince* v. *Rawlins*, 3 Wils. 16.

Too Small Damages.]—Upon the execution of a writ of inquiry, in an action for dilapidations, two surveyors were called on each side; those called for the plaintiff estimated the dilapidations, the one at 119*l.*, the other at 124*l.*; those called by the defendant estimated them, the one at 63*l.* 15*s.*, the other at 68*l.*; the jury returned a verdict for 36*l.* 10*s.* The court ordered that the inquisition should be set aside, without costs, unless the defendant would consent to the verdict being entered for 63*l.* 15*s.* *Wedding* v. *Mason*, 2 C. B. (N.S.) 382.

Rule to Return.]—Where a sheriff does not return in due time a writ of inquiry, the court will compel him by rule so to do. *Stockdale* v. *Hansard*, 8 D. P. C. 296; 3 Jur. 1174.

Application for New Writ.]—Where in an action in the high court to recover damages the defendant does not appear, and a writ of inquiry issues to the sheriff to assess damages with a jury, if either party desires to question the assessment of damages, the motion for a new writ of inquiry must be made to the court of appeal under s. 1 of the Judicature Act, 1890, and not to the queen's bench division. *William Radam's Microbe Killer Co.* v. *Leather*, 61 L. J., Q. B. 38; [1892] 1 Q. B. 85; 65 L. T. 604; 40 W. R. 83—C. A.

Appeal.]—An appeal lay against the decision of the court on a rule to enter a verdict or a nonsuit upon a point reserved at the trial of a cause before an under-sheriff under the writ of trial act. *Lery* v. *Green*, 1 El. & El. 969; 28 L. J., Q. B. 319; 5 Jur. (N.S.) 1245; 7 W. R. 486—Ex. Ch.

Costs.]—The amount of special fees paid to a good jury at the trial, before the secondary of the sheriffs of London, of a writ of inquiry to assess damages may be allowed on taxation of the plaintiff's costs. *Vines* v. *L. B. & S. C. Ry.*, 39 L. J., Ex. 175; L. R. 5 Ex. 201; 22 L. T. 448; 18 W. R. 814. S. P., *Vickery* v. *L. B. & S. C. Ry.*, 39 L. J., C. P. 169; L. R. 5 C. P. 165; 22 L. T. 270; 18 W. R. 549.

Since the 46th rule of Hilary Term, 1853, the costs of a good jury upon the execution of a writ of inquiry are allowed on taxation. *Wilkinson* v. *Malin*, 1 C. & M. 237; 1 D. P. C. 630; 3 Tyr. 255.

A declaration contained three breaches for arrears of sleeping rent due upon a mining lease, for not keeping the mine in repair, and for not properly working the mine. The defendant suffered judgment by default, and upon the execution of a writ of inquiry, the jury gave the plaintiff 50*l.* damages on the first breach, but refused to find any damages on the second and third breaches:—Held, that the plaintiff was, nevertheless, entitled to the expenses of witnesses called to prove those breaches whom the master in the exercise of his discretion thought material and necessary, the plaintiff being entitled as matter of law to nominal damages on those breaches. *Dods* v. *Evans*, 15 C. B. (N.S.) 621; 33 L. J., C. P. 146; 10 Jur. (N.S.) 154; 9 L. T. 723; 12 W. R. 432.

INQUISITION.

To assess Compensation for Taking Lands.]—*See* LANDS CLAUSES ACT.

Of Coroners.]—*See* CORONER.

Of Lunacy.]—*See* LUNATIC.

INSANITY.

See LUNATIC—TRUST.

INSOLVENCY.

See BANKRUPTCY.

INSPECTION.

Of Documents.]—*See* DISCOVERY.

Of Property.]—*See* PRACTICE.

END OF VOLUME VII.

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